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N. C. State Board of Health

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THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through
the Legislative Session of 1949

PREPARED UNDER THE SUPERVISION OF THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA

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

Under the Direction of

A. HEWSON MICHIE, S. G. ALRICH, W. M. WILLSON
AND BEIRNE STEDMAN

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N. C. State Board of Health

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the Legislative Session of 1949

Revised under the direction of the Department of Justice
of the State of North Carolina

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BY

THE MICHIE COMPANY

Volume 28

Scope of Volume

Statutes:

Full text of Chapters 53 through 82 of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1949 heretofore contained in Volume 2 of the General Statutes of North Carolina and the 1949 Cumulative Supplement thereto.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports volumes 1-230 (p. 576).
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-174.
Federal Supplement volumes 1-83.
United States Reports volumes 1-337.
Supreme Court Reporter volumes 1-69.
North Carolina Law Review volumes 1-27.

Abbreviations

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

P. R. Potter's Revisal (1821, 1827)
R. S. Revised Statutes (1837)
R. C. Revised Code (1854)
C. C. P. Code of Civil Procedure (1868)
Code Code (1883)
Rev. Revisal of 1905
C. S. Consolidated Statutes (1919, 1924)

Preface

Volume 2 of the General Statutes of North Carolina of 1943 has been replaced by recompiled volumes 2A, 2B and 2C. These new volumes contain Chapters 28 through 105 of the General Statutes, as amended and supplemented by the enactments of the General Assembly down through the 1949 Session. Chapters 28 through 52 appear in volume 2A, Chapters 53 through 82 in volume 2B, and Chapters 83 through 105 in volume 2C.

Both the statutes and the annotations in the recompiled volumes are in larger type and in more convenient form than in the original volume. The annotations in the new volumes comprise those which appeared in original volume 2 and the 1949 Cumulative Supplement thereto; however, they have been considerably revised, and it is believed that the present annotations are an improvement over the old.

The historical references appearing at the end of each section have been rearranged in chronological order. For instance, the historical references appended to § 31-5 read as follows: (1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62; R. C., c. 119, s. 22; Code, s. 2176; Rev., s. 3115; C. S., s. 4133; 1945, c. 140.) In this connection attention should be called to a peculiarity in the manner of citing the early acts in the historical references. The acts through the year 1825 are cited, not by the chapter numbers of the session laws of the particular years, but by the chapter numbers assigned to them in Potter's Revisal (published in 1821 and containing the acts from 1715 through 1820) or in Potter's Revisal continued (published in 1827 and containing the acts from 1821 through 1825). Thus, in the illustration set out above the citations "1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2" refer to the chapter numbers in Potter's Revisal and not to the chapter numbers of the Laws of 1784 and 1819, respectively. The chapter numbers in Potter's Revisal and Potter's Revisal continued run consecutively, and hence do not correspond, at least after 1715, to the chapter numbers in the session laws of the particular years. After 1825 the chapter numbers in the session laws are used.

The recompiled volumes have been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

HARRY McMULLAN,
Attorney General.

November 30, 1950.

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- 53-165. Banking Commission to make rules and regulations.
- 53-166. Charges not to exceed those of industrial banks on installment loans.
- 53-167. Violation a misdemeanor.
- 53-168. Business of making certain loans on motor vehicles exempted.

ARTICLE 1.*Definitions.*

§ 53-1. "Bank," "surplus," "undivided profits," and other words defined.—The following definitions shall be applied to the terms used in this chapter:

The term "bank" shall be construed to mean any corporation, other than build-

ing and loan associations, industrial banks, and credit unions, receiving, soliciting, or accepting money or its equivalent on deposit as a business.

The term "surplus" means a fund created pursuant to the provisions of this chapter by a bank from payments by stockholders or from its net earnings or undivided profits which, to the amount specified and by any additions thereto set apart and designated as such, is not available for the payment of dividends, and cannot be used for the payment of expenses or losses so long as such bank has undivided profits.

The term "undivided profits" means the credit balance of the profit and loss account of any bank.

The term "net earnings" means the excess of the gross earnings of any bank over the expenses and losses chargeable against such earnings during any dividend period.

The term "time deposits" means all deposits, the payment of which cannot be legally required within thirty days.

The term "demand deposits" means all deposits, the payment of which can be legally required within thirty days.

The term "insolvency" means: (a) when a bank cannot meet its deposit liabilities as they become due in the regular course of business; (b) when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; (c) when its reserve shall fall under the amount required by this chapter, and it shall fail to make good such reserve within thirty days after being required to do so by the Commissioner of Banks; (d) whenever the undivided profits and surplus shall be inadequate to cover losses of the bank, whereby an impairment of the capital stock is created. (1921, c. 4, s. 1; C. S., s. 216(a); 1927, c. 47, s. 1; 1931, c. 243, s. 5; 1945, c. 743, s. 1.)

Cross References.—As to definitions of "commercial and business paper" and "trade acceptance," see § 53-55. As to definition of "bank acceptance," see § 53-56. As to definition of "goods," see § 53-56. As to definition of "reserve," see § 53-51. As to definition of "Federal Reserve Act," "Federal Reserve Board," "Federal Reserve Banks," and "member banks," see § 53-61. As to definition of "banks" as used in the Negotiable Instruments Law, see § 25-1. As to demand deposits, see § 53-65.

Editor's Note.—In 1921 the General Assembly passed an act which enlarged the former Corporation Commission's powers of supervision over banks and made more specific regulations for the business of banking. See *Litchfield v. Roper*, 192 N.

C. 202, 134 S. E. 651 (1926). By Public Laws 1931, c. 243, all the powers vested in the Corporation Commission with respect to banks were transferred to the Commissioner of Banks, and former laws relating to banks and banking were conformably amended. *Blades v. Hood*, 203 N. C. 56, 164 S. E. 828 (1932). See § 53-92 et. seq.

The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission" in the last sentence of this section, and the 1945 amendment rewrote the definition of "bank."

The definition of "insolvency" as set forth in this section is correct. *State v. Shipman*, 202 N. C. 518, 163 S. E. 657 (1932).

ARTICLE 2.

Creation.

§ 53-2. **How incorporated.**—Any number of persons, not less than five, who may be desirous of forming a company and engaging in the business of establishing, maintaining, and operating banks of discount and deposit to be known as commercial banks, or engaging in the business of establishing, maintaining, and operating offices of loan and deposits to be known as savings banks, or of establishing, maintaining, and operating banks having departments for both classes of business, or operating banks engaged in doing a trust and fiduciary business, shall be incorporated in the manner following and in no other way; that is to say, such persons shall, by a certificate of incorporation under their hands and seals set forth:

1. The name of the corporation; no name shall be used already in use by another existing corporation organized under the laws of this State or of the Congress, or so nearly similar thereto as to lead to uncertainty or confusion.

2. The location of its principal office in this State.

3. The nature of its business, whether that of a commercial bank, savings bank, trust company, or a combination of two or more or all of such classes of business.

4. The amount of its authorized capital stock which shall be divided into shares of ten, twenty, twenty-five, fifty or one hundred dollars each; the amount of capital stock with which it will commence business, which shall not be less than twenty-five thousand dollars in cities or towns of three thousand population or less; nor less than thirty thousand dollars in cities and towns whose population exceeds three thousand, but does not exceed ten thousand; nor less than fifty thousand dollars in cities and towns whose population exceeds ten thousand but does not exceed twenty-five thousand; nor less than one hundred thousand dollars in cities and towns having a population of more than twenty-five thousand; the population to be ascertained by the last preceding national census: Provided, that this subsection shall not apply to banks organized and doing business prior to its adoption. Provided, further, that fractional shares may be issued for the purpose of complying with the requirements of § 53-88.

5. The names and post-office addresses of subscribers for stock, and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of the capital with which the company will commence business.

6. Period, if any, limited for the duration of the company. (1921, c. 4, s. 2; C. S., s. 217(a); 1927, c. 47, s. 2; 1929, c. 72, s. 1; 1947, c. 781.)

Cross References.—As to incorporation of general corporations, see § 55-2 et seq. As to power to issue nonpar bank stock, see § 55-73 et seq. As to provision for branch banks, see § 53-62.

Editor's Note.—The 1927 amendment added the last proviso to paragraph 4. And the 1929 amendment made paragraph

4 also applicable to shares of ten, twenty and twenty-five dollars each. Prior to the 1947 amendment this section also applied to banks engaged in doing a surety business.

Cited in *Cocke v. Hood*, 205 N. C. 832, 170 S. E. 637 (1933).

§ 53-3. Certificate of incorporation; how signed, proved, and filed.—

The certificate of incorporation shall be signed by the original incorporators, or a majority of them, and shall be proved or acknowledged before an officer duly authorized under the laws of this State to take proof or acknowledgment of deeds, and shall be filed in the office of the Secretary of State. The Secretary of State shall forthwith transmit to the Commissioner of Banks a copy of said certificate of incorporation, and shall not issue or record the same until duly authorized so to do by the Commissioner of Banks as hereinafter provided. (1921, c. 4, s. 3; C. S., s. 217(b); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

Refusal to Issue Charter.—Where plaintiffs applied for an industrial bank charter, and their application was not passed upon by the Secretary of State on the advice and recommendation of the Commissioner of Banks, acting in accordance with the stat-

utes, and plaintiffs sued to compel the issuance of a charter, alleging no capricious acts, bad faith or disregard of law by the State officers, the complaint did not state a cause of action and was not sufficient as a petition for certiorari or as an application for mandamus. *Pue v. Hood*, 222 N. C. 310, 22 S. E. (2d) 896 (1942).

§ 53-4. Examination by Commissioner; when certification to be refused.—Upon receipt of a copy of the certificate of incorporation of the proposed bank, the Commissioner of Banks shall at once examine into all the facts connected with the formation of such proposed corporation, including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business of banking, the Commissioner of Banks shall so certify to the Secretary of State, who shall thereupon issue and

record such certificate of incorporation. But the Commissioner of Banks may refuse to so certify to the Secretary of State, if upon examination and investigation he has reason to believe that the proposed corporation is formed for any other than legitimate banking business, or that the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation are not such as to command the confidence of the community in which said bank is proposed to be located; or that the public convenience and advantage will not be promoted by its establishment, or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted, or appropriated by an existing bank in this State, or so similar thereto as to be likely to mislead the public. (1921, c. 4, s. 4; Ex. Sess. 1921, c. 56, s. 1; C. S., s. 217(c); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

Duty of Commissioner.—This section was complete in every respect when it left the hands of the legislature and the duty imposed upon and the discretion vested in the Commissioner of Banks bears only upon the question whether certain conditions

exist justifying the creation of the proposed bank under the terms and procedure laid down in the statute. His action and the certificate issued thereon merely constitute the prescribed procedure to determine whether the franchise applied for was grantable under the law. *Pue v. Hood*, 222 N. C. 310, 22 S. E. (2d) 896 (1942).

§ 53-5. Certificate of incorporation, when certified.—Upon receipt of such certificate from the Commissioner of Banks, the Secretary of State shall, if said certificate of incorporation be in accordance with law, cause the same to be recorded in his office in a book to be kept for that purpose, and known as the corporation book, and he shall, upon the payment of the organization tax and fees, certify under his official seal two copies of the said certificate of incorporation and probates, one of which shall forthwith be recorded in the office of the clerk of the superior court of the county where the principal office of said corporation in this State shall or is to be located, in a book to be known as the record of incorporations, and the other certified copy shall be filed in the office of the Commissioner of Banks, and thereupon the said persons shall be a body politic and corporate under the name stated in such certificate. The said certificate of incorporation, or a copy thereof, duly certified by the secretary of State or the clerk of the superior court of the county in which the same is recorded, or by the Commissioner of Banks, under their respective seals, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established. The charter of any bank which fails to complete its organization and open for business to the public within six months after the date of filing its certificate of incorporation with the Secretary of State shall be void: Provided, however, the Commissioner of Banks may for cause extend the limitation herein imposed. (1921, c. 4, s. 5; C. S., s. 217(d); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

Who May Take Advantage of Defect in Organization.—A defect in the organization of a bank because of failure to begin business within the specified time can be taken advantage of only by a direct proceeding by the State for that purpose.

Boyd v. Redd, 120 N. C. 335, 27 S. E. 35 (1897), decided under the former law, and holding that such a failure could not affect the validity of whatever lien a bank had upon the shares of stock of a stockholder indebted to it. As to right of bank to purchase or receive pledge of its own stock under present law, see § 53-64.

§ 53-6. Payment of capital stock.—The capital stock of every bank shall be fully paid in, in cash, before it shall be authorized by the Commissioner of Banks to commence business and the full payment in cash of the capital stock shall be certified to the Commissioner of Banks under oath by the president and cashier of the said bank. Provided, that the stock sold by any bank in process of

organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation for selling such stock. The Commissioner of Banks shall refuse authority to commence business to any bank if commissions or fees have been paid, or have been contracted to be paid by it, or by anyone in its behalf, to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1921, c. 4, s. 6; C. S., s. 217(e); 1927, c. 47, s. 3; 1931, c. 243, s. 5.)

Cross Reference.—As to the similar provision relating to industrial banks, see § 53-140.

Editor's Note.—Prior to the 1927 amendment only fifty per cent of the capital stock

of a bank was required to be paid in cash before commencing business. The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-7. Statement filed before beginning business.—Before such company shall begin the business of banking, banking and trust, fiduciary, or surety business, there shall be filed with the Commissioner of Banks a statement under oath by the president or cashier, containing the names of all the directors and officers, with the date of their election or appointment, term of office, residence, and post-office address of each, the amount of capital stock of which each is the owner in good faith and the amount of money paid in on account of the capital stock. Nothing shall be received in payment of capital stock but money. (1921, c. 4, s. 7; C. S., s. 217(f); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-8. Authorized to begin business.—Upon filing of such statement, the Commissioner of Banks shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each director, the amount of capital stock of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business. If upon such examination it appears to the Commissioner of Banks that it is lawfully entitled to commence the business of banking, banking and trust, fiduciary, or surety business, he shall give to such corporation a certificate signed by the Commissioner of Banks, that such corporation has complied with all the provisions of the law required to be complied with, before commencing the business of banking, and that such corporation is authorized to commence business. (1921, c. 4, s. 8; C. S., s. 217(g); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-9. Transactions preliminary to beginning business.—No such corporation shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized to do so by the Commissioner of Banks. (1921, c. 4, s. 9; C. S., s. 217(h); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-10. Increase of capital stock.—A corporation doing business under the provisions of this chapter may increase its capital stock as provided by law for other corporations upon a vote in favor of the increase of two-thirds in interest of each class of stockholders in its voting powers. (1921, c. 4, s. 10; C. S., s. 217(i).)

Cross Reference.—As to manner of increasing capital stock of corporations generally, see § 55-31.

§ 53-11. Decrease of capital stock.—A corporation doing business under the provisions of this chapter may reduce its capital stock in the manner provided for other corporations upon a vote in favor of the decrease of two-thirds in interest of each class of stockholders with voting powers: Provided, that no bank shall reduce its capital stock to an amount less than the minimum required by law. Such reduction shall not be valid or warrant the cancellation of stock certificates until it has been approved by the Commissioner of Banks. Such approval shall not be given except upon a finding by the Commissioner of Banks that the security of existing creditors of the corporation will not be impaired. (1921, c. 4, s. 11; C. S., s. 217(j); 1931, c. 243, s. 5.)

Cross Reference.—As to manner of decreasing stock of corporations generally, see § 55-66.

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-12. Consolidation of banks.—A bank may consolidate with or transfer its assets and liabilities to another bank. Before such consolidation or transfer shall become effective, each bank concerned in such consolidation or transfer shall file, or cause to be filed, with the Commissioner of Banks, certified copies of all proceedings had by its directors and stockholders, which said stockholders' proceedings shall set forth that holders of at least two-thirds of the stock voted in the affirmative on the proposition of consolidation or transfer. Such stockholders' proceedings shall also contain a complete copy of the agreement made and entered into between said banks, with reference to such consolidation or transfer. Upon the filing of such stockholders' and directors' proceedings as aforesaid, the Commissioner of Banks shall cause to be made an examination of each bank to determine whether the interests of the depositors, creditors, and stockholders of each bank are protected, and that such consolidation or transfer is made for legitimate purposes, and his consent to or rejection of such consolidation or transfer shall be based upon such examination. No such consolidation or transfer shall be made without the consent of the Commissioner of Banks. The expense of such examination shall be paid by such banks. Notice of such consolidation or transfer shall be published for four weeks before or after the same is to become effective, at the discretion of the Commissioner of Banks, in a newspaper published in a city, town, or county in which each of said banks is located, and a certified copy thereof shall be filed with the Commissioner of Banks. In case of either transfer or consolidation the rights of creditors shall be preserved unimpaired, and the respective companies deemed to be in existence to preserve such rights for a period of three years. (1921, c. 4, s. 12; C. S., s. 217(k); 1931, c. 243, s. 5.)

Cross References.—As to merger of corporations generally, see § 55-165 et seq. As to liquidation of banks, see § 53-20 and note.

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

Presumption of Approval of Transaction.—Where under the provisions of this section a State bank transferred its assets to

another State bank, the latter assuming the former's liabilities under a consolidation agreement, it was presumed that the former Corporation Commission had notice or knowledge of the transaction coming within the scope of its duties, and had approved the transaction. *Corporation Commission v. Stockholders*, 199 N. C. 586, 155 S. E. 445 (1930).

§ 53-13. Consolidated banks deemed one bank.—In case of consolidation when the agreement of consolidation is made, and a duly certified copy thereof is filed with the Secretary of State, together with a certified copy of the approval of the Commissioner of Banks to such consolidation, the banks, parties thereto, shall be held to be one company, possessed of the rights, privileges, powers, and franchises of the several companies, but subject to all the provisions of law under which it is created. The directors and other officers named in the agreement of consolidation shall serve until the first annual meeting for election

of officers and directors, the date for which shall be named in the agreement. On filing such agreement, all and singular, the property and rights of every kind of the several companies shall thereby be transferred and vested in such new company, and be as fully its property as they were of the companies parties to the agreement. (1921, c. 4, s. 13; C. S., s. 217(1); 1931, c. 243, s. 5.)

Cross References.—As to substitution of § 53-17.

consolidated bank as executor or trustee under will, see § 31-19. As to fiduciary powers and liabilities of merged banks, see

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-14. Reorganization.—Whenever any bank under the laws of this State or of the United States is authorized to dissolve, and shall have taken the necessary steps to effect dissolution, it shall be lawful for a majority of the directors of such bank, upon authority in writing of the owners of two-thirds of its capital stock, with the approval of the Commissioner of Banks, to execute articles of incorporation as provided in this chapter, which articles, in addition to the requirements of law, shall further set forth the authority derived from the stockholders of such national bank or State bank, and upon filing the same as hereinbefore provided for the organization of banks, the same shall become a bank under the laws of this State, and thereupon all assets, real and personal, of the dissolved national or State bank shall by operation of law be vested in and become the property of such State bank, subject to all liabilities of such national or State bank not liquidated under the laws of the United States or this State before such reorganization. (1921, c. 4, s. 14; C. S., s. 217(m); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-15: Repealed by Acts 1947, c. 696.

Editor's Note.—The repealed section related to the consolidation of banks and insurance corporations.

§ 53-16. Consolidation of State banks or trust companies with national banking associations.—Any bank or trust company incorporated under the laws of North Carolina may be consolidated with any national banking association, or associations, under the charter of such national banking association or under a new charter issued to such consolidated association, upon such terms and conditions as may be lawfully agreed upon, provided that the laws of North Carolina governing the consolidation of State banks shall be first complied with as to the consolidation of such bank or trust company. When such consolidation shall have been effected and approved, as provided by law, all the rights, franchises and interests of such bank or trust company so consolidated with the national banking association, or national banking associations, in and to every species of property, real, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated, without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises and interests, including the right of succession as trustee, executor, administrator, or in any other fiduciary capacity, in the same manner, and to the same extent, as was held and enjoyed by such bank or trust company so consolidated. In case of such consolidation the rights of creditors of such bank or trust company shall be preserved unimpaired and all lawful debts and liabilities of such bank or trust company shall be deemed to have been assumed by such consolidated national banking association. (1929, c. 148, s. 1.)

§ 53-17. Fiduciary powers and liabilities of banks or trust companies merging or transferring assets and liabilities.—Whenever any

bank or trust company, organized under the laws of North Carolina or the acts of Congress, and doing business in this State, shall consolidate or merge with or shall sell to and transfer its assets and liabilities to any other bank or trust company doing business in this State, as provided by the laws of North Carolina or the acts of Congress, all the then existing fiduciary rights, powers, duties and liabilities of such consolidating or merging or transferring bank or banks and/or trust companies, including the rights, powers, duties and liabilities as executor, administrator, guardian, trustee, and/or any other fiduciary capacity, whether under appointment by order of court, will, deed, or other instrument, shall, upon the effective date of such consolidation or merger or sale and transfer, vest in, devolve upon, and thereafter be performed by, the transferee bank or the consolidated or merged bank or trust company, and such latter bank or trust company shall be deemed substituted for and shall have all the rights and powers of the transferring bank or trust company. (1931, c. 207; 1941, c. 80.)

Cross Reference.—As to powers and liabilities of merged corporations generally, see §§ 55-169, 55-170 and 55-172.

Editor's Note.—The 1941 amendment added the provisions relating to sale and transfer of assets and liabilities. See 19 N. C. Law Rev. 457. See also, 9 N. C. Law. Rev. 398.

Merger and Consolidation Distinguished.—A distinction is drawn between "consolidation" and "merger." See *Braak v. Hobbs*, 210 N. C. 379, 186 S. E. 500 (1936).

Consolidated Bank Succeeds to Power as Trustee under Deed of Trust.—A bank, created as a result of a consolidation of several State banks, may properly exercise the power of sale contained in a deed of

trust in which one of its constituent banks was named trustee, upon default by the trustor, since under this section the consolidated bank succeeds to such power. *Braak v. Hobbs*, 210 N. C. 379, 186 S. E. 500 (1936).

Amendment of Other Sections—Retrospective Operation.—This section, although in form an independent statute, was in reality an amendment of Public Laws 1925, c. 77, codified as § 53-15 (now repealed) and §§ 55-165 through 55-170, and was therefore applicable to a deed of trust executed prior to the enactment of this section and subsequent to the effective date of the 1925 act. *Braak v. Hobbs*, 210 N. C. 379, 186 S. E. 500 (1936).

ARTICLE 3.

Dissolution and Liquidation.

§ 53-18. **Voluntary liquidation.**—A bank may go into voluntary liquidation and be closed, and may surrender its charter and franchise as a corporation of this State by the affirmative votes of its stockholders owning two-thirds of its stock, such vote to be taken at a meeting of the stockholders duly called by resolution of the board of directors, written notice of which, stating the purpose of the meeting, shall be mailed to each stockholder, or in case of his death, to his legal representative or heirs at law, addressed to his last known residence ten days previous to the date of said meeting. Whenever stockholders shall by such vote at a meeting regularly called for the purpose, notice of which shall be given as herein provided, decide to liquidate such bank, a certified copy of all proceedings of the meeting at which said action shall have been taken, verified by the oath of the president and cashier, shall be transmitted to the Commissioner of Banks for his approval. If the Commissioner of banks shall approve the same, he shall issue to the said bank, under his seal, a permit for such purpose. No such permit shall be issued by the Commissioner of Banks until said Commissioner of Banks shall be satisfied that provision has been made by such bank to satisfy and pay off all depositors and all creditors of such bank. If not so satisfied, the Commissioner of Banks shall refuse to issue a permit, and shall be authorized to take possession of said bank and its assets and business, and hold the same and liquidate said bank in the manner provided in this chapter. When the Commissioner of Banks shall approve the voluntary liquidation of a bank, the directors of said bank shall cause to be published in a newspaper in the city, town, or county in which such bank is located, a notice that the bank is closing up its affairs and

going into liquidation, and notify its depositors and creditors to present their claims for payment. When any bank shall be in process of voluntary liquidation, it shall be subject to examination by the Commissioner of Banks, and shall furnish such reports from time to time as may be called for by the Commissioner of Banks. All unclaimed deposits and dividends remaining in the hands of such bank shall be subject to the provisions of this chapter as hereinafter provided. Whenever the Commissioner of Banks shall approve it, any bank may sell and transfer to any other bank, either State bank or national bank, all of its assets of every kind upon such terms as may be agreed upon and approved by the Commissioner of Banks and by two-thirds vote of its board of directors. A certified copy of the minutes of any meeting at which such action is taken, under the oath of the president and cashier, together with a copy of the contract of sale and transfer, shall be filed with the Commissioner of Banks. Whenever voluntary liquidation shall be approved by the Commissioner of Banks or the sale and transfer of the assets of any bank shall be approved by the Commissioner of Banks, a certified copy of such approval under seal of the Commissioner of Banks, filed in the office of the Secretary of State, shall authorize the cancellation of the charter of such bank, subject, however, to its continued existence, as provided by this chapter and the general law relative to corporations. (1921, c. 4, s. 15; C. S., s. 218(a); 1927, c. 47, s. 4; 1929, c. 73; 1931, c. 243, s. 5.)

Cross Reference.—As to voluntary dissolution of corporations generally, see § 55-121 et seq.

Editor's Note.—The 1927 amendment added provisions relating to sale of assets to another bank. The 1929 amendment corrected a typographical error in the 1927 amendment, and the 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

For article discussing the statutory changes made in the North Carolina banking law, see 11 N. C. Law Rev. 194.

Approval of Stockholders Not Necessary for Sale of Assets.—For a valid sale of assets to another bank the approval of the

stockholders of the selling bank is not required by this section, and the section is not invalid for that reason. *Planters' Sav. Bank v. Earley*, 204 N. C. 297, 168 S. E. 225 (1933).

As to enforcement of former statutory liability of stockholders by purchasing bank, see *Peoples Bank, etc., Co. v. Roscow*, 199 N. C. 653, 155 S. E. 560 (1930).

Applied, as to assets of bank in hands of receiver and right to sue officers and directors for publishing false statements as to solvency, in *Douglass v. Dawson*, 190 N. C. 458, 130 S. E. 195 (1925).

Cited in *In re Lafayette Bank, etc., Co.*, 198 N. C. 783, 153 S. E. 452 (1930).

§ 53-19. Commissioner of Banks may take charge, when.—The Commissioner of Banks may forthwith take possession of the business and property of any bank to which this chapter is applicable whenever it shall appear that such bank:

1. Has violated its charter or any laws applicable thereto;
2. Is conducting its business in an unauthorized or unsafe manner;
3. Is in an unsafe or unsound condition to transact its business;
4. Has an impairment of its capital stock;
5. Has refused to pay its depositors in accordance with the terms on which such deposits were received, or has refused to pay its holders of certificates of indebtedness or investment in accordance with the terms upon which such certificates of indebtedness or investment were sold;
6. Has become otherwise insolvent;
7. Has neglected or refused to comply with the terms of a duly issued lawful order of the Commissioner of Banks;
8. Has refused, upon proper demand, to submit its records, affairs, and concerns for inspection and examination to a duly appointed or authorized examiner of the Commissioner of Banks;
9. Its officers have refused to be examined upon oath regarding its affairs.
10. Has made a voluntary assignment of its assets to trustees;

Such banks may resume business as provided in § 53-37. (1911, c. 25, s. 4; 1921, c. 4, s. 16; C. S., ss. 218(b), 242; 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

For discussion of section, see 3 N. C. Law Rev. 79.

Restraining Commissioner from Taking Over Assigned Assets Sufficient to Pay Creditors.—A bank assigned all its assets to another bank under an agreement, approved by the Commissioner of Banks, that the latter bank should pay all depositors and creditors of the former. Before the assignee bank had fully discharged the agreement it became insolvent and was taken over by the Commissioner. It was held that, upon a showing that the assets

of the assignor bank are sufficient to pay in full all its depositors and creditors, the assignor bank, its depositors and creditors may restrain the Commissioner from taking possession of the assigned assets, and, pending the trial of the issue involving the value of the assigned assets, they may restrain the Commissioner from levying upon and collecting the statutory liability of the stockholders of the assignor bank. *Stanly Bank, etc., Co. v. Hood*, 206 N. C. 543, 174 S. E. 503 (1934).

Presumption That Bank Complied with Prerequisites Before Resuming Operation.—See *People's Bank v. Fidelity, etc., Co.*, 4 F. Supp. 379 (1933).

§ 53-20. Liquidation of banks.—(1) When Commissioner of Banks to Take Possession.—Whenever any State bank shall neglect or refuse for a period of sixty days to make a report to the Commissioner of Banks, as he may demand, or shall, after demand under seal of the Commissioner of Banks fail, neglect or refuse to comply with any of the rules, regulations or requirements of the State Banking Commission, or the provisions of the banking law, or if at any time the Commissioner of Banks shall find a bank subject to the supervision of the Commissioner of Banks, in an insolvent, unsafe or unsound condition to transact the business for which it was organized, or in an unsafe, or unsound condition to continue its business, or if such institution shall neglect or refuse to correct any irregularity which may be called to the attention of the president, cashier or board of directors, by the Commissioner of Banks, or any of his assistants, then, in either of such events, the Commissioner of Banks, or any duly authorized agent of the Commissioner of Banks appointed under seal of the Commissioner of Banks, shall forthwith take possession of such bank, and all of its assets and business and shall retain possession thereof until such bank shall be authorized by the Commissioner of Banks to resume business, or its affairs shall be fully liquidated as herein provided, or possession thereof shall have been surrendered under order of a judge of the superior court under the provisions of this section.

(2) **Directors May Act.**—Any bank may place its assets and business under the control of the Commissioner of Banks for liquidation by resolution of a majority of its directors upon notice to the said Commissioner of Banks, and, upon taking possession of said bank, the Commissioner of Banks, or duly appointed agent, shall retain possession thereof until such bank shall be authorized by the Commissioner of Banks to resume business or until the affairs of said bank shall be fully liquidated as herein provided, and no bank shall make any general assignment for the benefit of its creditors save and except by surrendering possession of its assets to the Commissioner of Banks, as herein provided. Whenever any bank for any reason shall suspend operations for any length of time, said bank shall, immediately upon such suspension of operations, be deemed in the possession of the Commissioner of Banks and subject to liquidation hereunder.

(3) **Notice of Seizure to Court Bar to Attachment, etc.; Transfers Void.**—When the Commissioner of Banks, or duly appointed agent, shall take possession of any bank under paragraphs (1) or (2) hereof he shall, within forty-eight hours, file with the clerk of the superior court in the county where said bank is located, a notice of his action which shall state the reason therefor; and such notice shall be deemed the equivalent of a summons and complaint against said bank in an action in the superior court except that it shall not be necessary to make service thereof, and the taking possession of any bank shall thereupon date from the

time when such authority was exercised and from and after such time all assets and property of such bank, of whatever nature shall be deemed to be in possession of the Commissioner of Banks, and the exercise of such authority shall operate as a bar to any attachment, or other legal proceeding, against such bank or its assets and, after such exercise of authority, no lien shall be acquired, in any manner binding or affecting any of the assets of such bank and every transfer or assignment made thereafter by such bank, or by its authority, of the whole or any part of its assets, shall be null and void; and the Commissioner of Banks shall be substituted in place of the bank in all actions in the State or federal courts, pending at the time of the exercise of such authority.

(4) Notice to Banks; Corporation and Persons Holding Assets; Liens Not to Accrue.—On taking possession of the assets and business of any bank, the Commissioner of Banks, or duly appointed agent, shall forthwith give notice, by mail or otherwise, of such action to all banks or other persons or corporations holding, or having in possession, any assets of such bank. No bank or other person or corporation shall have a lien or charge for any payment, advance or clearance made, or liability incurred against any of the assets of said bank after possession has been taken as provided under this section, except as hereinafter provided.

(5) Permission to Resume Business.—After the Commissioner of Banks has taken possession of any bank, such bank may resume business as provided in § 53-37.

(6) Remedy by Bank for Seizure; Answer to Notice; Injunction, etc.; Appeal.—Whenever any bank, of whose assets and business the Commissioner of Banks has taken possession as aforesaid, except where possession is taken under paragraph (2) hereof, shall deem itself aggrieved thereby, it may, at any time within ten (10) days after the filing of the notice with the clerk of the superior court, file an answer to said notice and may also upon notice to the Commissioner of Banks, apply to the resident or the presiding judge of the district for an injunction to enjoin further proceedings by the said Commissioner of Banks, and the said judge may cite the said Commissioner of Banks to show cause within ten days thereafter why further proceedings should not be enjoined, and after hearing the allegations and proof of the parties with respect to the condition of said bank, may dismiss such application for injunction or may enjoin further proceedings under this section by the Commissioner of Banks. If the judge shall enjoin further action of the Commissioner of Banks and permit the reopening of the bank, he shall have authority to require of the bank such surety bond as he may deem necessary to insure its solvency, payable to the Commissioner of Banks for the sole benefit of the general creditors of the bank, and upon such terms as said judge may deem proper. Either party shall have the right to appeal to the Supreme Court as in other actions.

(7) Collection of Debts and Claims; Sale or Compromise of Debts and Claims; Commissioner Succeeds to All Property of Bank.—Upon taking possession of the assets and business of any bank by the Commissioner of Banks, the Commissioner of Banks, or the duly appointed agent, is authorized to collect all money due such bank, and to do such other acts as are necessary to conserve its assets and property, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Commissioner of Banks, or the duly appointed agent, shall collect all debts due and claims belonging to such bank, by suit, if necessary; and, by motion in the pending action, and upon authority of an order of the presiding or resident judge of the district may sell, compromise or compound any bad or doubtful debt or claim, and may upon such order, sell the real and personal property of such bank on such terms as the order may provide or direct, except that, where the sale is made under power contained in any mortgage or lien bond or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under said authority.

Upon taking possession of any bank under this section, the Commissioner of

Banks and/or the duly appointed agent shall have the possession and the right to the possession of all the property, assets, choses in action, rights and privileges of the said bank, including the right to resign the trust or exercise the power in all mortgages, deeds of trust, and all other papers executed to secure the payment of money in any form in which the said bank shall have been named as trustee and/or pledgee, and such property rights and privileges shall vest in the said Commissioner and/or duly appointed liquidating agent absolutely, for the purpose of liquidating, and sales and conveyance of the same, together with any and all other incidental rights, privileges, and powers necessary and convenient for the enjoyment of the right of conveyance and sale and for the exercise of the same. Upon the motion made, the bank or any person interested, may be heard, but the judge hearing the motion shall enter his order as in his discretion will best serve the parties interested. The powers granted by the second preceding sentence shall be in addition to and not in derogation of any existing acts ratified at the 1931 session of the General Assembly.

The officers and directors of any bank, or any bank that is in liquidation as provided by law, shall not hereafter exercise any powers herein declared to be vested in the North Carolina Commissioner of Banks, and/or the duly appointed liquidating agent.

(8) Bond of Commissioner of Banks; Surety; Condition; Minimum Penalty.—Upon taking possession of any bank, the Commissioner of Banks, or the duly appointed agent, shall execute and file a bond payable to the State of North Carolina, with some surety company as surety thereon, with the clerk of the superior court of the county where the bank is located, conditioned upon the faithful performance of all duties imposed by reason of the liquidation of such bank by the said Commissioner of Banks, or the duly appointed agent, or any agent or assistant assisting in the liquidation of the said bank, the penal sum of said bond to be fixed by order of the Commissioner of Banks, which in no case shall be less than five thousand (\$5,000) dollars. Any person interested, by motion in the pending action, shall be heard by the resident or presiding judge as to the sufficiency of the bond; the judge hearing the motion may thereupon fix the bond; provided, that where such bank under this section is taken possession of by the Commissioner of Banks, he may, in his discretion with the approval of the State Banking Commission, appoint as his agent with the powers, duties and responsibilities of such agent under this section, the Federal Deposit Insurance Corporation or any corporation or agency established under and by virtue of the laws of the United States of America which is established for the purposes for which the said Federal Deposit Insurance Corporation was created under the banking act of one thousand nine hundred and thirty-three enacted by Congress; and provided further that such appointment may be made when and only when the liabilities of such bank to its depositors are insured by said corporation or agency, either in whole or in part. In the event of such appointment such corporation or agency, with the approval of the Commissioner of Banks, may serve as such agent without giving the bond required under all other circumstances in this subsection.

(9) Inventory Necessary.—Within thirty days after the filing of the notice of the taking possession of any bank in the office of the clerk of the superior court, the Commissioner of Banks, or the duly appointed agent, shall make and state an inventory of the assets and liabilities of the said bank, and shall file one copy thereof with the clerk of the superior court in the pending action and shall keep one copy on file in the said bank. Such inventory shall be open for inspection during the usual banking hours, provided, that nothing herein shall require said bank to remain open unnecessarily.

(10) Notice and Time for Filing Claims; Copies Mailed.—Notice shall be given by advertisement for four weeks in a newspaper published in said county; if no newspaper is published in said county, then in some newspaper having a general circulation in said county, calling on all persons who may have claims

against the bank to present the same to the Commissioner of Banks at the office of the bank, and within the time to be specified in the notice, not less, however, than ninety (90) days from the date of the first publication. A copy of this notice shall be mailed to all persons whose names appear as creditors upon the books of the bank. Affidavit by the Commissioner of Banks, or agent mailing the notice, to the effect that said notice was mailed shall be conclusive evidence thereof.

(11) Power to Reject Claims; Notice; Affidavit of Service; Action on Claim.—If the Commissioner of Banks, or the duly appointed agent, doubts the justice and validity of any claim or deposit, he may reject the same and serve notice of such rejection upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice shall be filed in the office of the clerk of the superior court in the pending action, and shall be conclusive evidence of such notice. Any action or suit upon such claim so rejected must be brought by the claimant against the Commissioner of Banks in the proper court of the county in which the bank is located within ninety days after such service, or the same shall be barred. Objections to any claim or deposit not rejected by the Commissioner of Banks, or the duly appointed agent, may be made by any person interested by filing such objection in the pending action and by serving a copy thereof on the Commissioner of Banks, or duly appointed agent, and the Commissioner of Banks or duly appointed agent, after investigation, shall either allow such objection and reject the claim or deposit, or disallow the objection. If the objection is not allowed and the claim or deposit not rejected, the Commissioner of Banks or the duly appointed agent, shall file a notice to this effect in the pending action; and within ten days thereafter, the person filing objection by motion in the pending action, a copy of which notice shall be served upon the person whose claim or deposit is objected to, may present to the court the question of the validity of said claim or deposit; and the questions of law and issues of fact shall thereupon be determined as in other civil actions.

(12) List of Claims Presented and Deposits; Copies; Proviso.—Upon the expiration of the time fixed for presentation of claims, the Commissioner of Banks, or the duly appointed agent, shall make a full and complete list of the claims presented and of the deposits as shown, including and specifying any claims or deposits which have been rejected by him, and shall file one copy in the office of the clerk of the superior court in the pending action, and shall keep one copy on file with the inventory in the office of the bank for examination. Any indebtedness against any bank which has been established or recognized as a valid liability of said bank before it went into liquidation, for which no claimant has filed claim, and/or any liability for which claim has been filed and disapproved, shall be listed in the office of the clerk of the superior court of the county in which the bank is located, by the liquidating agent, and the dividends accruing thereto shall be paid into the said office and shall be held for a period of three months after said liquidation is completed, and shall then be paid to the escheator of the University of North Carolina. Any claim which may be presented after the expiration of the time fixed for the presentation of claims in the notice hereinbefore provided shall, if allowed, share pro rata in the distribution only of those assets of the bank in the hands of the Commissioner of Banks, and undistributed at the time the claim is presented: Provided, that when it is made to appear to the judge of the superior court, resident or presiding in the county, that the claim could not have been filed within said period, said judge may permit those creditors or depositors who subsequently file their claim to share as other creditors.

(13) Declaration of Dividends; Order of Preference in Distribution.—At any time after the expiration of the date fixed by the Commissioner of Banks, or the duly appointed agent, for the presentation of claims against the bank, and from time to time thereafter, the Commissioner of Banks, out of the funds in his hands, after the payment of expenses and priorities, may declare and pay dividends to the depositors and other creditors of such bank in the order now or hereafter pro-

vided by law; and a dividend shall be declared when and as often as the funds on hand subject to the payment of dividends shall be sufficient to pay ten (10) per centum of all claims entitled to share in such dividends. In paying dividends and calculating the same, all disputed claims and deposits shall be taken into account, but no dividend shall be paid upon such disputed claims and deposits until the same shall have been finally determined. The following shall be the order and preference in the distribution of the assets of any bank liquidated hereunder:

(1) Taxes and fees due the Commissioner of Banks for examination or other services; (2) wages and salaries due officers and employees of the bank, for a period of not more than four months; (3) expenses of liquidation; (4) certified checks and cashier's checks in the hands of a third party as a holder for value and amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank; (5) amounts due creditors other than stockholders. The word "asset" used herein shall not be deemed to include bailments or other property to which such bank has no title. Provided, that when any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange, order to remit, note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or collecting any such item from any bank or other party, and failing to remit therefor, or the nonpayment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and shall attach from the date of the charge, entry or collection of any such funds. A statement of all dividends paid shall be filed in the office of the clerk of the superior court in the pending action, and said statements shall show the expenses deducted and the disputed claims and deposits considered in determining said dividend.

(14) Deposit of Funds Collected.—All funds collected by the Commissioner of Banks, in liquidating any bank, shall be deposited from time to time in such bank or banks as may be selected by him, and shall be subject to the check of the Commissioner of Banks. The payment of interest on the net average of such sums on deposit shall be controlled by the governor and Council of State, who shall have full power and authority to determine for what periods of time payment of interest on such deposits shall or shall not be required, and to fix the rate of interest to be paid thereon.

(15) Employment of Local Attorneys; Expert Accountants and Other Experts; Compensation.—The Commissioner of Banks, for the purpose of liquidating banks as herein provided, shall employ such liquidating agents, competent local attorneys, accountants and clerks as may be necessary to properly liquidate and distribute the assets of said bank, and shall fix the compensation for all such agents, attorneys, accountants and clerks, and shall pay the same out of the funds derived from the liquidation of the assets of said bank: Provided, that all expenditure for the purpose herein provided shall be approved by the resident or presiding judge in the pending action at such time as the same may be reported, and such charges shall be a proper charge and lien on the assets of such bank until paid.

(16) Unclaimed Dividends Held in Trust.—The unclaimed dividends remaining in the hands of the Commissioner of Banks for six months after the order for final distributions shall be held in trust for the several depositors and creditors of the liquidated bank; and the money so held by him shall be paid over to the persons respectively entitled thereto as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims the Commissioner of Banks shall have authority to apply to the superior court of the county, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the moneys so claimed. When issues of fact are raised by said motion, the same may, upon request of any claimant, be submitted to the jury for determination as other is-

sues of fact are determined. The interest earned on the unclaimed dividend so held shall be applied toward defraying the expenses incurred in the distribution of such unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds of the banking department to the credit of the Commissioner of Banks. After the Commissioner of Banks has held the unclaimed dividends held in trust by him under the provisions of this statute for the several depositors and creditors of the liquidated bank for a period of ten years, he is hereby given the authority to pay the principal amount of such unclaimed dividends to the University of North Carolina, to be held by the University of North Carolina without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto. Upon payment of the said unclaimed dividends to the University of North Carolina, the Commissioner of Banks shall be fully discharged from all further liability therefor.

(17) Report by Commissioner of Banks. — If the assets of any bank when fully collected by the Commissioner of Banks are not more than sufficient to pay the depositors and creditors of said bank, the Commissioner of Banks after he shall have fully distributed as herein provided the sums so collected, then he shall cause to be filed in the office of the clerk of the superior court in the pending action a full and complete report of all his transactions in said liquidation; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liabilities by reason of the liquidation of the bank.

(18) Action by Commissioner of Banks after Full Settlement. — Whenever the Commissioner of Banks shall have paid all the expenses of liquidation and shall have paid to each and every depositor and creditor of such bank, whose claims shall have been duly proven and allowed, the full amount of such claims, and shall have made proper provision for unclaimed and unpaid deposits and disputed claims and deposits, and shall have in hand other assets of said bank, he shall call a meeting of the stockholders of said bank by giving notice thereof by publication once a week for four weeks in a newspaper published in said county, or if no newspaper is published in said county, then in a newspaper having general circulation in said county, and by mailing a copy of such notice to each stockholder addressed to him at his address as the same shall appear upon the books of the bank. Affidavit of the officer mailing the notice herein required and of the printer as to the publication shall be conclusive evidence of notice hereunder. At such meeting any stockholders may be represented by proxy and the stockholders shall elect, by a majority vote of the stock present, an agent or agents who shall be authorized to receive from the Commissioner of Banks all the assets of said bank then remaining in his hands; and the Commissioner of Banks shall cause to be transferred and delivered to the said agent, or agents, all such assets of said bank. The Commissioner of Banks shall thereupon cause to be filed in the office of the clerk of the superior court in the pending actions a full and complete report of all his transactions, showing the assets of said bank so transferred, together with the name of the agent or agents receipting for the same; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liabilities by reason of the liquidation of the bank. Such agent, or agents, shall convert the assets coming into his hands, or their hands, into cash, and shall make distribution to the stockholders of said bank as herein provided. Said agent, or agents, shall file semi-annually a report of all transactions with the superior court of the county in which the bank is located, and with the Commissioner of Banks, and shall be allowed for such services such fees not in excess of five per cent, as may be fixed by the court. In case of death, removal or refusal to act, of any agent or agents elected by the stockholders, the Commissioner of Banks shall, upon report of such action on the part of such agent or agents to the superior court of the county in which the bank is located, turn over to said superior court for the stockholders

of said bank, all the remaining assets of the bank, file his report and be discharged from any and all further liability to the stockholders as herein provided. Said assets, when turned over to the superior court hereunder, shall remain in the hands of the superior court until such time as, by order of court or by action of the stockholders, distribution shall be provided for.

(19) Annual Report of Commissioner of Banks; Items in Report of; Publication.—The Commissioner of Banks shall file, as a part of his annual report to the governor, a list of the names of the banks so taken possession of and liquidated; and the Commissioner of Banks shall, from time to time, compile and make available for public inspection, reports showing the condition of each and all the banks so taken possession of; and the annual report of the Commissioner of Banks shall show the sum of unclaimed and unpaid deposits, with respect to each bank and shall show all depositories of all sums coming into the hands of the Commissioner of Banks under the provisions of this section.

(20) Compensation of Commissioner of Banks.—The Commissioner of Banks, for his services rendered in connection with the liquidation of banks hereunder, shall be entitled to actual expenses incurred in connection with the liquidation of each bank, including therein a reasonable sum for the time of the bank examiners and other agents of the Commissioner of Banks, which expenses shall be a prior lien on the assets of such bank so liquidated until paid in full; and the Commissioner of Banks shall have authority to prescribe reasonable rules and regulations for fixing such expenses.

(21) Exclusive Methods of Liquidation.—No bank created under the Banking Act or the Industrial Banking Act, and under the supervision of the Commissioner of Banks, shall be liquidated in any other way or manner than that provided herein.

(22) Application of Act.—The applicable provisions of this section as enacted by chapter 113 of the Public Laws of 1927 shall apply to all banks which on March 7, 1927, have suspended operations or are in the process of liquidation but for which no permanent receiver has been appointed by the court.

(23) Liquidation by Commissioner of Banks of All Banks in Receivership Required.—On and after the first day of January, one thousand nine hundred and thirty-six, the provisions of this section shall apply to all banks included in the definition or classification of banking institutions under this chapter, and/or any amendment thereto, which at said time shall be in receivership in the State courts; and the said banks shall be liquidated exclusively in accordance with the provisions of this section and by said Banking Commissioner. The liquidation of said banks shall be made strictly in accordance with the terms of this section and the words "competent local attorneys," as set forth in subsection (15) of this section shall be defined to be any attorney or attorneys resident of the county in which the bank is being liquidated. (1921, c. 4, s. 17; C. S., s. 218(c); 1927, c. 113; 1931, c. 243, s. 5, cc. 385, 405; 1933, c. 175, s. 2, c. 546; 1935, c. 81, s. 4, c. 231, s. 1, c. 277; 1939, c. 91; 1947, c. 621, s. 1.)

Local Modification.—Buncombe: 1933, c. 27; Rutherford: 1933, c. 567.

- I. General Consideration.
- II. Collection and Sale of Assets.
- III. Claims against Bank.
- IV. Distribution of Assets and Preferences.
- V. Actions.

Cross References.—As to conditions upon which closed banks may re-open, see § 53-37. As to escheats generally, see § 116-20 et seq. As to corresponding section of general corporation law not being applicable to banks, see § 55-125.

I. GENERAL CONSIDERATION.

Editor's Note.—Prior to the 1927 amendment, the superior court had exclusive jurisdiction over the affairs of an insolvent bank. See *Trust Co. v. Leggett*, 191 N. C. 362, 131 S. E. 752 (1926). By virtue of the amendment the court's duties were devolved upon the former Corporation Commission.

The first 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission" and "chief state bank examiner" formerly appearing in this section. The second 1931 amendment added

the second and third paragraphs of subsection (7). And the third 1931 amendment rewrote subsection (15).

The first 1933 amendment rewrote subsection (14), and the second 1933 amendment inserted the second sentence in subsection (12).

The first 1935 amendment added the proviso and last sentence of subsection (8), and the other 1935 amendments added subsection (23).

The 1947 amendment added the last two sentences to subsection (16). For brief discussion of the amendment and other provisions relating to escheats, see 25 N. C. Law Rev. 421. See also 26 N. C. Law Rev. 110.

The functions of the Commissioner of Banks are not limited to the provisions of this section, and the courts of equity have inherent power to permit him to exercise the functions of a chancery receiver in matters which are not inconsistent with his statutory duties. *Blades v. Hood*, 203 N. C. 56, 164 S. E. 828 (1932).

The Commissioner acts in a capacity equivalent to a receiver in taking over the assets of an insolvent bank, and in such capacity he represents the depositors and other creditors in the collection and distribution of the assets of the bank. See *Hood v. North Carolina Bank, etc., Co.*, 209 N. C. 367, 184 S. E. 51 (1936).

The Commissioner acts as a receiver under the inherent power of the court only in matters which are not provided for by statute, and his powers and duties in the collection and distribution of the assets of an insolvent bank are derived from the statute. *Hoft v. Mohn*, 215 N. C. 397, 2 S. E. (2d) 23 (1939).

General statements as to the capacity in which the Commissioner acts must be taken in connection with the problem under consideration, and may not be applied as controlling to particular transactions where the implications are different. Although the ultimate purpose of the collection of assets is for the benefit of the creditors and others entitled to final distribution, and in this sense the Commissioner undoubtedly represents them, yet, in the collection of specific items of debt, in a more technical sense he must be held to represent the bank to whose rights and privileges he has succeeded and which he exercises. He can assert no greater right than that of the bank against any debtor, nor can he avoid any defense which might not be made against the bank. In this respect, he is *pro hac vice* the bank. The payment by him of a judgment against the bank, out of its funds, has the same ef-

fect as it would have had if paid by the bank, and an assignment to him has the force and effect of an assignment to the bank. *Hoft v. Mohn*, 215 N. C. 397, 2 S. E. (2d) 23 (1939).

A bank taken over by the Commissioner continues as a legal entity. It is not dissolved and does not cease to exist, but its powers are exercised by the Commissioner (formerly the Corporation Commission) for the purpose of converting the assets, paying its liabilities, and distributing the surplus, if any, among the stockholders. *People's Bank v. Fidelity, etc., Co.*, 4 F. Supp. 379 (1933).

Section Does Not Affect Right to Restrain Commissioner.—The jurisdiction of the superior courts of this State, in a proper case, to restrain the Commissioner of Banks, is not affected by the provisions of this section. The Commissioner is an administrative officer of the State, and in the performance of his duties as prescribed by statute, is subject to the jurisdiction of the superior courts, in the exercise of their equitable jurisdiction. *Stanly Bank, etc., Co. v. Hood*, 206 N. C. 543, 174 S. E. 503 (1934); *Hood v. Burrus*, 207 N. C. 560, 178 S. E. 362 (1935).

Allowing Bank Officers to Continue Management.—Among other powers conferred by statute, the Corporation Commission (now Commissioner of Banks) may, without taking possession of the business and property of a State bank, upon its appearing to be in imminent danger of insolvency, direct upon what conditions its officers may continue in its management and control, and thus, upon the banks complying therewith, avoid losses to depositors, creditors, and stockholders, necessarily incident to the closing of its doors. *Taylor v. Everett*, 188 N. C. 247, 124 S. E. 316 (1924), cited in *People's Bank v. Fidelity, etc., Co.*, 4 F. Supp. 379 (1933).

Applied, as to former statutory liability of stockholders, in *In re Hood*, 208 N. C. 509, 181 S. E. 621 (1935); *Hood v. Hewitt*, 209 N. C. 810, 185 S. E. 161 (1936).

Cited in *Underwood v. Hood*, 205 N. C. 399, 171 S. E. 364 (1933); *State v. Davidson*, 205 N. C. 735, 172 S. E. 489 (1934); *Pritchard v. Hood*, 205 N. C. 790, 172 S. E. 485 (1934); *Edgerton v. Hood*, 205 N. C. 816, 172 S. E. 481 (1934); *In re Central Bank, etc., Co.*, 205 N. C. 822, 172 S. E. 484 (1934); *In re Bank of Murphy*, 205 N. C. 840, 172 S. E. 181 (1934); *Hood v. Mitchell*, 206 N. C. 156, 173 S. E. 61 (1934); *Hood v. Johnson*, 208 N. C. 77, 178 S. E. 855 (1935); *Hood v. Elder Mo-*

tor Co., 209 N. C. 303, 183 S. E. 529 (1936); *In re United Bank, etc., Co.*, 209 N. C. 389, 184 S. E. 64 (1936); *Hood v. Clark*, 211 N. C. 693, 191 S. E. 732 (1937); *Windley v. Lupton*, 212 N. C. 167, 193 S. E. 213 (1937); *Briley v. Crouch*, 115 F. (2d) 443 (1940).

II. COLLECTION AND SALE OF ASSETS.

"Assets" Defined.—The term "assets" is broad enough to cover anything available to pay the bank's creditors. *Hill v. Smathers*, 173 N. C. 642, 92 S. E. 607 (1917), holding that the term did not include the former statutory liability of stockholders.

Title to Assets.—Upon the appointment of a receiver under the statute, whether voluntary or by act of the Corporation Commission (now the Commissioner of Banks), the title to all of the bank's assets vests in the receiver to be administered for the benefit of its depositors, etc., alike. *Douglass v. Dawson*, 190 N. C. 458, 130 S. E. 195 (1925).

Personal Liability of Officers and Directors as Asset.—The right of action by the receiver of an insolvent bank for loss or depreciation of the bank's assets, due to the willful or negligent failure of its officers and directors to perform their official duties, is one enforceable for the benefit of the bank as well as for its creditors, and such liability of the officers and directors is an asset of the bank. *Corporation Comm. v. Merchants Bank, etc., Co.*, 193 N. C. 113, 136 S. E. 362 (1927).

Where the wrongful act of officers and directors is a breach of their duty to the bank, resulting in loss to the bank, the damages recoverable are assets of the bank. *Bane v. Powell*, 192 N. C. 387, 135 S. E. 118 (1926), citing *Douglass v. Dawson*, 190 N. C. 458, 130 S. E. 195 (1925).

Proceeds of Sale of Bank's Property Cannot Be Paid to New Bank.—The court having jurisdiction is without power to authorize the sale of an insolvent bank's property in bulk to purchasers under an agreement that they organize another bank and pay to it the purchase price for distribution to the creditors and depositors, and thus relieve the Corporation Commission (now Commissioner of Banks) of the duty to collect and distribute the assets. *In re Lafayette Bank, etc., Co.*, 198 N. C. 783, 153 S. E. 452 (1930), raising but not deciding the question whether the court could authorize the sale of the assets in bulk.

An order authorizing the Commissioner to sell a stock assessment judgment af-

fect only the Commissioner and whoever purchases by virtue thereof, and so far as the stockholder was concerned, the order was *res inter alios acta*. *In re Hood*, 208 N. C. 509, 181 S. E. 621 (1935).

III. CLAIMS AGAINST BANK.

As to preferred claims, see paragraphs under the next succeeding analysis line of this note.

Claim Not Barred by Failure to Institute Suit in Ninety Days.—In an action against the statutory receiver of an insolvent bank to recover bonds held by the bank for safe keeping, it appeared that the agent of the receiver advised plaintiffs that no claim was necessary for the bonds. Defendant contended that, under this section, the claim was barred for failure to bring suit within ninety days after the time designated for presenting claims, or in ninety days after the claim was presented and disallowed upon notice to plaintiffs. It was held that plaintiffs were not "creditors" or "claimants" within the meaning of this section and therefore it is not applicable to the action, and further, even conceding the statute is applicable, it would be inequitable and unconscionable for defendant to be allowed to set same up as a defense. *Bright v. Hood*, 214 N. C. 410, 199 S. E. 630 (1938).

IV. DISTRIBUTION OF ASSETS AND PREFERENCES.

Collections Made and Unremitted for Given Preference.—It will be noted that under subsection (13) of this section claims against the estate of an insolvent bank for amounts due on collections made and unremitted for, or for which final actual payment has not been made by the bank, are given preference, in the final distribution of the assets of said bank. *Braswell v. Citizens Nat. Bank*, 197 N. C. 229, 148 S. E. 236 (1929).

Same—Not Applicable to National Banks.—The proviso in subsection (13) of this section relating to the distribution of the assets of insolvent banks has no application to the assets of national banks. The National Banking Act provides how the assets of insolvent national banks shall be distributed, and it is well settled that state statutes cannot affect this distribution. *Spradlin v. Royal Mfg. Co.*, 73 F. (2d) 776 (1934), reversing *Royal Mfg. Co. v. Spradlin*, 6 F. Supp. 98 (1934).

So where a national bank received a draft for collection and remitted therefor a draft drawn on one of its correspondents, but failed before this draft could be

paid, it was held that the owner of the draft collected had no lien on the assets of the insolvent bank in the hands of the receiver. There was no augmentation of the assets of the bank as a result of the collection, but merely a shifting of credits, and consequently no basis for the declaration of a trust. *Spradlin v. Royal Mfg. Co.*, 73 F. (2d) 776 (1934), reversing *Royal Mfg. Co. v. Spradlin*, 6 F. Supp. 98 (1934).

A certificate of deposit sent by an insurance company to a national bank for collection was used in clearance, a draft for the balance on the clearance transaction being received by the bank and its draft being sent to the company for the amount collected on the certificate. The clearance draft not being paid, the collecting bank stopped payment on its draft and subsequently became insolvent, as did the other bank to the clearance transaction. The collecting bank's receiver filed claim with the receiver of the other bank for the amount of the clearance draft, which was paid in full as a preferred claim under subsection (13) of this section. It was held that a debtor and creditor relationship in regard to the certificate arose between the insurance company and the collecting bank, and the company's successor was not entitled to a preference in the distribution of the collecting bank's assets. *Citizens Nat. Bank v. Fidelity, etc., Co.*, 86 F. (2d) 4 (1936).

Solvent Banks Not Included.—The proviso of subsection (13) of this section, relating to lien for amount of check, etc., collected and not remitted for, was not intended to apply to solvent banks. *Spradlin v. Royal Mfg. Co.*, 73 F. (2d) 776 (1934), reversing *Royal Mfg. Co. v. Spradlin*, 6 F. Supp. 98 (1934).

The words "or otherwise" in the proviso in subsection (13) of this section, are to be construed in connection with the other parts of the statute, meaning any mode of transportation analogous to those specified in the statute, requiring "remitting" or "sending" the money to the payee of the check. *Morecock v. Hood*, 202 N. C. 321, 162 S. E. 730 (1932).

Purchaser of Bank Draft or Check Not Entitled to Preference.—The purchase of a bank draft, a cashier's check or a certified check creates the relation of debtor and creditor between the bank and the purchaser, and the purchaser is not entitled to a preference over other general creditors of the bank from which it was purchased. *Great Atlantic, etc., Tea Co. v. Hood*, 205 N. C. 313, 171 S. E. 344 (1933).

Same—Cashier's Check.—Where a bank debits an account with the amount of a check drawn by the depositor and issues its cashier's check for the amount but is placed in a receiver's hands before remitting the proceeds to a third person as instructed to do by the depositor, the cashier's check does not constitute a preference as defined by this section. *Board of Education v. Hood*, 204 N. C. 353, 168 S. E. 522 (1933).

If a depositor in a bank takes a cashier's check for his deposit, and thereafter surrenders the cashier's check, purchasing with the proceeds a draft for the purchase price of Liberty Bonds, and the bank is closed before the draft is paid, such transaction does not constitute a preference as defined by this section. *In re Bank of Pender*, 204 N. C. 143, 167 S. E. 561 (1933).

Same—Check or Draft on Another Bank.—Where a check was purchased from a bank, which a few days later became insolvent and the bank on which the check was drawn refused to honor it, the purchaser could not claim a preference under this section. *Great Atlantic, etc., Tea Co. v. Hood*, 205 N. C. 313, 171 S. E. 344 (1933).

A depositor presented his check for payment over the counter of a bank, which charged his account with the amount thereof and gave him a draft drawn on another bank. He deposited the draft in a third bank and it was returned unpaid. It was held that he was not entitled to a preference in the assets of the bank drawing the draft, the transaction not coming within the proviso in subsection (13). *Morecock v. Hood*, 202 N. C. 321, 162 S. E. 730 (1932).

Draft Sent to Drawee Bank for Collection Not Charged to Drawer's Account.

—Where a depositor drew a draft on his local bank against a general deposit and the payee forwarded the draft to the drawee bank for collection and it was returned with notice of the bank's insolvency, it was held that the drawer's claim was not entitled to a statutory preference under this section for the reason that the bank did not charge the draft to the account of the drawer; and if the bank's failure to return the draft within twenty-four hours after its receipt by mail implied an acceptance under the provisions of sections 25-143 and 25-144, such acceptance did not ipso facto create a preference. *Lamb v. Hood*, 205 N. C. 409, 171 S. E. 359 (1933).

Taxes Constitute Preferred Claim.—A bank, owning the land upon which the

bank building was situate, closed its doors and the Commissioner of Banks took possession for purposes of liquidation by virtue of the statute. At the time of closing there was an outstanding mortgage securing an indebtedness of \$25,000, all of which was unpaid and in default. The mortgagee took possession of the real estate and collected the rents and thereafter the liquidating agent of the bank listed the real property for taxation. County and town taxes were duly assessed and subsequently the mortgagee duly exercised the power of sale and became the purchaser of the property. It was held that as the bank, the mortgagor, was the real owner it was liable for taxes unpaid at the time of the sale and such taxes constitute a preferred claim against the assets of the insolvent bank. *Hood v. McGill*, 206 N. C. 83, 173 S. E. 20 (1934).

Payment of Dividends to Clerk of Court.—In *In re Bank of Ayden*, 206 N. C. 821, 175 S. E. 177 (1934), dividends declared by the Commissioner of Banks were paid to clerk of court to hold for three months, during which time conflicting contentions of creditors and depositors were heard and decided.

Applied, as to preferences, in *Dixie Mercerizing Co. v. Hood*, 207 N. C. 135, 176 S. E. 285 (1934); *Williams v. Hood*, 207 N. C. 737, 178 S. E. 669 (1935); *In re Champion Bank, etc., Co.*, 207 N. C. 802, 178 S. E. 555 (1935).

V. ACTIONS.

Action to Recover for Wrongful Act of Officers and Directors.—Where the wrongful act of officers and directors is a breach of their duty to the bank, resulting in loss to the bank, the damages recoverable are assets of the bank. Upon its insolvency and upon the appointment of a receiver for the liquidation of the bank, such receiver, in the first instance, may alone maintain the action to recover the damages, as as-

sets of the bank, to be administered by him for the benefit of all its depositors, creditors or stockholders. *Bane v. Powell*, 192 N. C. 387, 135 S. E. 118 (1926), citing *Douglass v. Dawson*, 190 N. C. 458, 130 S. E. 195 (1925).

A bank creditor may not maintain an action to interfere with the disposition of its assets by the Commissioner in the absence of any allegation of fraud, bad faith, or neglect on the part of the Commissioner, and a showing that a greater return would result from the disposition of the assets as contended for by the creditor. *In re Hood*, 208 N. C. 509, 181 S. E. 621 (1935).

When the Commissioner is made a party, he succeeds to the rights of the bank in the litigation pending and comes into the pending case for the purpose of protecting the rights of creditors in the recovery, not for the purpose of asserting a new and independent cause of action. *Fidelity, etc., Co. v. People's Bank*, 72 F. (2d) 932 (1934).

No new cause of action is created where Commissioner is made a party to a previous action by the bank on its cashier's fidelity bond. See *People's Bank v. Fidelity, etc., Co.*, 4 F. Supp. 379 (1933).

Venue.—In determining residence for purposes of venue, the personal residence of the Commissioner of Banks controls, in the absence of statute. *Hartford Acci., etc., Co. v. Hood*, 225 N. C. 361, 34 S. E. (2d) 204 (1945).

An action on a note by the Commissioner of Banks and the liquidating agent, etc., is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendants' motion for change of venue to the county of their residence is properly refused. *Hood v. Progressive Stores*, 209 N. C. 36, 182 S. E. 694 (1935).

§ 53-21. Sale of stocks of defunct banks validated.—All private sales of stocks in resident corporations, joint stock companies and limited partnerships, made prior to March 20, 1935, by the Commissioner of Banks or a duly appointed agent in the course of the liquidation of a defunct bank, where such sale was made by and with the approval of a liquidation board duly selected by the creditors and stockholders of such bank and upon authority of an order of the presiding or resident judge of the district in which the principal office of such bank was located, are hereby in all respects validated, ratified and confirmed. (1935, c. 113.)

§ 53-22. Statute relating to receivers applicable to insolvent banks.—Article thirteen, chapter fifty-five relating to receivers, when not inconsistent with the provisions of § 53-20, shall apply to liquidation of insolvent banks. (1921, c. 4, s. 19; 1923, c. 148, s. 4; C. S., s. 218(e); 1931, c. 215.)

Editor's Note.—The 1931 amendment rewrote this section.

Commissioner of Banks Is Statutory Receiver and May Exercise Powers Not

Stated in Statute.—The Commissioner of Banks, as successor to the Corporation Commission in the liquidation of insolvent banks, is a statutory receiver, and upon the insolvency of a bank he is given possession and the right to possession of all property, rights, etc., with certain enumerated powers together with such incidental powers as are necessary to a sale of the insolvent bank's assets, but the functions of the Commissioner are not

limited to the provisions of § 53-20, and the courts of equity have inherent power to permit him to exercise the functions of a chancery receiver in matters which are not inconsistent with his statutory duties. *Blades v. Hood*, 203 N. C. 56, 164 S. E. 228 (1932).

Cited in *Douglass v. Dawson*, 190 N. C. 458, 130 S. E. 195 (1925); *Hoft v. Mohr*, 215 N. C. 397, 2 S. E. (2d) 23 (1939).

§ 53-23. Books, records, etc., disposition of.—All books, papers, and records of a bank which has been finally liquidated shall be deposited by the receiver in the office of the clerk of the superior court for the county in which the office of such bank is located, or in such other place as in his judgment will provide for the proper safekeeping and protection of such books, papers, and records. The books, papers, and records herein referred to shall be held subject to the orders of the Commissioner of Banks and the clerk of the superior court for the county in which such bank was located. (1921, c. 4, s. 20; C. S., s. 218(f); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-24. Destruction of records of liquidated insolvent banks.—After the expiration of ten years from the date of filing in the office of the clerk of the superior court of a final order approving the liquidation by the banking department of any insolvent bank and the delivery to the clerk or into his custody of the records of such bank, the said records may be destroyed by the clerk of the superior court holding said records by burning the same in the presence of the register of deeds and the sheriff of said county, who shall join with the clerk in the execution of a certificate as to the destruction of said records. The certificate shall be filed by the clerk in the court records of the liquidation of the bank whose records are thus destroyed.

After ten years from the filing by the Commissioner of Banks of a final report of liquidation of any insolvent bank, the said Commissioner, by and with the consent of the State Banking Commission or its successor, may destroy by burning the records of any insolvent bank held in the department of the Commissioner of Banks in connection with the liquidation of such bank: Provided, that in connection with any unpaid dividends the Commissioner of Banks shall preserve the deposit ledger or other evidence of indebtedness of the bank with reference to the unpaid dividend until the dividend shall have been paid.

Nothing in this section shall be construed to authorize the destruction by the clerk of the superior court of any county or by the Commissioner of Banks of any of the formal records of liquidation, nor shall the Commissioner of Banks have authority under this section to destroy any of the records made in his office with reference to the liquidation of any insolvent bank. (1939, c. 91, s. 1, c. 135.)

§ 53-25. Trust terminated on insolvency of trustee bank.—Whenever any bank or trust company created under the laws of this State, which has heretofore been, or shall hereafter be, appointed trustee in any indenture, deed of trust or other instrument of like character, executed to secure the payment of any bonds, notes or other evidences of indebtedness, has been or shall be by reason of insolvency, or for any other cause provided by law, taken over for liquidation by the Commissioner of Banks of this State or by any other legally constituted authority, the powers and duties of such bank or trust company as trustee in any such instrument shall, upon the entry of an order of the clerk of the superior

court appointing a successor trustee, upon a petition as hereinafter provided, immediately cease and determine. (1931, c. 250, s. 1.)

§ 53-26. Petition for new trustee; service upon parties interested.—In all cases of such insolvency and liquidation mentioned in § 53-25, the clerk of the superior court of any county in which such indenture, deed of trust or other instrument of like character is recorded shall, upon the verified petition of any person interested in any such trust, either as trustee, beneficiary or otherwise, which interest shall be set out in said petition, enter an order directing service on all interested parties either personally or by the publication in some newspaper published in the county, or in some adjoining county if no newspaper is published in the county where such application is made, of a notice directed to all persons concerned, commanding and requiring all persons having any interest in said trust, to be and appear at his office at a day designated in said order and notice, not less than thirty days from the date thereof, and show cause why a new trustee shall not be appointed. (1931, c. 250, s. 2.)

§ 53-27. Publication and contents of notice.—Such notice shall be published in the manner required by law for service of summons by publication, and shall set forth the names of the parties to the indenture, deed of trust or other such instrument, the date thereof, and the place or places where the same is recorded. (1931, c. 250, s. 3.)

§ 53-28. Appointment where no objection made.—If, upon the day fixed in said notice, no person shall appear and object to the appointment of a substitute trustee, the clerk shall, upon such terms as he deems advisable to the best interest of all parties, appoint some competent person, or corporation authorized to act as such, substituted trustee, who shall be vested with and shall exercise all the powers conferred upon the trustee named in said instrument. (1931, c. 250, s. 4.)

§ 53-29. Hearing where objection made; appeal from order.—If objection shall be made to the appointment of a new trustee, the clerk shall hear and determine the matter, and from his decision an appeal may be prosecuted as in case of special proceedings generally. (1931, c. 250, s. 5.)

§ 53-30. Registration of final order.—The final order of appointment of such new trustees shall be certified by the clerk of the superior court in which such order is entered and shall be recorded in the office of the register of deeds in the county or counties in which the instrument under which such appointment has been made is recorded, and a minute of the same shall be entered by the register of deeds on the margin of the record where said original instrument is recorded. (1931, c. 250, s. 6.)

§ 53-31. Petition and order applicable to all instruments involved.—The petition and the order appointing such new trustee may include and relate and apply to any number of indentures, deeds of trust or other instruments, wherein the same trustee is named. (1931, c. 250, s. 7.)

§ 53-32. Additional remedy.—Sections 53-25 to 53-31 shall be in addition to and not in substitution for any other remedy provided by law. (1931, c. 250, s. 8.)

Editor's Note.—As the remedy provided in connection with §§ 45-10 to 45-16. 9 N. is cumulative, the statute should be read C. Law Rev. 403.

§ 53-33. Validation of acts of officers of insolvent banks as trustees in deeds of trust.—Whenever any State bank, prior to January first, one thousand nine hundred and thirty-one, shall have become insolvent and its assets and business been placed in the hands of the Corporation Commission or taken control of by the Corporation Commission for liquidation, and the board of directors

of said bank shall have thereafter by resolution authorized or directed the officers of said bank or some of them to perform or exercise in the name of the bank as trustee any power or duty of such bank as trustee under any deed in trust to it recorded in any county in this State, provided said resolution was passed prior to the eleventh day of May, one thousand nine hundred and thirty-one, the performance or exercise of any such power or duty heretofore or hereafter by any officer or officers so authorized shall be effective and binding on all parties concerned as the act of such bank as trustee as aforesaid, to the same extent and in the same manner as if such bank had not become insolvent and its assets and business had not been placed in the hands of the Corporation Commission or taken control of by the Corporation Commission for liquidation. (1931, c. 403.)

§ 53-34. Validation of sales by Corporation Commission under mortgages, etc., giving banks power of sale.—Whenever it appears that either the North Carolina Corporation Commission, the chief State bank examiner, or any liquidating agent appointed pursuant to the provisions of § 53-20, has undertaken to exercise the power of sale set up in any mortgage, deed of trust, or other written instrument for the security of the payment of money in which any bank then in liquidation was named trustee, the said acts including the acts of resigning the trust, of the North Carolina Corporation Commission and/or chief State bank examiner, and/or liquidating agent appointed as aforesaid, are hereby validated and declared to be of the same force and effect as if done by the bank named as trustee in the mortgage, deed of trust, or other instrument. (1931, c. 132.)

Editor's Note.—This section appears to have been intended to overcome the effect of *Mitchell v. Shuford*, 200 N. C. 321, 156 S. E. 513 (1931). In view, however, of this case, and of *Booth v. Hairston*, 193 N. C. 278, 136 S. E. 879 (1927); *Booth v. Hairston*, 195 N. C. 8, 141 S. E. 480 (1928), doubt has been cast upon the con-

stitutionality of the validating act. It is believed, however, that the facts of the situation aimed at by the validating act can be distinguished. The future policy is stated in § 53-25 et seq., and in the 1931 amendment to § 53-20, subsection (7). 9 N. C. Law Rev. 401.

§ 53-35. Foreclosures and execution of deeds by Commissioner of Banks validated.—Whereas, the Commissioner of Banks, created by chapter two hundred forty-three of the Public Laws of 1931, was given general supervision over the banks of this State; and

Whereas, the Commissioner of Banks, under authority of chapter three hundred and eighty-five of the Public Laws of 1931, succeeded to all the property of banks in liquidation, including fiduciary powers under the mortgages and deeds of trust; and

Whereas, the Commissioner of Banks, in his own name and in the name of a number of conservators or liquidating agents of banks in the process of liquidation under his supervision, has foreclosed a large number of deeds of trust in which such banks were the named trustee, and has executed under the powers contained therein a large number of trustee's deeds under authority thereof: Now, therefore, all the deeds and acts of the Commissioner of Banks and/or conservators or liquidating agents of such banks in the process of liquidation, as in the preamble to this section described, are hereby in all respects ratified, validated and confirmed.

This section shall not effect litigation pending April 3, 1939. (1939, c. 368.)

§ 53-36. Commissioner to report to Secretary of State certain matters relative to liquidation of closed banks; publication.—The Commissioner of Banks of the State of North Carolina shall on or before the first day of June, 1933, and on the first day of January and July of each year thereafter file with the Secretary of the State of North Carolina a report showing all

banks under liquidation in the State of North Carolina, and the names of any and all auditors together with the amounts paid to them for auditing each of said banks, and the names of any and all attorneys employed in connection with the liquidation of said banks together with the amount paid or contracted to be paid to each of said attorneys. If any attorney has been employed on a fee contingent upon recovery said report must state in substance the contract.

Within five days from the receipt of said report the Secretary of the State of North Carolina shall cause same to be published one time in some newspaper published in each county in which a bank or banks are under liquidation, if there be a newspaper published in said county. If not, the Secretary of the State of North Carolina shall cause a copy of said report to be posted at the courthouse door in said county. (1933, c. 483.)

ARTICLE 4.

Reopening of Closed Banks.

§ 53-37. Conditions under which banks may reopen.—Whenever the Commissioner of Banks has taken in possession any bank, such bank may, with the consent of the Commissioner of Banks, resume business upon such terms and conditions as may be approved by the State Banking Commission. When such banks have been taken in possession under the provisions of § 53-20, paragraphs (1) or (2), such conditions shall be fully stated in writing and a copy thereof shall be filed with the clerk of the superior court in the action required to be commenced in such cases against said bank under the provisions of § 53-20, paragraph (3): Provided, however, no bank or banking institution which has been taken in possession by the Commissioner of Banks under the provisions of the State banking laws shall be reopened to receive deposits or for the transaction of a banking business unless and until:

- (a) The bank has been completely restored to solvency;
- (b) The capital stock, if impaired, has been entirely restored in cash;
- (c) It shall clearly appear to the Commissioner of Banks that such bank may be reopened with safety to the public and such reopening is necessary to serve the business interests of the community. (1921, c. 4, s. 16; C. S., s. 218(q); 1927, c. 113, s. 1; 1931, c. 243, s. 5, c. 388, s. 1; 1939, c. 91, s. 2.)

Cross References.—As to liquidation, see § 53-20. As to when Commissioner takes charge, see § 53-19.

Liability of Directors under Agreement.—The agreement of directors to make good the impairment of the capital stock of a state bank as a condition precedent to the management of its business by its own officers, and at the instance of the State Bank examiner, acting according

to the power conferred by statute upon the Corporation Commission, rendered such directors, as stockholders, liable to the extent of the obligations they thus assumed, and this liability was independent of the former statute (C. S. § 219(a)) creating an additional liability to the amount of stock held by them in the banking corporation. *Taylor v. Everett*, 188 N. C. 247, 124 S. E. 316 (1924).

§ 53-38. Certain contracts not affected.—Nothing in § 53-37 shall impair or affect any contracts made by banks and depositors of banks reopened prior to May 12, 1931, under the permission of the State Banking Department. (1931, c. 388, s. 4.)

ARTICLE 5.

Stockholders.

§ 53-39. New State banks to set up surplus fund.—The common stockholders of any bank organized after March 17, 1933, under the laws of the State of North Carolina shall pay in, in cash, a surplus fund equal to fifty per centum of its common capital stock before the bank shall be authorized to commence business. (1933, c. 159, s. 2; 1935, c. 79, s. 1.)

Editor's Note.—The 1935 amendment inserted the word "common" preceding the words "stockholders" and "capital stock."

For a discussion of this section, see 11 N. C. Law Rev. 200. And see 13 N. C. Law Rev. 91.

§ 53-40. Executors, trustees, etc., not personally liable.—Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stockholders, but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be if living and competent to hold stock in his own name. (1921, c. 4, s. 23; C. S., s. 219(c).)

This section extends to every trust relation, however created, and attaches liability to the estate and funds in the hands of the trustee. *Hood v. North Carolina Bank, etc., Co.*, 209 N. C. 367, 184 S. E. 51 (1936).

This provision is held to refer not only to trustees appointed by will, or by order of a court or of a judge, but to any trust relation, however created. But the exemption is limited to cases of express and active trusts, where there is a probability of some estate to respond to the liability. *American Trust Co. v. Jenkins*, 193 N. C. 761, 138 S. E. 139 (1927).

Former Statutory Liability of Stockholders Abolished.—Public Laws 1935, c. 99, amending C. S. § 219(a), abolished the former statutory liability of stockholders in the banks of this State. *Fidelity Security Co. v. Hight*, 211 N. C. 117, 189 S. E. 174 (1937); *Hood v. Richardson Realty*, 211 N. C. 582, 191 S. E. 410 (1937).

Same—Decisions Relating to Former Liability.—In *Smathers v. Western Carolina Bank*, 155 N. C. 283, 71 S. E. 345 (1911), it was held that by reason of this statute, a person to whom a certificate for shares of the capital stock in a bank was issued, showing on its face that he held the said shares as trustee for a *cestui que trust*, also named in the certificate, was not liable personally as a stockholder in an action by the receiver of the bank to recover judgment upon the former statutory liability of stockholders. *American Trust Co. v. Jenkins*, 193 N. C. 761, 138 S. E. 139 (1927). See *Corporation Comm. v. Latham*, 201 N. C. 342, 160 S. E. 295 (1931).

Same—Liability Attached to Estate or Funds in Hands of Trustees, etc.—By this provision an administrator, executor, guardian, or trustee was not personally liable for the statutory liability on bank stock held in their representative capacities, but such liability attached to the estate or funds in their hands. *Hood v. North Carolina Bank, etc., Co.*, 209 N. C. 367, 184 S. E. 51 (1936).

And where a trustee breached its duty in failing to sell bank stock for reinvestment, its wrongful act did not relieve the estate of the statutory liability to the prejudice of depositors and creditors of the bank. *Hood v. North Carolina Bank, etc., Co.*, 209 N. C. 367, 184 S. E. 51 (1936).

A trust estate was held liable for assessment on bank stock owned regardless of the method by which the trust was established, and where shares of bank stock appeared on the books of the bank in the name of "executors," the statutory liability thereon of the estate could not be defeated by showing that the stock was held by the executors as executors and trustees under the will for the benefit of minor ulterior beneficiaries, the beneficiaries of the income from the trust estate being of age, and there being nothing on the books of the bank to disclose the trusteeship. *Hood v. North Carolina Bank, etc., Co.*, 209 N. C. 367, 184 S. E. 51 (1936).

Assignee of Judgment against Executor as Such Not Entitled to Set Up Personal Liability of Executor.—Plaintiff assignee of a judgment against an executor in his representative capacity for a stock assessment made on shares of stock of a bank in liquidation, sought by subsequent proceedings to charge the executor personally with liability upon allegations that the executor personally owned the bank stock, legally or equitably. The mere assignment of the judgment, without more, was held to transfer only the rights of the assignor of the judgment in his status of judgment creditor and not his personal rights not incident to such status, and plaintiff was not entitled to set up the personal liability of the executor. *Jones v. Franklin's Estate*, 209 N. C. 585, 183 S. E. 792 (1936).

Liability of Trustee to Trust Estate Cannot Be Set Off against Liability of Estate.—The liability of a bank trustee to the trust estate for its negligent failure to sell for reinvestment shares of stock of the bank belonging to the trust estate could not be set up as a counterclaim or

set-off against the former statutory liability of the estate upon the insolvency of the bank. In re United Bank, etc., Co., 209 N. C. 389, 184 S. E. 64 (1936).

§ 53-41. Stock sold if subscription unpaid.—Whenever any stockholder, or his assignee, fails to pay any installment on the stock, when the same is required by law to be paid, the directors of the bank shall sell the stock of such delinquent stockholder at public or private sale, as they may deem best, having first given the delinquent stockholder twenty days' notice, personally or by mail, at his last known address. If no party can be found who will pay for such stock the amount due thereon to the bank with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank, and such stock shall be sold, as the directors may order, within thirty days of the time of such forfeiture, and if not sold, it shall be canceled and deducted from the capital stock of the bank. (1921, c. 4, s. 25; C. S., s. 219(e).)

Cross Reference.—As to liability for unpaid stock under general corporation law, see § 55-65.

§ 53-42. Impairment of capital; assessments, etc.—The Commissioner of Banks shall notify every bank whose capital shall have become impaired from losses or any other cause, and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within sixty days of such notice by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made: Provided, that such bank may reduce its capital to the extent of the impairment, as provided in § 53-11. If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon thirty days' notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none therein, a newspaper circulating in the county in which the bank is located, to make good the deficiency, and the balance, if any, shall be returned to the delinquent shareholder or shareholders. If any such bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the Commissioner of Banks, the Commissioner of Banks may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law. A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock; but in the event the stock of any stockholder be sold as hereinbefore provided, and the said stock when sold fails to bring the amount of the assessment against said stockholder, then, and in such event, the said stockholder shall be personally liable for the difference between the amount of said assessment and the price brought by the sale of said stock. (Ex. Sess. 1921, c. 56, s. 3; C. S., s. 219(f); 1925, c. 117; 1931, c. 243, s. 5.)

Cross Reference.—As to the amount of reserve required, see §§ 53-50 and 53-51.

Editor's Note.—This section first appeared in Public Laws 1921, Ex. Sess., c. 56, amending the Public Laws 1921, c. 4. Its provisions are substantially similar to the national banking act which was designed principally for the purpose of

strengthening banks whose capital has become impaired. See *Elon Banking, etc., Co. v. Burke*, 189 N. C. 69, 126 S. E. 163 (1925).

The 1925 amendment added the part of the last sentence appearing after the semicolon. The amendment was passed to meet the decision in *Elon Banking, etc.,*

Co. v. Burke, 189 N. C. 69, 126 S. E. 163 (1925); Bank of Pinehurst v. Derby, 218 N. C. 653, 12 S. E. (2d) 260 (1940).

The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

Amendatory Act Cannot Be Given Retroactive Effect.—The act of 1925, amending this section by providing for personal liability of stockholders for the amount by which the sale of their stock failed to realize a sum sufficient to pay the assessment, provided a new remedy, and to permit the bank to maintain the action against a stockholder who purchased his

stock prior to the enactment of the amendment of 1925 would violate due process of law, and would impair the obligations of the contract, and hence the act of 1925 cannot be given retroactive effect. Bank of Pinehurst v. Derby, 218 N. C. 653, 12 S. E. (2d) 260 (1940).

"Payable in Cash" Construed.—The expression "payable in cash" merely means that the account is presently due, and its payment may be presently enforced, but only by the methods the statute specifies. Elon Banking, etc., Co. v. Burke, 189 N. C. 69, 126 S. E. 163 (1925).

ARTICLE 6.

Powers and Duties.

§ 53-43. **General powers.**—In addition to the powers conferred by law upon private corporations, banks shall have the power:

1. To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security or real and personal property. Such corporations at the time of making loans or discounts may take and receive interest or discounts in advance.

2. To adopt regulations for the government of the corporation not inconsistent with the Constitution and laws of this State.

3. To purchase, hold, and convey real estate for the following purposes:

(a) Such as shall be necessary for the convenient transaction of its business, including furniture and fixtures, with its banking offices and other apartments to rent as a source of income, which investment shall not exceed fifty per cent of its paid-in capital stock and permanent surplus: Provided, that this provision shall not apply to any such investment made before the ninth day of March, one thousand nine hundred and twenty-one. Provided further, that the Commissioner of Banks may in his discretion authorize the continuance of investments made prior to the first day of February, one thousand nine hundred and twenty-five, of the character described in this paragraph. Provided, further, that the Commissioner of Banks may, in his discretion, authorize any bank located in a city having a population of more than ten thousand, according to the last United States census, to invest more than fifty per cent of its capital and permanent surplus in its banking houses, furniture, and fixtures.

(b) Such as is mortgaged to it in good faith by way of security for loans made or moneys due to such banks.

(c) Such as has been purchased at sales upon foreclosures of mortgages and deeds of trust held or owned by it, or on judgments or decrees obtained and rendered for debts due to it, or in settlements affecting security of such debts. All real property referred to in this subsection shall be sold by such bank within one year after it is acquired, unless, upon application by the board of directors, the Commissioner of Banks extends the time within which such sale shall be made. Any and all powers and privileges heretofore granted and given to any person, firm, or corporation doing a banking business in connection with a fiduciary and insurance business, or the right to deal to any extent in real estate, inconsistent with this chapter, are hereby repealed.

4. Nothing contained in this section shall be deemed to authorize banking corporations to engage in the business of dealing in investment securities, either di-

rectly or through subsidiary corporations: Provided, however, that the term "dealing in investment securities" as used herein, shall not be deemed to include the purchasing and selling of securities without recourse, solely upon order, and for the account of, customers; and provided further, that "investment securities," as used herein, shall not be deemed to include obligations of the United States, or general obligations of any state or of any political subdivision thereof, or of cities, towns, or other corporate municipalities of any state or obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Banks or the Home Owner's Loan Corporation.

Any provision in conflict with this subsection contained in the articles of incorporation heretofore issued to any banking corporation is hereby revoked.

5. Subject to the approval of the Commissioner of Banks and on the authority of its board of directors, or a majority thereof, to enter into such contracts, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of one thousand nine hundred and thirty-three (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporation.

6. Any commercial bank, savings bank, or trust company, heretofore or hereafter organized under any general or special laws of this State and any national bank doing business in this State, shall have power, in addition to such other powers as it may have:

(a) Upon the making of a loan or discount, to deduct in advance, from the proceeds of such loan, interest at a rate not exceeding six per centum (6%) per annum upon the amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in installments: Provided, any commercial bank may exercise and enjoy all the powers now or hereafter provided in paragraph 3 of section 53-141.

(b) Nothing in subsection 6 shall be construed as in anywise extending or increasing or decreasing the powers of commercial banks, savings banks, or trust companies or national banks to make loans or discount notes other than as herein or by other laws expressly provided.

7. Maintain separate departments and deposit in its commercial department to the credit of its trust department all uninvested fiduciary funds of cash and secure, under rules and regulations of the State Banking Commission, all such deposits in the name of the trust department whether in consolidated deposits or for separate fiduciary accounts, by segregating and delivering to the trust department such securities as may be eligible for the investment of the sinking funds of the State of North Carolina, equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five per centum of such deposits. Such securities shall be held by the trust department as security for the full payment or repayment of all such deposits, and shall be kept separate and apart from other assets of the trust department. Until all of such deposits shall have been accounted for to the trust department or to the individual fiduciary accounts, no

creditor of the bank shall have any claim or right to such security. When fiduciary funds are deposited by the trust department in the commercial department of the bank, the deposit thereof shall not be deemed to constitute a use of such funds in the general business of the bank and the bank in such instance shall not be liable for interest on such funds. To the extent and in the amount such deposits may be insured by the Federal Deposit Insurance Corporation, the amount of security required for such deposits by this section may be reduced.

The Banking Commission shall have power to make such rules and regulations as it may deem necessary for the enforcement of the provisions of the preceding paragraph, and such authority shall exist and is hereby conferred under the general authority heretofore conferred upon said Commission as well as by this paragraph. (1921, c. 4, s. 26; 1923, c. 148, s. 5; C. S., s. 220(a); Ex. Sess. 1924, c. 67; 1925, c. 279; 1927, c. 47, s. 5; 1931, c. 243, s. 5; 1933, c. 303; 1935, c. 81, s. 1, c. 82; 1937, c. 154; 1941, c. 77; 1943, c. 234.)

Cross References.—As to powers conferred upon private corporations, see § 55-26 et seq. As to form for corporate conveyances, see § 47-41.

Editor's Note.—The 1923 amendment inserted the words "and deeds of trust held or" near the beginning of clause (c) of subsection 3. The 1924, 1925 and 1927 amendments made changes in clause (a) of subsection 3. The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission" formerly appearing in this section.

The 1933 amendment added subsection 4, and the 1935 amendment changed the list of obligations excepted therein. The 1935 amendment also added subsection 5, the 1937 amendment added subsection 6, and the 1941 amendment added subsection 7. For comment on last amendment, see 19 N. C. Law Rev. 544.

Prior to the 1943 amendment the proviso to paragraph (a) of subsection 6 provided: "no loan made under the provisions of subsection 6 shall exceed fifteen hundred dollars (\$1,500.00) to any one person, firm, partnership or corporation."

Similarity of Section to Federal Act.—The words used in the statute relative to the powers of corporations engaged in the banking business under the laws of this State are almost identical with those

used in the federal statute, relative to the powers of National Banks. *Indiana Quarries Co. v. Angier Bank, etc., Co.*, 190 N. C. 277, 129 S. E. 619 (1925).

Power to Become Surety or Lend Credit.—In the absence of an express grant of authority, a banking corporation, as a rule, has not the power to become the guarantor or surety of the obligation of another person, or to lend its credit to any person. *Indiana Quarries Co. v. Angier Bank, etc., Co.*, 190 N. C. 277, 129 S. E. 619 (1925).

A bank is not authorized to become a guarantor, except where it is necessary to protect its rights where the guaranty relates to commercial paper and is an incident to the purchase and sale thereof, or when the guaranty is especially authorized by law. *Indiana Quarries Co. v. Angier Bank, etc., Co.*, 190 N. C. 277, 129 S. E. 619 (1925).

Negotiations of Evidences of Debt.—In the course of its dealings and for a lawful purpose, a bank may negotiate notes, drafts, bills of exchange, and other evidences of indebtedness embraced by this section; and where there is more than one transfer of the same security, and the equities are equal, the first in time will prevail. *Richmond County v. Page Trust Co.*, 195 N. C. 545, 132 S. E. 786 (1928).

§ 53-44. Investment in bonds guaranteed by United States.—(1) Any bank, building and loan association, land and loan association, savings and loan association, insurance company, title insurance company, land mortgage company, fraternal order or benevolent association, or any other corporation incorporated under the laws of this State, and operating under the supervision of the Commissioner of Banks, Insurance Commissioner, or Superintendent of Savings and Loan Associations; the State Treasurer, as custodian of the assurance fund provided under the Torrens Act, or any officer charged with the investment of sinking funds of the State, any county, city, town, incorporated village, township, school district, school taxing district, or other district or political subdivision of government of the State; the North Carolina State Thrift Society, any clerk of the court holding money by color of his office or as receiver; and any person, firm or corporation acting as executor, administrator, guardian, trustee, or other

person acting in a fiduciary capacity may invest in bonds issued, or in bonds which are fully and unconditionally guaranteed as to principal and interest by the United States, to the same extent as the same are now or may be hereafter authorized to invest in any obligation of the United States: Provided that all investments authorized hereunder shall be guaranteed, both as to the payment of principal and interest thereon, by the United States treasury.

(2) **Security for Loans and Deposits.**—No bank shall be required to maintain a reserve against deposits secured by any of the above mentioned bonds equal in market value to the amount of such deposits, and such bonds shall be valid security for all loans and deposits to the same extent as are any obligations of the United States.

(3) **Bonds Deemed Cash in Settlements by Fiduciaries.**—In settlements by guardians, executors, administrators, trustees and others acting in a fiduciary capacity, the bonds and securities herein mentioned shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds, and may be paid as such by the transfer thereof to the persons entitled and without any liability for a greater rate of interest than the amount actually accruing from such bonds. (1935, c. 164; 1937, c. 433.)

Cross References.—As to investment of funds held by bank for investment or distribution, see § 36-27. As to banks holding stock as fiduciary, see § 36-32.

Editor's Note.—The 1937 amendment

struck out the words "not exceeding par value thereof" formerly appearing in the first sentence of subsection (3). As to section generally, see 13 N. C. Law Rev. 362.

§ 53-45. Banks, fiduciaries, etc., authorized to invest in mortgages of Federal Housing Administration, etc.—(1) Insured Mortgages and Obligations of National Mortgage Associations. — It shall be lawful for all commercial and industrial banks, trust companies, building and loan associations, insurance companies, and other financial institutions engaged in business in this State, and for guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State to invest, to the same extent that such funds may be invested in interest-bearing obligations of the United States, their funds or the moneys in their custody or possession which are eligible for investment, in bonds or notes secured by a mortgage or deed of trust insured by the Federal Housing Administrator, in mortgages on real estate which have been accepted for insurance by the Federal Housing Administrator, and in obligations of national mortgage associations.

(2) **Insured Loans.**—All such banks, trust companies, building and loan associations and insurance companies, and other financial institutions, and also all such guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State, may make such loans, secured by real estate, as the Federal Housing Administrator has insured or has made a commitment to insure, and may obtain such insurance.

(3) **Eligibility for Credit Insurance.**—All banks, trust companies, building and loan associations, insurance companies and other financial institutions, on being approved as eligible for credit insurance by the Federal Housing Administrator, may make such loans as are insured by the Federal Housing Administrator.

(4) **Certain Securities Made Eligible for Collaterals, etc.**—Wherever, by statute of this State, collateral is required as security for the deposit of public or other funds; or deposits are required to be made with any public official or department; or an investment of capital or surplus, or a reserve or other fund, is required to be maintained, consisting of designated securities, bonds, and notes secured by a mortgage or deed of trust insured by the Federal Housing Administrator, debentures issued by the Federal Housing Administrator and obligations of national mortgage associations shall be eligible for such purposes.

(5) **General Laws Not Applicable.**—No law of this State prescribing the nature, amount or form of security or requiring security upon which loans or in-

vestments may be made, or prescribing or limiting the rates or time of payment of the interest any obligation may bear, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to the foregoing paragraphs. (1935, cc. 71, 378; 1937, c. 333.)

Editor's Note.—The 1937 amendment and loan associations, and made other extended this section to apply to building changes.

§ 53-46. Limitations on investments in securities.—The investment in any bonds or other interest-bearing securities of any one firm, individual or corporation, unless it be the interest-bearing obligations of the United States, obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Banks, or the Home Owners' Loan Corporation, State of North Carolina, or other state of the United States, or of some city, town, township, county, school district, or other political subdivision of the State of North Carolina, shall at no time be more than twenty per cent of the unimpaired capital and permanent surplus of any bank to an amount not in excess of two hundred and fifty thousand dollars; and not more than ten per cent of the unimpaired capital and permanent surplus in excess of two hundred and fifty thousand dollars: Provided, that nothing in this section shall be construed to compel any bank to surrender or dispose of any investment in the stocks or bonds of a corporation owning the lands or buildings occupied by such bank as its banking home, if such stocks or bonds were lawfully acquired prior to February 25, 1927. (1921, c. 4, s. 27; C. S., s. 220(b); 1927, c. 47, s. 6; 1931, c. 243, s. 5; 1933, c. 359; 1935, c. 199; 1937, c. 186.)

Cross References.—As to the suspension of this section, see § 53-49. As to limitation of amount of bank acceptances, see § 53-56.

Editor's Note.—The 1927 amendment rewrote this section. The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission." The 1933 amendment eliminated provisions permitting restricted investments in stock or

bonds of a corporation owning the building or land occupied by the bank. The 1935 amendment inserted the words "or other state of the United States, or of some" near the beginning of the section. And the 1937 amendment inserted the words "obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Banks, or the Home Owners' Loan Corporation."

§ 53-47. Stocks, limitations on investment in.—No bank shall make any investment in the capital stock of any other state or national bank: Provided, that nothing herein shall be construed to prevent banks doing business under this chapter from subscribing to or purchasing, upon such terms as may be agreed upon, the capital stock of banks organized under that act of Congress known as the "Edge Act" or the capital stock of central reserve banks whose capital stock exceeds one million dollars. To constitute a central reserve bank as contemplated by this chapter, at least fifty per cent of the capital stock of such bank shall be owned by other banks. The investment of any bank in the capital stock of such central reserve bank or bank organized under the act of Congress commonly known as the "Edge Act," shall at no time exceed ten per cent of the paid-in capital and permanent surplus of the bank making same. No bank shall invest more than fifty per cent of its permanent surplus in the stocks of other corporations, firms, partnerships, or companies, unless such stock is purchased to protect the bank from loss. Any stocks owned or hereafter acquired in excess of the limitations herein imposed shall be disposed of at public or private sale within six months after the date of acquiring the same, and if not so disposed of they shall be charged to profit and loss account, and no longer carried on the books as an asset. The limit of time in which said stocks shall be disposed of or charged off the books of the bank may be extended by the Commissioner of Banks if in his judgment it is for the best interest of the bank that such extension be granted; provided that the limitations imposed in this section on the ownership of stock in

or securities of corporations is suspended to the extent (and to that extent only) that any bank operating under the supervision of the Commissioner of Banks may subscribe for and purchase shares of stock in or debentures, bonds or other types of securities of any corporation organized under the laws of the United States of America for the purpose of insuring to depositors a part or all of their funds on deposit in banks where and to such extent as such stock or security ownership is required in order to obtain the benefits of such deposit insurance for its depositors. (1921, c. 4, s. 28; C. S., s. 220(c); 1931, c. 243, s. 5; 1935, c. 81, s. 3.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission," and the 1935

amendment added the proviso at the end of the section.

§ 53-48. Loans, limitations of.—The total direct and indirect liability of any person, firm or corporation, other than a municipal corporation for money borrowed, including in the liabilities of a firm, the liabilities of the several members thereof, shall at no time exceed twenty per cent of two hundred and fifty thousand dollars, or fractional part thereof, of the unimpaired capital and permanent surplus of the bank and not more than ten per cent of the excess of two hundred and fifty thousand dollars of the unimpaired capital and permanent surplus of the bank: Provided, however, that the discount of bills of exchange drawn in good faith against actual existing values, the discount of solvent trade acceptances, or other solvent commercial or business paper actually owned by the person, firm or corporation negotiating the same and the purchase of any notes, the making of any loans, secured by not less than a like face amount of bonds of the United States or State of North Carolina or certificates of indebtedness of the United States, shall not be considered as money borrowed within the meaning of this section: Provided, further, that the limitations of this section shall not apply to loans or obligations to the extent that they are secured or covered by guarantees or by commitments or agreements to take over or purchase the same, made by any federal reserve bank or by the United States or any department, board, bureau, commission or establishment of the United States, including any corporation wholly owned directly or indirectly by the United States. (1921, c. 4, s. 29; 1923, c. 148, s. 6; C. S., s. 220(d); 1925, c. 119, s. 1; 1927, c. 47, s. 7; 1937, c. 419; 1943, c. 204; 1945, c. 127, s. 1.)

Cross References.—As to the suspension of this section, see § 53-49. As to limitation of amount of bank acceptances, see § 53-56.

Editor's Note.—The words "or business" in the first proviso were inserted by the 1923 amendment. The 1925 amendment inserted therein the word "solvent" and made other changes in the section. The 1927 amendment rewrote the section. The 1937 amendment added the last proviso as it formerly read, and the 1943 amendment rewrote the section to include, in such proviso, departments, boards, etc., of the United States, or corporations wholly owned directly or indirectly by the United States. The 1945 amendment inserted in the first proviso the words "the making of any loans."

Purpose of Section.—The wisdom of this provision and § 53-111 is manifest; banks, whose business is conducted in strict compliance therewith seldom become insolvent. *State v. Cooper*, 190 N.

C. 528, 130 S. E. 180 (1925).

Section Not Retroactive.—The statutory limitation upon a bank making loans to any one person or class of common interest, does not apply to loans, or extensions or renewals thereof, existing at the date of the ratification of the statute. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

Loss of Assets Must Result.—In an action against the managing officials of a bank for wrongful depletion of assets in mismanagement of the affairs of the bank in making loans in excess of the limit set forth in this section, the evidence is insufficient to be submitted to a jury, if it appears that no loss to the assets of the bank has been caused by the acts of the officials. *Gordon v. Pendleton*, 202 N. C. 241, 162 S. E. 546 (1932).

Criminal Liability.—The violation of this section is a misdemeanor. See § 53-134.

A bank must act through its officers and

directors, and where they have violated the provisions of this section as to lending the bank's money, the offense is committed by them under the meaning of the statute, and they are individually indictable therefor. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925); *State v. Davidson*, 205 N. C. 735, 172 S. E. 489 (1934).

Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed by § 53-134. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

Intent to Defraud Not Element of Offense.—An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or

directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The willful doing of the unlawful act constitutes the crime declared by § 53-134 to be a misdemeanor, punishable as such in the discretion of the court. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

Consolidation of Indictments.—An indictment charging the officer of the bank of violating § 53-111, and also unlawfully making loans for the bank to certain persons in excess of the maximum percentage of the capital stock and permanent surplus, in violation of this section, alleges the commission of crimes of the same class. Where there are two indictments thereof against the same person they may be consolidated and tried together by the court. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

§ 53-49. Suspension of investment and loan limitation.—The board of directors of any bank, may by resolution duly passed at a meeting of the board, request the Commissioner of Banks to suspend temporarily the limitations on loans and investments as the same may apply to any particular loan or investment in excess of the limitations of §§ 53-46, 53-47, and 53-48 which the bank desires to make. Upon receipt of a duly certified copy of such resolution, the Commissioner of Banks may, in his discretion, suspend the limitations on loans and investments insofar as they would apply to the loan or investment which the bank desires to make: Provided, however, such loan shall be amply secured and shall be for a period not longer than one hundred and twenty days. (1921, c. 4, s. 30; C. S., s. 220(e); 1931, c. 243, s. 5; 1933, c. 239, s. 1.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission".

§ 53-50. Reserve.—Every bank shall at all times have on hand or on deposit with approved reserve depositories, instantly available funds in an amount equal to at least fifteen per cent of the aggregate amount of its demand deposits, and five per cent of the aggregate amount of its time deposits. But no reserve shall be required on deposits secured by a deposit of United States bonds or the bonds of the State of North Carolina. Any bank that is now or may hereafter become a member of the federal reserve bank shall maintain the same reserve with respect to deposits as shall be required of other members of such federal reserve bank. (1921, c. 4, s. 31; C. S., s. 220(f).)

Cross References.—As to effect of impaired capital upon reserve, see § 53-42. As to authority to join federal reserve bank, see § 53-61. As to failure to maintain

required reserve, see § 53-111.

Applied in *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

§ 53-51. Reserve and cash defined.—Reserve shall consist of cash on hand and balances payable on demand, due from other approved solvent banks, which have been designated depositories as hereinafter provided in this chapter. Cash includes lawful money of the United States, and exchange of any clearing-house association. (1903, c. 275, s. 29; Rev., s. 232; 1919, c. 58; 1921, c. 4, s. 32; C. S., s. 220(g).)

§ 53-52. Forged check, payment of.—No bank shall be liable to a de-

positor for payment by it of a forged check or other order to pay money unless within sixty days after the receipt of such voucher by the depositor he shall notify the bank that such check or order so paid is forged. (1921, c. 4, s. 33; C. S., s. 220(h).)

Editor's Note.—"This section is a substantial re-enactment of C. S. § 231, except that formerly the depositor had six months within which to give notice of the forgery. *Greensboro Ice, etc., Co. v. Security Nat. Bank*, 210 N. C. 244, 186 S. E. 362 (1936)". *Arnold v. State Bank, etc., Co.*, 218 N. C. 433, 437, 11 S. E. (2d) 307 (1940).

Receipt of Statement by Bookkeeper Who Forged Checks Is Receipt by Corporation.—The receipt of a corporation's bank

statement by its bookkeeper is receipt of the statement by the corporation, and it may not recover against the bank for the payment of forged checks when notice is not given within sixty days after such receipt of the bank statement, even though the checks were forged by the bookkeeper, who destroyed them after he received the canceled checks from the bank. *Greensboro Ice, etc., Co. v. Security Nat. Bank*, 210 N. C. 244, 186 S. E. 362 (1936).

§ 53-53. Minor, payment of deposit in the name of.—When money is held on deposit by any state, industrial or national bank in this State in the name of a minor under fifteen years of age, it may be paid, together with the interest, if there be any interest thereon, upon receipts or checks signed by such minor and one of the minor's parents. When money is held on deposit by any state, industrial or national bank in this State in the name of a minor fifteen years of age or upward, it may be paid, together with the interest, if there be any interest thereon, upon receipts or checks signed by the minor. A written statement from the minor, if fifteen years of age or upward, or from one of the said minor's parents, if the minor is under fifteen years of age, shall be conclusive evidence of the age of the minor. (1921, c. 4, s. 34; C. S., s. 220(i); 1939, c. 84.)

Cross Reference.—As to payment of deposit in trust for minor to minor upon death of trustee, see § 53-59.

Editor's Note.—The 1939 amendment repealed the former section and substituted the above therefor. See 17 N. C. Law Rev.

345.

This section is an exception to the general rule that contracts of an infant are voidable at the option of the infant. *Coker v. Virginia-Carolina Joint-Stock Land Bank*, 208 N. C. 41, 178 S. E. 863 (1935).

§ 53-54. Transactions not performed during banking hours.—Nothing in any law of this State shall in any manner whatsoever affect the validity of, or render void or voidable, the payment, certification, or acceptance of a check or other negotiable instrument or any other transaction by a bank in this State, because done or performed during any time other than regular banking hours: Provided, that nothing herein shall be construed to compel any bank in this State, which by law or custom is entitled to close at twelve noon on any Saturday, or for the whole or part day of any legal holiday, to keep open for the transaction of business, or to perform any of the acts or transactions aforesaid on any Saturday after such hour or on any legal holiday, except at its option. (1921, c. 4, s. 35; C. S., s. 220(j).)

§ 53-55. Commercial and business paper defined.—The term "commercial or business paper," as used in this chapter, is hereby defined to mean a promissory note, and the term "trade acceptance" to mean a draft or bill of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used or are to be used for such purposes, but such definition shall not include notes, drafts, or bills of exchange covering merely investments, or issued or drawn for the purpose of carrying on or trading in stocks, bonds, or other investment securities, except bonds and notes of the government of the United States and State of North Carolina. (1921, c. 4, s. 36; 1923, c. 148, s. 7; C. S., s. 220(k); 1941, c. 268.)

Cross Reference.—As to promissory notes and checks, see § 25-191 et seq.

struck out the former second sentence which sentence related to maturity.

Editor's Note.—The 1941 amendment

§ 53-56. **Bank acceptances defined.**—Any bank doing business under this chapter may accept for payment at a future date, drafts or bills of exchange having not more than six months sight to run, drawn upon it by its customers under acceptance agreements, and which grow out of transactions involving the importation or exportation of goods; and issue letters of credit authorizing the holders thereof to draw upon it or its correspondents, provided that there is a definite bona fide contract for the shipment of goods within a specified reasonable time, and the existence of such contract is certified in the acceptance agreement; or which grow out of transactions involving the domestic shipment of goods, provided that shipping documents, conveying or securing to the accepting bank title to readily marketable goods, are attached or in the hands of an agent of the accepting bank, independent of the drawer, for his account, at the time of acceptance, or which are secured at the time of acceptance by warehouse receipts or other documents conveying or securing to the accepting bank title to readily marketable goods fully covered by insurance, the warehouse receipts or other documents to be those of a responsible warehouse, independent of the drawer, the acceptance to remain secured during the life of the acceptance unless suitable security of same character, or cash, be substituted: Provided, no bank shall accept drafts or bills of exchange under this section to an aggregate amount at any time more than equal to the sum of its capital and permanent surplus: Provided further, that no bank shall accept, whether in a foreign or domestic transaction, for any one person, firm, or corporation, to any amount at any time equal to more than twenty-five per cent of its capital and permanent surplus, unless the accepting bank is secured either by attached documents or those held for its account by its agent, independent of the drawer, or by some other actual security of the same character. Should the accepting bank purchase or discount its own acceptances, such acceptances will be considered as a direct loan to the drawer, and be subject to the limitation on loans hereinbefore provided in this chapter. The State Banking Commission may issue such further regulations as to such acceptances as it may deem necessary in conformity with this chapter. As used herein, the word "goods" shall be construed to mean and include goods, wares, merchandise, or agricultural products, including livestock. (1921, c. 4, s. 37; C. S., s. 220(1); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

Acceptance Prior to Statute.—Notwithstanding that prior to the statute, an acceptance was beyond the power of a bank

when not expressly permitted by the charter, an acceptance by a bank not so authorized was not invalid, though actually beyond power, and a payment might be enforced. *Sherrell v. American Trust Co.*, 176 N. C. 591, 97 S. E. 471 (1918).

§ 53-57. **Nonpayment of check in error, liability for.**—No bank shall be liable to a depositor because of the nonpayment, through mistake or error, and without malice, of a check which should have been paid had the mistake or error of nonpayment not occurred, except for the actual damage by reason of such nonpayment that the depositor shall prove, and in such event the liability shall not exceed the amount of damage so proven. (1921, c. 4, s. 38; C. S., s. 220-(m).)

Damages.—A bank wrongfully and unlawfully refusing to pay a check breaches its contract and the depositor is entitled to nominal damages at least. *Thomas v. American Trust Co.*, 208 N. C. 653, 182 S. E. 136 (1935).

Any person will be deemed substantially damaged upon the refusal of a bank to pay his checks, unless protected by the provisions of this section, and substantial damages may be awarded. And where the

nonpayment is through malice, punitive damages may also be recovered. *Woody v. First Nat. Bank*, 194 N. C. 549, 140 S. E. 150 (1927), holding that plaintiff was entitled to nominal damages at least.

Where Nonpayment Malicious.—This section does not apply where the complaint alleges that the nonpayment was wrongful and malicious. In such case the question of malice is for the jury, and the sustaining of a demurrer to the complaint is

reversible error. The complaint is subject to demurrer only when it appears from the allegations that nonpayment was through error or mistake and without malice, and that no actual damages resulted to depositor from such nonpayment. *Woody v. National Bank*, 194 N. C. 549, 140 S. E. 150 (1927).

Charge on Injury to Credit Not Supported by Evidence Is Error.—In an action to recover for the wrongful and unlawful refusal by a bank to pay a deposit-

or's check, it is error for the court to charge the jury on the issue of damage that it should consider the evidence of damage sustained by plaintiff through injury to his credit and reputation in the community resulting from the bank's wrongful act when there is no evidence that plaintiff's credit or reputation had been injured thereby. *Thomas v. American Trust Co.*, 208 N. C. 653, 182 S. E. 136 (1935).

§ 53-58. Check or note sent direct to bank on which drawn; photostatic copies of lost items; presentation of original by innocent holder.—Any bank receiving for collection or deposit any check, note, or other negotiable instrument drawn upon or payable at another bank, located in another town or city, whether within or without this State, may forward such instrument for collection, direct to the bank on which it is drawn, or at which it is payable, and such method of forwarding direct to the payer bank shall be deemed due diligence, and the failure of such payer bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor: Provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument.

In any case where checks, notes, or other negotiable instruments are transmitted by one bank to another in the process of collection and the same shall be lost or shall be destroyed, the bank last forwarding the same, or any bank in the chain of collection handling such items prior to their loss or destruction, may furnish photostatic copies of such checks, notes or other negotiable instruments, and such photostatic copies, when forwarded by the last forwarding bank before such instruments were lost or destroyed, shall be taken and treated as the original items which they represent and the bank to which forwarded and any bank subsequent thereto through which the same are forwarded to the bank upon which the same are drawn shall be relieved of any liability for treatment of the same as originals; provided, however, that the bank last forwarding such items shall be solely liable for payment upon any original of such items if subsequently presented for payment to such bank by an innocent holder, although the bank is not the drawee bank. (1921, c. 4, s. 39; C. S., s. 220(n); 1949, c. 818.)

Editor's Note.—The 1949 amendment added the second paragraph. For comment on the amendment, see 27 N. C. Law Rev. 427.

Dealings Presumed to Contemplate Statute.—Banks must be presumed to have dealt with each other with respect to a statute of the state in which a check was deposited for collection, defining the rights and liabilities of banks to which checks are forwarded for collection. *Federal Land Bank v. Barrow*, 189 N. C. 303, 127 S. E. 3 (1925), citing *Malloy v. Federal Reserve Bank*, 281 F. 997 (1922).

Sending Check to Drawee Bank Is Proper.—Under this section, the sending of a cashier's check by the forwarding bank to the drawee bank for collection was held "due diligence." *Federal Land Bank v. Barrow*, 189 N. C. 303, 127 S. E. 3 (1925).

A collecting bank makes a good presentment of a check for payment by forwarding it to the drawee bank in another city by mail. *Braswell v. Citizens Nat. Bank*, 197 N. C. 229, 148 S. E. 236 (1929).

Same—Was Formerly Negligence.—The holding in *Bank v. Floyd*, 142 N. C. 187, 55 S. E. 95 (1906), and in *American Nat. Bank v. Savannah Trust Co.*, 172 N. C. 344, 90 S. E. 302 (1916), that it is negligence in a bank having a draft or check for collection to send it directly to the drawee, was abrogated by the express provisions of this statute. See *Federal Land Bank v. Barrow*, 189 N. C. 303, 127 S. E. 3 (1925); *Malloy v. Federal Reserve Bank*, 281 F. 997 (1922).

When Section Applicable.—This section is applicable only when the liability of a bank, which has received for collection or deposit a check drawn on a bank located

in another city or town, to the holder or depositor of the check is involved. The statute cannot be held to affect the right of the drawer of the check to have the payee or his agent for collection demand money in payment of his check or take the risk of accepting anything but money. *Dewey Bros. v. Margolis*, 195 N. C. 307, 142 S. E. 22 (1928).

Same—Rights and Liabilities as to Collection.—When a collecting bank receives a check for collection payable at a bank in another town, there is no authority of agency conferred by the drawer of the check on it to receive in payment anything but money. And where the drawer of the

check has money to meet the check on deposit in the drawee bank, on presentment in due course, and an intervening bank, in the course of collection, receives a check of the drawee bank in payment, which is not paid by reason of the drawee bank becoming insolvent before presentment of its check, the drawer of the check is released from liability thereon. This section has no application to the facts in the case. *Dewey Bros. v. Margolis*, 195 N. C. 307, 142 S. E. 22 (1928).

Cited in *Qualls v. Farmers, etc., Bank*, 197 N. C. 438, 149 S. E. 546 (1929); *Bank of Canton, etc., Co. v. Clark*, 198 N. C. 169, 151 S. E. 102 (1930).

§ 53-59. Deposits in trust, payment of.—Whenever any deposits shall be made in any bank or banking institution in this State by any person in trust for any other person who is a minor of the age of fifteen years and upward, and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the bank, in event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom said deposit was made: Provided, that the amount of said deposit is not in excess of one hundred dollars. (1921, c. 4, s. 40; C. S., s. 220(o).)

Cross References.—As to whom a deposit in trust for a minor may be paid generally, see § 53-53. As to deposits by

fiduciaries generally, see § 32-8 et seq.

Editor's Note.—This section is discussed in 9 N. C. Law Rev. 13.

§ 53-60. Farm loan bonds, authorized investment in.—Any bank or insurance company organized under the laws of this State, and any person acting as executor, administrator, guardian, or trustee, may invest in federal farm loan bonds issued by any federal farm loan bank or jointstock land bank organized pursuant to an act entitled "An act of Congress to provide capital for agricultural development, to create standard forms of investment based upon farm mortgages to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories, and financial agents for the United States, and for other purposes," approved the seventeenth day of July, one thousand nine hundred and sixteen. (1921, c. 4, s. 41; C. S., s. 220(p).)

§ 53-61. Federal reserve bank, authority to join.—The words "Federal Reserve Act," as herein used, shall be held to mean and to include the act of Congress of the United States, approved December twenty-third, nineteen hundred thirteen, as heretofore and hereafter amended. The words "Federal Reserve Board" shall be held to mean the Federal Reserve Board created and described in the Federal Reserve Act. The words "federal reserve banks" shall be held to mean federal reserve banks created and organized under the authority of the Federal Reserve Act. The words "member bank" shall be held to mean any national or state bank or bank and trust company which has become or which becomes a member of one of the federal reserve banks created by the Federal Reserve Act.

(a) Any bank incorporated under the laws of this State shall have the power to subscribe to the capital stock and become a member of a federal reserve bank.

(b) Any bank incorporated under the laws of this State which is, or which may become, a member of the federal reserve bank is by this chapter vested with all powers conferred upon member banks of the federal reserve banks by terms of the Federal Reserve Act as fully and completely as if such powers were specifically enumerated and described therein, and such powers shall be exercised subject to all restrictions and limitations imposed by the Federal Reserve Act, or

by regulations of the Federal Reserve Board made pursuant thereto. The right, however, is expressly reserved to revoke or to amend the powers herein conferred.

(c) A compliance on the part of any such bank with the reserve requirements of the Federal Reserve Act shall be held to be a full compliance with the provisions of the laws of this State, which require banks to maintain cash balances in their vaults or with other banks, and no such bank shall be required to carry or maintain reserve other than such as is required under the terms of the Federal Reserve Act.

(d) Any such bank shall continue to be subject to the supervision and examination required by the laws of this State, except that the Federal Reserve Board shall have the right, if it deems necessary, to make examinations; and the authorities of this State having supervision over such banks may disclose to the Federal Reserve Board, or to the examiners duly appointed by it, all information in reference to the affairs of any bank which has become, or desires to become, a member of a federal reserve bank. (1921, c. 4, s. 42; C. S., s. 220(q).)

Cross Reference.—As to the amount of reserve required, see § 53-50.

Editor's Note.—This section is a substantial re-enactment of C. S. § 221.

Unemployment Compensation.—A bank organized under the laws of this State is not an instrumentality of the federal gov-

ernment so as to exempt it from the tax imposed by the Unemployment Compensation Act, notwithstanding that the bank may be a member of the Federal Reserve System. *Unemployment Compensation Comm. v. Wachovia Bank, etc., Co.*, 215 N. C. 491, 2 S. E. (2d) 592 (1939).

§ 53-62. Establishment of branches.—Any bank doing business under this chapter may establish branches in the cities in which they are located, or elsewhere, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks, in his discretion, and shall not be given until he shall have ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of such branch. Such branch banks shall be operated as branches of and under the name of the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier and such other officers as may be required to properly conduct the business of such branch, and a board of managers or loan committee shall be responsible for the conduct and management of said branch, but not of the parent bank or of any branch save that of which they are officers, managers, or committee: Provided, that the Commissioner of Banks shall not authorize the establishment of any branch, the paid-in capital stock of whose parent bank is not sufficient in an amount to provide for the capital of at least twenty-five thousand dollars for the parent bank, and at least twenty-five thousand dollars for each branch which it is proposed to establish in cities or towns of three thousand population or less; nor less than thirty thousand dollars in cities and towns whose population exceeds three thousand, but does not exceed ten thousand; nor less than fifty thousand dollars in cities and towns whose population exceeds ten thousand, but does not exceed twenty-five thousand; nor less than one hundred thousand dollars in cities and towns whose population exceeds twenty-five thousand. All banks operating branches prior to February 18, 1921, shall, within a time limit to be prescribed by the Commissioner of Banks, cause said branch bank to conform to the provisions of this section: Provided, however, that any bank with a capital stock (including both common and preferred) of one million (\$1,000,000.00) dollars or more may without additional capital establish and operate such number of branches or agencies in the State of North Carolina as the Commissioner of Banks may in his discretion permit; but a bank operating branches under this proviso shall at all times maintain an unimpaired capital of at least one million (\$1,000,000.00) dollars: Provided further, that the Commissioner of Banks shall not permit the

establishment of additional branches, and/or agencies unless said bank maintains its capital stock and surplus in ratio of one to ten to its deposits; provided that in small communities having no other banking facilities, and upon a finding by the Commissioner of Banks that the public convenience and advantage will be promoted thereby, the opening of "tellers window agencies or branches" of then existing banks may be permitted, but no more than one such agency or branch may be so opened in any one community nor shall any bank be permitted to open such an agency or branch when its unimpaired capital and surplus in proportion to deposits is below that herein required: Provided, further, that the State Banking Commission may authorize the establishment of a teller's window only, for a bank in the community in which its home office or a branch thereof is located, without the allocation of additional capital for said teller's window as otherwise provided by law. (1921, c. 4, s. 43; Ex. Sess. 1921, c. 56, s. 2; C. S., s. 220(r); 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 139; 1947, c. 990.)

Editor's Note.—The 1921 and 1927 amendments related to the amount required for parent and branch banks in cities and towns of 3,000 population or less. The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission." The 1933 amendment added the second and third provisos. See 11 N. C. Law Rev. 199. The 1935 amendment added the proviso making an exception in smaller communities having no other banking facilities. See 13 N. C.

Law Rev. 360. And the 1947 amendment added the last proviso.

Prior to this section the establishment of branches was prohibited except with the consent of the Corporation Commission. See C. S. § 216. Prior to such statute, authority to establish branches depended upon the charter. For decisions under the old law, see *Morehead Banking Co. v. Tate*, 122 N. C. 313, 30 S. E. 341 (1898); *Worth v. Bank*, 122 N. C. 397, 29 S. E. 775 (1898).

§ 53-63. Certificate of deposit, unlawful issuing of.—It shall be unlawful for any bank to issue any certificate of deposit or other negotiable instrument of its indebtedness to the holder thereof except for lawful money of the United States, checks, drafts, or bills of exchange which are the actual equivalent of such money; nor shall such moneys, checks, drafts, or bills of exchange be the proceeds of any note given in payment of the purchase price of any stock. Any officer or employee of any bank violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 44; C. S., s. 220(s).)

Cross Reference.—As to provision making it unlawful for bank to handle draft connected with receipt of liquor, see §

18-33.

Cited in *Southport v. Williams*, 290 F. 488 (1923).

§ 53-64. Bank's own stock, unlawful to loan on.—It shall be unlawful for any bank to make any loan secured by the pledge of its own shares of stock, nor shall any bank be the holder as pledgee, or as purchaser, of any portion of its capital stock unless such stock is purchased or pledged to it to prevent loss upon a debt previously contracted in good faith. Provided, that whenever any bank shall have shares of its own stock sold to, or pledged to it, for the purpose of preventing a loss upon a debt previously contracted, it shall dispose of all such shares of stock within a period of six months from the date such stock was sold or pledged to it and if not so disposed of, the same shall be charged to profit and loss and no longer carried as an asset of the bank. (1921, c. 4, s. 45; C. S., s. 220(t); 1927, c. 47, s. 9.)

Editor's Note.—As to lien on stock under former law, see *Boyd v. Redd*, 120 N. C. 335, 27 S. E. 35 (1897); *First Nat. Bank v. Riggins*, 124 N. C. 534, 32 S. E. 801 (1899); *In re Mills Co.*, 162 F. 42 (1908).

Taking Stock in Payment of Note.—A payee bank may not cancel a note in consideration of shares of its stock delivered to it by the maker of the note, it not appearing that he was insolvent, or that the transaction was necessary to pre-

vent loss to the bank, and payment so made is not a valid defense in the hands of another bank to which the note had been indorsed before maturity by the

payee bank as collateral security. *White v. Whitehurst*, 194 N. C. 305, 139 S. E. 598 (1927).

§ 53-65. Deposits payable on demand.—Any bank may receive deposits of funds subject to withdrawals or to be paid upon the checks of the depositor. All deposits in such banks shall be payable on demand, without notice, except when the contract of deposit shall otherwise provide. (1921, c. 4, s. 46; C. S., s. 220(u).)

Cross Reference.—As to definition of “demand deposits,” see § 53-1.

§ 53-66. Savings deposits.—Any bank conducting a savings department may receive deposits on such terms as are authorized by its board of directors and agreed to by its depositors. The board of directors shall prescribe the terms upon which such deposits shall be received and paid out, and a passbook shall be issued to each depositor containing the rules and regulations adopted by the board of directors governing such deposits, in which shall be entered each deposit made, the interest allowed thereon, and each payment made to such depositor. By accepting such book the depositor assents and agrees to the rules and regulations therein contained. (1921, c. 4, s. 47; C. S., s. 220(v).)

Editor’s Note.—See 9 N. C. Law Rev. 13.

§ 53-67. Boards of directors, banks controlled by.—The corporate powers, business, and property of banks doing business under this chapter shall be exercised, conducted, and controlled by its board of directors, which shall meet at least quarterly. Such board shall consist of not less than five directors, to be chosen by the stockholders, and shall hold office for one year, and until their successors are elected and qualified. The annual meeting of stockholders for the election of directors shall be held during the month of January of each year. (1921, c. 4, s. 48; C. S., s. 220(w); 1925, c. 170.)

Editor’s Note.—The last sentence of this section was added by the 1925 amendment.

§ 53-68. Statements showing deposits of State and State officials.—All banks in which any money is on deposit by the State of North Carolina or any of the officials thereof shall, in their published statements as by law required, show the amount of money on deposit in such bank to the credit of the State or of any official thereof; and no officials of the State shall deposit money in any bank which shall refuse to comply with the provisions of this section. (1923, c. 211, s. 1; C. S., s. 220(x).)

Cross Reference.—As to deposit of State funds, see § 147-77 et seq.

§ 53-69: Repealed by Session Laws 1945, c. 635.

§ 53-70. Fees on remittances covering checks.—For the purpose of providing for the solvency, protection, and safety of the banking institutions and trust companies chartered by this State and having their principal offices in this State, it shall be lawful for all banks and trust companies in this State to charge a fee, not in excess of one-eighth of one per cent, on remittances covering checks, the minimum fee on any remittance therefor to be ten cents. (1921, c. 20, s. 1; C. S., s. 220(z).)

Cross Reference.—As to checks exempted from section, see § 53-73.

Transaction Not within Statute.—The exchange or collection charges authorized

by this section apply only to “remittances” covering checks, and where checks, etc., are sent to a bank in the same town with the bank on which they are drawn, for

which either money or bank entries are required, such transactions do not fall within the meaning of the term "remittances" which will entitle the bank on which they are drawn to the exchange charges specified in the statute. *First Nat. Bank v. Peoples Bank*, 194 N. C. 720, 140 S. E. 705 (1927).

Enforcement of Payment.—A bank may

§ 53-71. **Checks payable in exchange.**—In order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this State, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawee bank, in exchange drawn on the reserve deposits of said drawee bank when any such check is presented by or through any federal reserve bank, post office, or express company, or any respective agents thereof. (1921, c. 20, s. 2; C. S., s. 220(aa).)

Cross Reference.—As to checks exempt from section, see § 53-73.

Editor's Note.—For discussion of section, see 1 N. C. Law Rev. 133; 2 N. C. Law Rev. 36; 8 N. C. Law Rev. 55.

Purpose and Effect of Statute.—This section was enacted to relieve banks and trust companies, chartered by this State, of embarrassments growing out of the policy theretofore pursued by the federal reserve bank with respect to the collection of checks drawn on said banks and trust companies. It does not deal with or purport to deal with the rights or liabilities of depositors who in the transaction of their business draw checks on their deposits with said banks and trust companies. The purpose of the section and its only effect is to confer upon such banks and trust companies the right, in certain instances, to pay checks drawn on them in a medium other than money, and to deprive the payee or holder of such checks of the right to demand payment in money. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929).

The effect of this section is as though the provision of the law is written into the face of the check; and consequently where the maker or drawer does not specify cash payment, he agrees, as does the payee in accepting it, that if presented by or through a federal reserve bank, express company, etc., the check shall be payable by an exchange draft drawn by the payee bank on its reserved deposits. *Farmers', etc., Bank v. Federal Reserve Bank*, 262 U. S. 649, 43 S. Ct. 651, 67 L. Ed. 1157 (1923); *Cleve v. Craven Chemical Co.*, 18 F. (2d) 711 (1927).

Constitutionality.—This section does not violate the Constitution of the United States. *Farmers', etc., Bank v. Federal Reserve Bank*, 262 U. S. 649, 43 S. Ct. 651, 67 L. Ed. 1157 (1923), overruling 183 N.

maintain its action against another bank to enforce by mandatory injunction its payment of the exchange charges drawn through the one on the other, allowed by the statute and the fact that the plaintiff is a national and the defendant a state bank, does not vary this principle, and § 53-74 does not apply. *First Nat. Bank v. Peoples Bank*, 194 N. C. 720, 140 S. E. 705 (1927).

C. 546, 112 S. E. 252 (1922); *Federal Land Bank v. Barrow*, 189 N. C. 303, 127 S. E. 3 (1925).

Construed Strictly.—This section should be construed strictly. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929).

Federal reserve banks cannot require payment in any other medium than the exchange. *Federal Land Bank v. Barrow*, 189 N. C. 303, 127 S. E. 3 (1925).

This section does not change the general rule that when a depositor draws his check on a bank or trust company chartered by this State, such check is payable in money, or at the option of the holder, in a medium other than money—such payment being at the risk of the holder. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929).

Certificates of Deposit.—This section has no application to certificates of deposit. *Citizens Nat. Bank v. Fidelity, etc., Co.*, 86 F. (2d) 4 (1936).

Requiring Payment in Money.—Under this section the drawer has the right to specify on the face of the check that payment shall be made in money, and in such case the drawee bank or trust company must pay in money, in any event. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929).

Payment in money may be required if the check is presented for payment, in person, or by an agent for collection other than as prescribed by this section. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929).

Liability Where Exchange Unpaid.—It will not be held under this section, that a drawee bank can charge checks drawn on it by its customers to the accounts of such customers, remit in drafts or exchange to the forwarding bank, and thereby be released, notwithstanding that said drafts or exchange are, for valid and lawful reasons, not paid. Where a check drawn on a bank

or trust company chartered by this State is presented to the drawee bank, "by or through any federal reserve bank, post office or express company or any respective agent thereof," and such bank or trust company, in the exercise of the option conferred by said statute, sends to the forwarding bank its draft on its reserve deposits in payment of such check, it will not be discharged of liability for the collection of its depositor's check until such draft on its reserve deposit has been paid. *Graham v. Proctorville Warehouse*, 189 N. C. 533, 127 S. E. 540 (1925).

Where the payee of a check deposits it in a bank for collection and does not thereon indicate that the collecting bank is to require payment in money, he authorizes the collecting bank to collect in due course of mail and comes within the provisions of this section and § 53-57 as being a check presented by or through a "post office," and the collecting bank is not liable for accepting the check of the drawee bank on another bank, resulting ultimately in nonpayment, and the payee must suffer the loss thereon. *Braswell v. Citizens Nat. Bank*, 197 N. C. 229, 148 S. E. 236 (1929).

Where a bank receives a check in payment of a note and elects to put it in the

hands of a federal reserve bank for collection, which bank accepts the check of the drawee bank on another bank in payment, when the check would have been paid in course of collection had cash been demanded, the drawer and endorsers on the original check are relieved of liability thereon, and may not be held if the check of the drawee bank was not paid because of its later insolvency; and this result is not affected by this section since the payee bank has the option of presenting the check for payment through the federal reserve bank or not. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929), criticizing *Cleve v. Craven Chemical Co.*, 18 F. (2d) 711 (1927).

Charging Check to Drawer's Account as Payment.—When the drawee bank has to the credit of the drawer funds sufficient and available for the payment of his check, and accepts and charges the check to the drawer's account, the check is paid, and the drawer is discharged from liability, not only on the check, but also for the debt in payment of which the check was drawn. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929), citing *Dewey Bros. v. Margolis*, 195 N. C. 307, 142 S. E. 22 (1928); *Quarles v. Taylor & Co.*, 195 N. C. 313, 142 S. E. 25 (1928).

§ 53-72. Notation on checks forbidden.—It shall be unlawful for any person, or persons, other than the maker thereof to make, by rubber stamp or otherwise, any notation on any check drawn on any bank or trust company chartered in this State, the effect of which notation shall change or affect any condition or provision thereof, as created by §§ 53-70 through 53-74. Any person or persons violating this section shall be guilty of a misdemeanor, and upon conviction shall pay a fine of not more than two hundred dollars (\$200), or be imprisoned not more than thirty days. (1921, c. 20, s. 3; C. S., s. 220(bb).)

§ 53-73. Checks exempted.—All checks drawn on the banks and trust companies in this State in payment of obligations due the State of North Carolina or the federal government shall be exempt from the provisions of §§ 53-70 and 53-71. (1921, c. 20, s. 4; C. S., s. 220(cc).)

§ 53-74. No protest on checks refused for nonpayment of exchange charges; no action on refusal to pay checks.—No officer in this State shall protest for nonpayment any check or checks drawn on any bank or trust company chartered by this State when payment is refused by the drawee bank solely on account of failure or refusal of the holder or owner thereof to pay exchange charges authorized in §§ 53-70 through 53-74; and there shall be no right of action, either in law or equity, against any bank or trust company chartered by this State, for refusal to pay any such check when such action is based alone on the ground of refusal to pay exchange or collection charges authorized in §§ 53-70 through 53-74. (1921, c. 20, s. 5; C. S., s. 220(dd).)

Cross Reference.—See note to § 53-70.

§ 53-75. Statement of account from bank to depositor deemed final adjustment if not objected to within five years.—When a statement of account has been rendered by a bank to a depositor accompanied by vouchers, if any, which are the basis for debit entries in such account, or the depositor's pass-

book has been written up by the bank showing the condition of the depositor's account and delivered to such depositor with like accompaniment of vouchers, if any, such account shall, after the period of five years from the date of its rendition in the event no objection thereto has been theretofore made by the depositor, be deemed finally adjusted and settled and its correctness conclusively presumed and such depositor shall thereafter be barred from questioning the incorrectness of such account for any cause. (1929, c. 188, s. 1.)

§ 53-76. Depositor not relieved from exercising diligence as to errors.—Nothing in the preceding section shall be construed to relieve the depositor from the duty now imposed by law of exercising due diligence in the examination of such account and vouchers, if any, when rendered by the bank and of immediate notification to the bank upon discovery of any error therein, nor from the legal consequences of neglect of such duty; nor to prevent the application of § 53-52 to cases governed thereby. (1929, c. 188, s. 2.)

§ 53-77. Governor empowered to proclaim banking holidays.—The Governor is hereby authorized and empowered, by and with the advice and consent of the Council of State, to name and set apart such day or days, as he may from time to time designate, as banking holidays. During such period of holidays, all the ordinary and usual operations and business of all banking corporations, State or national, in this State shall be suspended, and during such period no banking corporation shall pay out or receive deposits, make loans or discounts, transfer credits, or transact any other banking business whatsoever: Provided, however, that during any such holiday, including the holiday validated in this section, the Commissioner of Banks, with the approval of the Governor, may permit any or all such banking institutions to perform any or all of the usual banking functions.

The banking holiday heretofore proclaimed by the Governor of this State for Monday, Tuesday and Wednesday, March sixth, seventh and eighth, one thousand nine hundred and thirty-three, is hereby approved and validated, and the said days are hereby declared to be banking holidays in the State of North Carolina. (1933, c. 120, ss. 1, 2.)

Editor's Note.—For discussion of section, see 11 N. C. Law Rev. 195.

Cited in Hood v. Clark, 211 N. C. 693, 191 S. E. 732 (1937).

ARTICLE 7.

Officers and Directors.

§ 53-78. Executive committee, directors shall appoint.—The board of directors shall appoint an executive committee or committees, each of which shall be composed of at least three of its members with such duties and powers as are defined by the regulations or bylaws, who shall serve until their successors are appointed. Such executive committee or committees shall meet as often as the board of directors may require, which shall not be less frequently than once each month, and approve or disapprove all loans and investments. All loans and investments shall be made under such rules and regulations as the board of directors may prescribe. (1921, c. 4, s. 49; C. S., s. 221(a).)

§ 53-79. Minutes of directors and executive committee meetings.—Minutes shall be kept of all meetings of the board of directors and of the executive committee or committees, and same shall be recorded in a book or books which shall be kept for that purpose; which book or books shall be kept on file in the bank. Such minutes shall show a record of the action taken by the board of directors and executive committee or committees, on all loans, discounts, and investments made, authorized or approved, and such further action as the board of directors and executive committee or committees shall make concerning the conduct, management, and welfare of the bank. The minutes of the executive com-

mittee or committees shall be submitted to the board of directors for approval at each meeting of the board. (1921, c. 4, s. 50; C. S., s. 221(b).)

Effect of Not Writing Minutes.—The plaintiffs cannot be deprived of their right by reason of failure of the proper officer to actually make a written minute or record of the proceedings for the reason that proceedings of a corporate meeting of stockholders or directors are facts, and that they may be proved by parol testimony where they are not so recorded. *Bailey v. Has-*

sell, 184 N. C. 450, 115 S. E. 166 (1922). And this notwithstanding this section, there being no objection appearing in the record to the testimony of the plaintiff and other witnesses as to what transpired among the directors about this transaction. *Everett v. Staton*, 192 N. C. 216, 134 S. E. 492 (1926).

§ 53-80. Directors, qualifications of.—Every director of a bank doing business under this chapter shall be the owner and holder of shares of stock in the bank having a par value of not less than five hundred dollars, provided such bank shall have a capital stock of more than fifteen thousand dollars, and not less than two hundred dollars if such bank shall have a capital stock of fifteen thousand dollars or less. And every such director shall hold such shares in his own name unpledged and unencumbered in any way. The office of any director at any time violating any of the provisions of this section shall immediately become vacant, and the remaining directors shall declare his office vacant and proceed to fill such vacancy forthwith. Not less than three-fourths of the directors of every bank doing business under this chapter shall be residents of the State of North Carolina: Provided, that as to banks doing business before February 18, 1921, the requirements as to amount of stock owned by a director shall not apply unless the Commissioner of Banks shall rule that such director is not bona fide discharging his duties. (1921, c. 4, s. 51; C. S., s. 221(c); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-81. Directors shall take oath.—Every director shall, within thirty days after his election, take and subscribe, in duplicate, an oath that he will diligently and honestly perform his duties in such office; and that he is the owner in good faith of the shares of stock of the bank required to qualify him for such office, standing in his own name on its books, and one of such oaths shall forthwith be filed with the Commissioner of Banks, and the other shall be kept on file in the bank. (1921, c. 4, s. 52; C. S., s. 221(d); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-82. Directors, liability of.—Any director of any bank who shall knowingly violate, or who shall knowingly permit to be violated by any officers, agents, or employees of such bank, any of the provisions of this chapter shall be held personally and individually liable for all damages which the bank, its stockholders or any other person shall have sustained in consequence of such violation. Any aggrieved stockholder in any bank in liquidation may prosecute an action for the enforcement of the provisions of this section. Only one such action may be brought. The procedure shall follow as nearly as may be that prescribed by § 44-14, relative to suits on bonds of contractors with municipal corporations. (1921, c. 4, s. 53; C. S., s. 221(e); 1935, c. 464.)

Cross References.—As to criminal liability, see §§ 53-126 to 53-134. And see notes to §§ 53-48 and 53-111.

Editor's Note.—The 1935 amendment added the last three sentences.

Liability Where False Statement Mis-
leads.—A false and misleading statement

made by the directors by which one was led to make deposits gave a cause of action against the directors. It was also held that the directors are presumed to know the condition of the bank. *Tate v. Bates*, 118 N. C. 287, 24 S. E. 482 (1896). See also *Townsend v. Williams*, 117 N. C. 330, 23

S. E. 461 (1895); *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478 (1896); *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827 (1898).

Who May Prosecute Action.—An action for damage against the directors for false statements as to the bank's solvency, made to private persons and in the bank's report to the Commission, is solely maintainable

by the receiver of the bank unless the private person can show an injury peculiar to him as distinguished from the loss among the creditors generally. *Douglass v. Dawson*, 190 N. C. 458, 130 S. E. 195 (1925).

Cited in *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

§ 53-83. **Directors, examining committee of.**—A committee of at least three directors or stockholders shall be appointed annually to examine, or to superintend the examination of the assets and the liabilities of the bank, and to report to the board of directors the result of such examination. The committee, with the approval of the board of directors, may provide for such examinations by a certified public accountant or clearinghouse examiner in any city where such examination is provided for by the rules of such clearinghouse association. A copy of such report of examination, which is herein required to be made, attested, and verified under oath by the signature of at least three members of such committee, shall forthwith be filed with the Commissioner of Banks. (1921, c. 4, s. 54; C. S., s. 221(f); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-84. **Depositaries, designated by directors.**—By resolution of the board of directors, other banks organized under the laws of this State, or of another state, or of the National Banking Act of the United States, shall be designated as depositaries or reserve banks in which a part of such bank's reserve shall be deposited, subject to payment on demand. A copy of such resolution shall, upon its adoption, be forthwith certified to the Commissioner of Banks and the depositary so designated shall be subject to the approval of the Commissioner of Banks. For causes which he may deem adequate, the Commissioner of Banks shall have authority at any time to withdraw such approval. (1921, c. 4, s. 55; C. S., s. 221(g); 1931, c. 243, s. 5.)

Local Modification.—Guilford; Nash, Town of Spring Hope: 1933, c. 568; Halifax, Town of Hobgood; Haywood; Nash, Town of Bailey: 1935, c. 95.

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

Cited in *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

Cross Reference.—As to the amount, etc., of the reserve, see § 53-50.

§ 53-85. **Stockholders' book.**—The directors shall provide a book in which shall be kept the name and resident address of each stockholder, the number of shares held by each, the time when such person became a stockholder, together with all transfer of stock, stating the time when made, the number of shares and by whom transferred, which book shall be subject to the inspection of the directors, officers, and stockholders of the bank at all times during the usual hours for the transaction of business. (1921, c. 4, s. 56; C. S., s. 221(h).)

§ 53-86. **Directors, officers, etc., accepting fees, etc.**—No gift, fee, commission, or brokerage charge shall be received, directly or indirectly, by any officer, director, or employee of any bank doing business under this chapter, on account of any transaction to which the bank is a party. Any officer, director, employee, or agent who shall violate the provisions of this section shall be guilty of a misdemeanor, and shall be and thereafter remain ineligible as an officer, director, or employee of any bank doing business under this chapter. Nothing in this section shall be construed to prevent the payment of necessary and proper attorney's fees to any licensed attorney for professional services rendered, and

nothing in this section shall be construed to apply to commissions on insurance and surety bond premiums. (1921, c. 4, s. 57; C. S., s. 221(i); 1947, c. 695.)

Editor's Note.—The 1947 amendment added the words following the comma in the last sentence.

§ 53-87. **Dividends, directors may declare.**—The board of directors of any bank may declare a dividend of so much of its undivided profits as they may deem expedient, subject to the requirements hereinafter provided. When the surplus of any bank having a capital stock of fifteen thousand dollars or more is less than fifty per cent of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus twenty-five per cent of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to fifty per cent of the paid-in capital stock. When the surplus of any bank having a capital stock of less than fifteen thousand dollars is less than one hundred per cent of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus fifty per cent of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to one hundred per cent of the paid-in capital stock. In order to ascertain the undivided profits from which such dividend may be made, there shall be charged and deducted from the actual profits:

(a) All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the bank;

(b) Interest paid or then due on debts which it owes;

(c) All taxes due;

(d) All overdrafts which have been standing on the books of the bank for a period of sixty days or longer;

(e) All losses sustained by the bank. In computing the losses, there shall be included debts owing the bank which have become due and are not in process of collection, and on which interest for one year or more is due and unpaid, unless said debts are well secured; and debts reduced to final judgments which have been unsatisfied for more than one year and on which no interest has been paid for a period of one year, unless said judgments are well secured.

(f) All investments carried on its books, which are prohibited under the provisions of this chapter, or rules and regulations made by the Commissioner of Banks, pursuant to the powers conferred under this chapter. (1921, c. 4, s. 58; C. S., s. 221(j); 1927, c. 47, s. 10; 1931, c. 243, s. 5.)

Editor's Note.—The 1927 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-88. **Surplus, shall not be used for.**—The surplus of any bank doing business under this chapter shall not be used for the purpose of paying expenses or losses until the credit to undivided profits has been exhausted. But any portion of such surplus may be converted into capital stock and distributed as a stock dividend, provided that such surplus shall not thereby be reduced below fifty per cent of the paid-in capital of such bank, having a paid-in capital of fifteen thousand dollars or more. When the surplus of any bank having a capital stock of less than fifteen thousand dollars shall reach an amount equal to one hundred per cent of its paid-in capital, the board of directors of such bank shall declare a dividend of fifty per cent of said surplus and distribute the same as a stock dividend: Provided, that where the distribution of such a stock dividend would increase the capital stock of any bank to an amount greater than fifteen thousand dollars, the board of directors of such bank may, in its discretion, declare a stock dividend of only so much of said surplus as will be necessary to increase the stock of the said bank to fifteen thousand dollars. (1921, c. 4, s. 59; C. S., s. 221(k).)

Cross Reference.—As to definition of "surplus," see § 53-1.

§ 53-89. Overdrafts, payment by officer, etc.—Any officer (other than a director), or employee of a bank, who shall permit any customer or other person to overdraw his account, or who shall pay any check or draft, the paying of which shall overdraw any account, unless the same shall be authorized by the board of directors or by a committee of such board authorized to act, shall be personally and individually liable to such bank for the amounts of such overdrafts. (1921, c. 4, s. 60; C. S., s. 221(1).)

§ 53-90. Officers and employees shall give bond.—The active officers and employees of any bank before entering upon their duties shall give bond to the bank in a bonding company authorized to do business in North Carolina, in the amount required by the directors and upon such form as may be approved by the Commissioner of Banks, the premium for same to be paid by the bank. The Commissioner of Banks or directors of such bank may require an increase of the amount of such bond whenever they may deem it necessary. If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damages as it may have sustained. (1921, c. 4, s. 61; Ex. Sess., 1921, c. 18; C. S., s. 221(m); 1927, c. 47, s. 11; 1929, c. 72, s. 2; 1931, c. 243, s. 5.)

Editor's Note.—The 1929 amendment rewrote the section as changed by the 1927 amendment, and the 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

Statute Enters into and Forms Part of Bond.—The provision of this section requiring officers and employees of a bank to give bond in an amount required by the directors and upon such form as may be approved by the Commissioner of Banks, is the only statutory provision which becomes a part of the bond. *Hartford Acci., etc., Co. v. Hood*, 226 N. C. 706, 40 S. E. (2d) 198 (1946). See *Hood v. Simpson*, 206 N. C. 748, 175 S. E. 193 (1934).

Effect of Renewal of Bond.—When a bond, which guarantees the fidelity of a bank cashier and guarantees the bank against loss by reason of embezzlement, etc., of said cashier, is executed for an indefinite term and thereafter is kept in force by the payment of annual premiums, for

each year the officer was re-elected, then each and every renewal thereof is a separate and distinct bond or independent contract. *Hood v. Simpson*, 206 N. C. 748, 175 S. E. 193 (1934).

Where a bond guaranteeing the payment of any loss sustained through the dishonesty of a bank official, while "in the continuous employment of a bank" after a specified date, is kept in force for a period of years by the payment of the stipulated annual premium, recovery on the bond is limited to the maximum liability therein stipulated for losses occurring during the life of the bond, and the contention that the surety is liable for defalcations to the amount of the penal sum of the bond for each of the years during which the bond is kept in force, is untenable. *Hartford Acci., etc., Co. v. Hood*, 226 N. C. 706, 40 S. E. (2d) 198 (1946), distinguishing *Hood v. Simpson*, 206 N. C. 748, 175 S. E. 193 (1934).

§ 53-91. Officers and employees may borrow, when.—No officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank of which he is an officer or employee, except upon good collateral or other ample security or endorsement; and no such loan shall be made until the same has been approved by a majority of the board of directors and a resolution, duly entered upon the minutes of the board of directors and signed by them, showing the amount of the loan, the directors approving the same and a brief description of the security upon which said loan is made; and a certified copy of such resolution shall be attached to the instrument evidencing the indebtedness: Provided, however, this section shall not apply to directors who are neither officers nor employees of the bank. (1921, c. 4, s. 62; C. S., s. 221(n); 1925, c. 119, s. 2; 1927, c. 47, s. 12.)

Editor's Note.—The 1925 amendment broadened the scope of this section, and the 1927 amendment added the proviso at the end.

ARTICLE 8.

Commissioner of Banks and Banking Department.

§ 53-92. **Appointment of Commissioner of Banks; State Banking Commission.**—On or before April first, one thousand nine hundred and thirty-one, after the ratification of this section, and quadrennially thereafter, the Governor, with the advice and consent of the Senate, shall appoint a Commissioner of Banks who shall hold his office for a term of four years or until his successor has been appointed and has qualified, subject, however, to the provisions herein made as to his removal. The Commissioner of Banks shall, before entering upon the discharge of his duties, enter into bond with some surety company authorized to do business in the State of North Carolina, in the sum of not less than fifty thousand dollars, conditioned upon the faithful and honest discharge of all duties and obligations imposed by statute upon him.

The State Banking Commission, which has heretofore been created, shall hereafter consist of the State Treasurer and the Attorney General, who shall serve as ex officio members thereof, and seven members who shall be appointed by the Governor. Four members of the said Commission shall be practical bankers and the remainder of the membership of said Commission shall be selected so as to fairly represent the business, manufacturing, farming and dairying interests of the State. The present membership of said Banking Commission shall continue until the first day of April, 1951, and the Governor shall appoint the two additional members thereof to serve until said time. Thereafter, three of the members of said Commission shall be appointed for terms of two years and four of the members of said Commission shall be appointed for terms of four years, and thereafter all members of said Commission who are appointed by the Governor shall be appointed for terms of four years. The appointive members of said Commission shall receive as compensation for their services the same per diem and expenses as is paid to the members of the Advisory Budget Commission, which compensation shall be paid from the fees collected from the examination of banks, as provided by law.

The Banking Commission shall meet at such time or times, and not less than once every three months, as the Commission shall, by resolution, prescribe, and the Commission may be convened in special session at the call of the Governor, or upon the request of the Commissioner of Banks. The State Treasurer shall be chairman of the said Commission.

No member of said Commission shall act in any matter affecting any bank in which he is financially interested, or with which he is in any manner connected. No member of said Commission shall divulge or make use of any information coming into his possession as a result of his service on such Commission, and shall not give out any information with reference to any facts coming into his possession by reason of his services on such Commission in connection with the condition of any state banking institution, unless such information shall be required of him at any hearing at which he is duly subpoenaed, or when required by order of a court of competent jurisdiction.

The Commissioner of Banks shall act as the executive officer of the Banking Commission, but the Commission shall provide, by rules and regulations, for hearings before the Commission upon any matter or thing which may arise in connection with the banking laws of this State upon the request of any person interested therein, and review any action taken or done by the Commissioner of Banks.

The Banking Commission is hereby vested with full power and authority to supervise, direct and review the exercise by the Commissioner of Banks of all powers, duties, and functions now vested in or exercised by the Commissioner

of Banks under the banking laws of this State. (1931, c. 243, s. 1; 1935, c. 266; 1939, c. 91, s. 1; 1949, c. 372.)

Editor's Note.—All of the section except the first paragraph was inserted by the 1939 amendment in lieu of provisions relating to the former advisory banking commission. And the 1949 amendment rewrote the second paragraph.

Commissioner Succeeds to Judicial Powers of Corporation Commission.—Had the banking department been created as a purely administrative agency it might fairly be contended that the finality of its actions would be in an administrative sense only, and appropriate legal proceedings could be had to test them. But the Corporation Commission had judicial powers in dealing with banks—its stock assessments were, for

example, given the effect of superior court judgments. *Corporation Commission v. Murphey*, 197 N. C. 42, 147 S. E. 667 (1929), aff'd 280 U. S. 534, 50 S. Ct. 161, 74 L. Ed. 598 (1930). See also *Corporation Commission v. Bank of Vanceboro*, 200 N. C. 422, 157 S. E. 59 (1931). And the Commissioner of Banks succeeded to those judicial powers so that he is obviously not a purely administrative official. There still remains the possibility that as to certain matters his rulings are administrative and that it is in respect to such rulings only that the decisions of the State Banking Commission as an appellate administrative body are final. 9 N. C. Law Rev. 348.

§ 53-93. Powers and duties of Commissioner.—The Commissioner of Banks shall have the powers, duties and functions herein given, and in addition thereto such other powers and rights as may be necessary or incident to the proper discharge of his duties. (1931, c. 243, s. 2.)

Cross Reference.—For validation of foreclosures and executions of deeds of trust by the Commissioner of Banks, see § 53-35.

Liquidation of Insolvent Banks.—The Commissioner of Banks, when engaged in the liquidation of the assets of an insolvent bank, as authorized by statute, does not derive his power or his authority from the

court. His power and authority, both to take possession of an insolvent bank, and to liquidate its assets for distribution among its creditors according to their respective rights, are derived from the statute. In *re Central Bank, etc., Co.*, 206 N. C. 251, 173 S. E. 340 (1934).

§ 53-94. Right to sue and defend in actions involving banks; liability to suit.—As Commissioner of Banks he is empowered to sue and prosecute or defend in any action or proceeding in any courts of this State or any other state and in any court of the United States for the enforcement or protection of any right or pursuit of any remedy necessary or proper in connection with the subjects committed to him for administration or in connection with any bank or the rights, liabilities, property or assets thereof, under his supervision; but nothing herein shall be construed to render the Commissioner of Banks liable to be sued except as other departments and agencies of the State may be liable under the general law. (1931, c. 243, s. 3.)

§ 53-95. Commissioner to exercise powers under supervision of Banking Commission.—All the powers, duties, and functions granted to or imposed upon the Commissioner of Banks by law shall be exercised by him under the direction and supervision of the Banking Commission, and wherever provision is made in any law now in effect authorizing and permitting the Commissioner of Banks to make rules and regulations with respect to any actions or things required to be done under the banking laws of this State, such rules and regulations shall be made by the Banking Commission, and the words "the Commissioner of Banks," used in such statutes authorizing him to make rules and regulations, shall be construed to mean the Banking Commission, and the words "Banking Commission" substituted in such statutes for "Commissioner of Banks." (1931, c. 243, s. 4; 1939, c. 91, s. 2.)

Editor's Note.—The 1939 amendment added that portion of the section beginning with the words "under the direction."

§ 53-96. Salary of Commissioner; legal assistance and compensa-

tion.—The salary of the Commissioner of Banks shall be fixed by the advisory budget commission. The Governor may in his discretion appoint and assign to the Commissioner of Banks such legal assistance as in his judgment may be necessary; and compensation therefor, when permanent, shall be fixed in like manner. (1931, c. 243, s. 6.)

§ 53-97. **Vacancy appointments and removal.**—Vacancies existing in the office of Commissioner of Banks by death, resignation or otherwise shall be filled by the Governor; and he shall have the power of removal for sufficient cause. (1931, c. 243, s. 8.)

§ 53-98. **Seal of office of Commissioner; certification of documents.**—The Commissioner of Banks shall have a seal of office bearing the legend "State of North Carolina—Commissioner of Banks," with such other appropriate device as he may adopt. (1931, c. 243, s. 9.)

§ 53-99. **Official records.**—The Commissioner of Banks shall keep a record in his office of his official acts, rulings and transactions: Provided, however, that where any disclosure of the records in his office, or of any report or other transaction, might injuriously affect any bank actually operating, such disclosure shall not be made or required except as may now be done under the provisions of law in similar cases. (1931, c. 243, s. 10.)

§ 53-100. **General or special investigations of insolvent banks.**—Whenever it may appear to be to the public interest, the Governor may cause a general or special investigation to be made of the affairs of any insolvent bank or banks, singly or in related groups, with a view to discovering and establishing the causes of the failure of such bank or banks, and responsibility therefor; and of discovering the dealings with such banks of persons, officers, corporations or municipalities which may have led to such insolvency or which may have endangered or involved any public funds therein. The Governor may assign counsel who shall prosecute such inquiry before the Commissioner of Banks, or a deputy or commissioner appointed by the Commissioner of Banks for the purpose; and the Commissioner of Banks is hereby empowered to conduct such investigation either in person or through such commissioner or deputy appointed by him. The inquiry shall be held at the office of the Commissioner of Banks in the city of Raleigh or at any other place or places in the State designated by the Commissioner of Banks under such rules and regulations as the State Banking Commission may prescribe and may be adjourned from time to time as convenience may require. Attendance of witnesses and production of papers may be required by subpoena under the hand of the Commissioner or his deputy, and on failure of any witness to appear as subpoenaed or his or her failure to produce any books or papers, as called for by such Commissioner or deputy on subpoena or other order due notice shall be served, at the instance of such Commissioner or deputy, of not less than three days to appear before a judge of the superior court residing in or holding courts within the district wherein such witness is subpoenaed or notified to appear or produce such records or papers, on a day certain and a place named, when such judge shall hear the matter and is authorized to punish such witness as for contempt as he may find on such hearing.

A summary of such investigation shall be made with the findings and recommendations of the Commissioner thereon, and a copy thereof submitted to the Governor, and when the facts shall disclose that any person or persons are criminally responsible, a summary shall be sent to the solicitor of the judicial district likely to have jurisdiction of the matter, whose duty it shall be to have the matter presented to the grand jury for its action. The Governor may employ counsel to assist in the prosecution of any person or persons criminally responsible and fix his compensation and the manner of its payment. (1931, c. 243, s. 11.)

§ 53-101. **Clerical help.**—The Commissioner of Banks is empowered to

employ sufficient clerical and secretarial help, and other necessary labor to conduct the affairs of his office with economy and efficiency. Persons so employed shall be paid as other employees in the departments of the State and shall be under the same rules and regulations. (1931, c. 243, s. 12.)

§ 53-102. Suitable offices; transfer of books, records, etc., by Corporation Commission.—Suitable offices shall be provided for the Commissioner of Banks in some State owned public building in Raleigh. (1931, c. 243, s. 13.)

§ 53-103: Repealed by Session Laws 1945, c. 743, s. 1.

§ 53-104. Commissioner of Banks shall have supervision over, etc.—Every bank or corporation transacting the business of banking, or doing a banking business in connection with any other business, under the laws of and within this State, and any individual, partnership, association, or corporation which undertakes or attempts to transact the business of banking, or do a banking business in connection with any other business, shall be under the supervision of the Commissioner of Banks. It shall be his duty to execute and enforce through the State bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to banks as defined in this chapter. For the more complete and thorough enforcement of the provisions of this chapter, the State Banking Commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this chapter, as may in its opinion be necessary to carry out the provisions of the laws relating to banks and banking as herein defined, and as may be further necessary to insure such safe and conservative management of the banks under its supervision as will provide adequate protection for the interests of the depositories, creditors, stockholders, and public in their relations with such banks. All banks doing business under the provisions of this chapter shall conduct their business in a manner consistent with all laws relating to banks and banking, and all rules, regulations, and instructions that may be promulgated or issued by the State Banking Commission. (1921, c. 4, s. 63; C. S., s. 222(a); 1931, c. 243, s. 5; 1939, c. 91, s. 2; 1945, c. 743, s. 1.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission" and "chief State bank examiner" formerly appearing in this section. The 1945 amendment rewrote the first sentence and struck out the former first part of the second sentence reading:

"The Commissioner of Banks shall exercise control of and supervision over the banks doing business under this chapter, and."

For discussion of section, see 3 N. C. Law Rev. 81.

§ 53-105. Reports of condition.—Every bank shall make to the Commissioner of Banks not less than three reports during each year, according to the form which may be prescribed by said Commissioner of Banks; which report shall be verified by the oath or affirmation of the president, vice-president, cashier, secretary, or treasurer of said bank, and in addition thereto, two of the directors. Each such report shall exhibit in detail and under appropriate heads the resources, assets, and liabilities of such bank at the close of business on any past day by the Commissioner of Banks specified, and shall be transmitted to the Commissioner of Banks within ten days after the receipt of a request or requisition therefor from the Commissioner of Banks; and in a form prescribed by the Commissioner of Banks; a summary of such report shall be published in a newspaper published in the place where the bank is located, or if there is no newspaper in the place, then in the nearest one published thereto in the county in which such bank is established. Proof of such publication shall be furnished the Commissioner

of Banks in such form as may be prescribed by him. (1921, c. 4, s. 64; 1923, c. 148, s. 2; C. S., s. 222(b); 1931, c. 243, s. 5.)

Editor's Note.—The 1923 amendment substituted "Commissioner of Banks" for "Corporation Commission." changed the minimum number of reports from four to three, and the 1931 amend-

§ **53-106. Special reports.**—The Commissioner of Banks may call for special reports whenever in his judgment it is necessary to inform him of the condition of any bank, or to obtain a full and complete knowledge of its affairs. Said reports shall be in and according to the form prescribed by the Commissioner of Banks, and shall be verified in the manner provided in § 53-105, and shall be published as therein provided, if required by the Commissioner of Banks so to be. (1921, c. 4, s. 66; C. S., s. 222(d); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ **53-107. Failure to make report, penalty for.**—Every bank failing to make and transmit any report which the Commissioner of Banks is authorized to require by this chapter, and in and according to the form prescribed by said Commissioner of Banks, within ten days after the receipt of a request or requisition therefor, or failing to publish the reports as required, shall forthwith be notified by the Commissioner of Banks, and if such failure continue for five days after the receipt of such notice, such delinquent bank shall be subject to a penalty of two hundred dollars. The penalty herein provided for shall be recovered in a civil action in any court of competent jurisdiction, and it shall be the duty of the Attorney General to prosecute all such actions. (1921, c. 4, s. 67; C. S., s. 222(e); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ **53-108. List of stockholders to be kept.**—Every bank doing business under this chapter shall at all times keep a correct record of the names of all its stockholders, and once in each year, or whenever called upon, file in the office of the Commissioner of Banks a correct list of all its stockholders, the resident address of each, and the number of shares held by each. (1921, c. 4, s. 68; C. S., s. 222(f); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ **53-109. Official communications of Commissioner of Banks.**—Each official communication directed by the Commissioner of Banks, or any state bank examiner, to any bank, or to any officer thereof, relating to an examination or investigation conducted or made by the Commissioner of Banks, or containing suggestions or recommendations as to the conduct of the bank shall, if required by the authority submitting same, be submitted by the officer or director receiving it, to the executive committee or board of directors of such bank and duly noted in the minutes of such meeting. The receipt and submission of such notice to the executive committee or board of directors shall be certified to the Commissioner of Banks within such time as he may require, by three members of such committee or board. (1921, c. 4, s. 69; C. S., s. 222(g); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ **53-110. Banking Commission to prescribe books, records, etc.**—

Whenever in its judgment it may appear to be advisable, the State Banking Commission may issue such rules, instructions, and regulations prescribing the manner of keeping books, accounts, and records of banks as will tend to produce uniformity in the books, accounts, and records of banks of the same class. (1921, c. 4, s. 70; C. S., s. 222(h); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-111. Reserve, when below legal requirement.—When the reserve of any bank falls below the amount required by law, it shall not make new loans or discounts, otherwise than by discounting or purchasing bills of exchange, payable at sight or on demand, nor make dividends of its profits until the reserve required by law is restored. The Commissioner of Banks shall require any bank whose reserve falls below the amount herein required immediately to make good such reserve. In case the bank fails for thirty days thereafter to make good its reserve the Commissioner of Banks may forthwith take possession of the property and business of such bank until its affairs be adjusted or finally liquidated as provided for in this chapter. (1921, c. 4, s. 71; C. S., s. 222(i); 1931, c. 243, s. 5.)

Cross References.—As to definition of reserve, see § 53-51. As to amount of reserve, see § 53-50.

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

Purpose of Section.—The wisdom of this provision and § 53-48 is manifest; banks, whose business is conducted in strict compliance therewith seldom become insolvent. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

Criminal Liability of Officer.—A bank must act through its officers, and where they have violated the provisions of this section and § 53-48, as to lending the bank's money, the offense is committed by the officers under the meaning of the statute, and they are individually indictable therefor. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor

prescribed by § 53-134. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

Intent Not Element of Offense.—An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The willful doing of the unlawful act constitutes the crime declared by § 53-134 to be a misdemeanor, punishable as such in the discretion of the court. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

Consolidation of Indictments.—An indictment charging a bank officer of violating this section and also unlawfully making loans in violation of § 53-48, alleges the commission of crimes of the same class. Where there are two indictments thereof against the same person they may be consolidated and tried together by the court. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925).

§ 53-112. Appraisal of assets of doubtful value.—If any assets of a bank are of a doubtful or disputed value, an appraisal of such assets may be had by the Commissioner of Banks, and for the purpose of making such appraisal the Commissioner of Banks shall designate one agent as an appraiser and the bank shall designate an agent as an appraiser and the two so chosen shall designate a third. The appraisers so selected shall make an appraisal of the assets so designated as doubtful or disputed and file a written report of their appraisal with the bank and with the Commissioner of Banks. In making such appraisal the appraisers shall determine the actual cash market value of such assets. Such appraisal, when made, shall be accepted as the value of such assets for the purpose of examination or for the purpose of determining the actual cash market value of such assets. The appraisers designated shall not be interested, in any

way, either in the bank or as an employee of the Commissioner of Banks and all expenses of such appraisal shall be paid by the bank whose assets are appraised. If any bank required to appoint an appraiser hereunder shall fail for ten (10) days to appoint an appraiser, the Commissioner of Banks may apply to the clerk of the superior court of the county in which the bank is located for the appointment of such an appraiser, and the clerk shall thereupon make the appointment for the bank. (1927, c. 47, s. 13; 1931, c. 243, s. 5.)

Editor's Note. — The 1931 amendment "State bank examiner" formerly appearing substituted "Commissioner of Banks" for "Corporation Commission" and "chief

§ 53-113. Certified copies of records as evidence.—In all civil actions in the courts of this State wherein are involved as evidence or otherwise any of the records of the Commissioner of Banks, a certified copy over the signature and under the seal of the Commissioner of Banks shall be admissible in evidence to the same effect as if produced in court at trial by the proper custodian of the records. (1927, c. 47, s. 14; 1931, c. 243, s. 5.)

Editor's Note. — The 1931 amendment "State bank examiner" formerly appearing substituted "Commissioner of Banks" for "Corporation Commission" and "chief

§ 53-114. Other powers of State Banking Commission.—In addition to all other powers conferred upon and vested in the State Banking Commission, the said Commission, with the approval of the Governor, is hereby authorized, empowered and directed, whenever in its judgment the circumstances warrant it:

(a) To authorize, permit, and/or direct and require all banking corporations under its supervision, to extend for such period and upon such terms as it deems necessary and expedient, payment of any demand and/or time deposits.

(b) To direct, require or permit, upon such terms as it may deem advisable, the issuance of clearinghouse certificates or other evidences of claims against assets of such banking institutions.

(c) To authorize and direct the creation, in such banking institutions, of special trust accounts for the receipt of new deposits, which deposits shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separate in cash or on deposit in such banking institutions as it shall designate or invested in such obligations of the United States and/or the State of North Carolina as it shall designate.

(d) To adopt for such banking institutions such regulations as are necessary in its discretion to enable such banking institutions to comply fully with the federal regulations prescribed for national or state banks. (1933, c. 120, s. 3; 1939, c. 91, s. 2.)

§ 53-115. State Banking Commission to make rules and regulations.—The State Banking Commission is hereby authorized, empowered and directed to make all necessary rules and regulations, and to give all necessary instructions with respect to such banking corporations which the Commissioner of Banks may authorize, permit and/or direct and require to be conducted under the provisions of §§ 53-77, 53-114, 53-115, and 53-116. And it shall be the duty of all such banking corporations and their officers, agents and employees, to comply fully with any and all such rules, regulations and instructions, established and promulgated by the State Banking Commission with respect to such banking corporations under the terms of §§ 53-77, 53-114, 53-115, and 53-116; and such orders, rules, and regulations shall have the same force and effect as rules, regulations and instructions promulgated under the existing banking laws. (1933, c. 120, s. 4; 1939, c. 91, s. 2.)

§ 53-116. Commissioner need not take over banks failing to meet deposit demands.—The Commissioner of Banks is authorized and directed not

to take possession of any banking corporation under his supervision for failure to meet its deposit liabilities during the period in which such banking corporation is operating under the terms of § 53-114, paragraph (a); and he is hereby relieved from any and all liability for permitting such banking corporations to continue operations under the terms thereof. (1933, c. 120, s. 5.)

ARTICLE 9.

Bank Examiners.

§ 53-117. **Appointment by Commissioner of Banks.**—The Commissioner of Banks, for the purpose of carrying out the provisions of this chapter, shall appoint from time to time such State bank examiners, assistant State bank examiners, clerks and stenographers as may be necessary to make a thorough examination of and into the affairs of every bank doing business under this chapter, as often as the Commissioner of Banks may deem necessary, and at least once each year. The Commissioner of Banks may at any time remove any person appointed by him under this chapter. (1921, c. 4, s. 72; C. S., s. 223(a); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission" and "chief State bank examiner" formerly appearing in this section. For cases describing man-

ner in which Corporation Commission took charge through examiner, see *Taylor v. Everett*, 188 N. C. 247, 124 S. E. 316 (1924), discussed in 3 N. C. Law Rev. 79.

§ 53-118. **Duties and powers.**—It shall be the duty of the examiners to verify all reports made to the Commissioner of Banks by the officers and directors, members, or individuals conducting any banking institution, as required by this chapter or by the Commissioner of Banks. The officers of every bank shall submit and surrender its books, assets, papers, and concerns to the examiners appointed under this chapter, who shall retain the custody and possession of such books, assets, papers, and concerns for such length of time as may be required for the purpose of making an examination as required by this chapter. If any officer shall refuse to surrender the books, assets, papers, and concerns as herein provided, or shall refuse to be examined under oath touching the affairs of such bank, the Commissioner of Banks may forthwith take possession of the property and business of the bank and liquidate its affairs in accordance with the provisions of this chapter. (1921, c. 4, s. 73; C. S., s. 223(b); 1931, c. 243, s. 5.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-119. **Officers and employees, removal of.**—The Commissioner of Banks shall have the right, and is hereby empowered, to require the immediate removal from office of any officer, director, or employee of any bank doing business under this chapter, who shall be found to be dishonest, incompetent, or reckless in the management of the affairs of the bank, or who persistently violates the laws of this State or the lawful orders, instructions, and regulations issued by the State Banking Commission. (1921, c. 4, s. 74; C. S., s. 223(c); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-120. **Examiners may administer oaths; summoning witnesses.**—For the purpose of making examinations as required by this chapter, any duly appointed examiner may administer oaths to examine any officer, director, agent, employee, customer, depositor, shareholder of such bank, or any other person or persons, touching its affairs and business. Any examiner may summon in writing any officer, director, agent, employee, customer, depositor, shareholder, or any

person or persons resident of this State to appear before him and testify in relation thereto. (1921, c. 4, s. 75; C. S., s. 223(d).)

§ 53-121. Examiners may make arrest.—When it shall appear to any examiner, by examination or otherwise, that any officer, agent, employee, director, stockholder, or owner of any bank has been guilty of a violation of the criminal laws of this State relating to banks, it shall be his duty, and he is hereby empowered to hold and detain such person or persons until a warrant can be procured for his arrest; and for such purposes such examiners shall have and possess all the powers of peace officers of such county, and may make arrest without warrant for past offenses. Upon report of his action to the Commissioner of Banks, said Commissioner may direct the release of the person or persons so held, or, if in his judgment such person or persons should be prosecuted, the Commissioner of Banks shall cause the solicitor of the judicial district in which such detention is had to be promptly notified, and the action against such person or persons shall be continued a reasonable time to enable the solicitor to be present at the trial. (1921, c. 4, s. 76; C. S., s. 223(e); 1931, c. 243, s. 5.)

Editor's Note.—See 15 N. C. Law Rev. 101. Commissioner of Banks" for "Corporation Commission."

The 1931 amendment substituted "Com-

§ 53-122. Fees for examinations and other services.—For the purpose of paying the salaries and necessary traveling expenses of the Commissioner of Banks, State bank examiners, assistant State bank examiners, clerks, stenographers and other employees of the Commissioner of Banks, the following fees shall be paid into the office of the Commissioner of banks: (a) Each bank and each branch of any bank which under the laws of the State of North Carolina is subject to supervision and examination by the Commissioner of Banks and is authorized to do business or is in process of voluntary liquidation shall, within ten days after the assessment has been made, pay into the office of the Commissioner of Banks according to its total resources as shown by its report of condition made to the Commissioner of Banks at the close of business December thirty-first, nineteen hundred and twenty-six, and on the thirty-first day of December, or the date most nearly approximating same of each year thereafter on which a report of condition is made to the Commissioner of Banks not in excess of the following fees for its annual examination: Fifty dollars for the first one hundred thousand dollars of assets or less, seven dollars for each one hundred thousand dollars or fraction in excess thereof, and two dollars for each one hundred thousand dollars or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such.

(b) All examinations made other than those provided for in subsection (a) hereof shall be deemed special examinations and for such special examination the bank shall pay into the office of the Commissioner of Banks the following fees for each special examination: Fifty dollars for the first one hundred thousand dollars of assets or less, seven dollars for each one hundred thousand dollars or fraction in excess thereof, and two dollars for each one hundred thousand dollars or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such. The fees paid for special examination shall be based on the assets of the bank examined as of the date of such examination.

(c) For services performed for any bank other than examination, the Commissioner of banks may make such charge as in his opinion is fair and just.

(d) In all criminal cases tried in any of the courts of this State wherein any of the employees of the Commissioner of Banks are used as witnesses, a fee of ten (\$10.00) dollars per day and actual expenses incurred shall be allowed such witnesses and the same shall be paid to the Commissioner of Banks by the clerk of the court of the county in which the case is tried and thereafter charged in bill of costs as are other costs incurred in the trial; and in all civil actions tried in any of the courts of this State, wherein any of the employees of the Commissioner

of Banks are required as witnesses, the party requiring such employee as witness shall deposit with the Commissioner of Banks when the subpoena is served a sufficient sum to cover the witness fee of ten (\$10.00) dollars per day and expenses, and such sums as may thus be advanced shall thereafter be charged in the bill of costs as other costs are charged.

All sums paid under this subsection shall be paid to the Commissioner of Banks as are fees for examination and used in like manner.

(e) The total compensation and necessary traveling expenses of the employees of the Commissioner of Banks shall not in any one year exceed the total fees collected under the provisions of this section.

(f) In the first half of each calendar year, the State Banking Commission shall review the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year, and, if the estimated fees provided for under paragraphs (a) and (b) shall exceed the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year, then the State Banking Commission may reduce by uniform percentage the fees provided for in paragraphs (a) and (b) of this section but not in a percentage greater than fifty per cent (50%) nor to an amount which will reduce the amount of the fees to be collected below the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. (1921, c. 4, s. 77; C. S., s. 223(f); 1927, c. 47, s. 15; 1931, c. 243, s. 5; 1943, c. 733; 1945, c. 467.)

Editor's Note.—The 1927 amendment rewrote the section, and the 1931 amendment substituted "Commissioner of Banks" for "chief State bank examiner" and "Corporation Commission" formerly appearing in

this section. The 1943 amendment added subsection (f), and the 1945 amendment rewrote the subsection and increased the reduction allowed therein from 25 to 50 per cent.

§ 53-123. Examiners shall make report.—Examiners shall make a full and detailed report in writing to the Commissioner of Banks of the condition of each bank within ten days after each and every examination made by them. (1921, c. 4, s. 78; C. S., s. 223(g); 1931, c. 243, s. 5.)

Editor's Note. — The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

ARTICLE 10.

Penalties.

§ 53-124. Examiner making false report.—If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the State prison for not less than four months nor more than ten years. (1921, c. 4, s. 79; C. S., s. 224(a).)

Cross Reference.—See § 14-254.

§ 53-125. Examiners disclosing confidential information.—If any bank examiner or other employee of the Commissioner of Banks fails to keep secret the facts and information obtained in the course of an examination of a bank, except when the public duty of such examiner or employee requires him to report upon or take official action regarding the affairs of such bank, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned not more than twelve months, or both, in the discretion of the court. Nothing in this section shall prevent the proper

exchange of information with the representatives of the banking departments of other states, with the federal reserve bank or national bank examiners, or other authorities, with the creditors of such bank or others with whom a proper exchange of information is wise or necessary, or with the clearinghouse officials and examiners. (1921, c. 4, s. 80; C. S., s. 224(b); 1931, c. 243, s. 5.)

Editor's Note. — The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-126. Loans or gratuities forbidden. — No State bank, or any officer, director or employee thereof shall hereafter make any loan or grant any gratuity to the Commissioner of Banks, any bank examiner or assistant bank examiner of the Commissioner of Banks of North Carolina. Any such officer, director or employee violating this provision shall be guilty of a misdemeanor and imprisoned not exceeding one year or fined not more than one thousand dollars, or both; and they may be fined a further sum equal to the money so loaned or gratuity given. If the Commissioner of Banks, or any bank examiner, or assistant bank examiner of the Commissioner of Banks of North Carolina shall accept a loan or gratuity from any State bank, or from any officer, director or employee thereof, he shall be guilty of a misdemeanor and imprisoned not exceeding one year, or fined not more than one thousand dollars, or both, and may be fined a further sum equal to the money so loaned or gratuity given. (1927, c. 29, s. 1; 1931, c. 243, s. 5.)

Editor's Note. — The 1931 amendment substituted "Commissioner of Banks" for "chief State bank examiner" and "Corporation Commission" formerly appearing in this section.

§ 53-127. Use of "bank," "banking," or "trust" in corporate name. — No corporation shall hereafter be chartered under the laws of this State with the words "bank," "banking," or "trust" as a part of its name except corporations reporting to and under the supervision of the Commissioner of Banks, or corporations under the supervision of the Commissioner of Insurance; nor shall any corporate name be amended so as to include the words "bank," "banking," "banker," or "trust," unless the corporation be under such supervision. No person, association, firm or corporation domiciled within the State of North Carolina except corporations, persons, associations, or firms reporting to and under the supervision of the Commissioner of Banks or under the supervision of the Commissioner of Insurance, shall therein advertise or put forth any sign as bank, banking, banker or trust company, or use the word "bank," "banking," "banker," or "trust," as a part of its name and title, or in any way solicit or receive deposits or transact business as a trust company: Provided, that this chapter shall not be held to prevent any individual as such from acting in any trust capacity as heretofore: Provided, further, that it shall be lawful for any corporation incorporated prior to January first, one thousand nine hundred and five, to retain the word "trust" in the name of said corporation, though it does not transact a banking business or such other business as requires its examination by the Commissioner of banks or the Commissioner of Insurance.

Any violation of the provisions of this section shall be a misdemeanor, and upon conviction thereof the offender shall be fined in a sum not exceeding five hundred dollars for each offense. (1921, c. 4, s. 81; C. S., s. 224(c); 1931, c. 243, s. 5; 1943, c. 543.)

Editor's Note. — The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission," and the 1943 amendment rewrote the section.

§ 53-128. Derogatory reports, willfully and maliciously making. — Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial con-

dition, or affects the solvency or financial standing of any bank, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 82; C. S., s. 224(d).)

§ 53-129. Misapplication, embezzlement of funds, etc.—Whoever being an officer, employee, agent or director of a bank, with intent to defraud or injure the bank, or any person or corporation, or to deceive an officer of the bank or an agent appointed to examine the affairs of such bank, embezzles, abstracts, or misapplies any of the money, funds, credit or property of such bank, whether owned by it or held in trust, or who, with such intent, willfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment, decree or fictitiously borrows or solicits, obtains or receives money for a bank not in good faith, intended to become the property of such bank; or whoever being an officer, employee, agent, or director of a bank, makes or permits the making of a false statement or certificate, as to a deposit, trust fund or contract, or makes or permits to be made a false entry in a book, report, statement or record of such bank, or conceals or permits to be concealed by any means or manner, the true and correct entries of said bank, or its true and correct transactions, who knowingly loans, or permits to be loaned, the funds or credit of any bank to any insolvent company or corporation, or corporation which has ceased to exist, or which never had any existence, or upon collateral consisting of stocks or bonds of such company or corporation, or who makes or publishes or knowingly permits to be made or published a false report, statement or certificate as to the true financial condition of such bank, shall be guilty of a felony and upon conviction thereof shall be fined not more than ten thousand dollars or imprisoned in the State's prison not more than thirty years, or both. (1921, c. 4, s. 83; C. S., s. 224(e); 1927, c. 47, s. 16.)

Editor's Note.—The 1927 amendment rewrote this section.

The intent and purpose of this section is to prevent the deception of the officers of a bank or the depletion of its assets or injury of its business by falsification of the bank's books by its officers or employees, and an indictment for the offense is not sufficient which merely charges such falsification without showing that the false entries were material or affected the interests of the bank or deceived its officers. *State v. Cole*, 202 N. C. 592, 163 S. E. 594 (1932).

A specific intent to deceive or to defraud is not necessary to a conviction of a bank officer or employee of making false entries on the books of the bank under the provisions of this section, it being sufficient if the defendant willfully made such false entries, the performance of the act expressly forbidden by statute constituting an offense in itself without regard to the question of specific intent. *State v. Lattimore*, 201 N. C. 32, 158 S. E. 741 (1931).

In a prosecution under this section for willfully making false entries on the books of a bank an instruction which was intended to stress and in effect did stress the necessity of proving that the false entries

were willfully and not inadvertently made, will not be held for error. *State v. Lattimore*, 201 N. C. 32, 158 S. E. 741 (1931).

Section 14-254 Not in Conflict.—Section 14-254, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with this section as passed in 1921. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143 (1924).

"Abstracts" Construed.—The legal meaning of the word "abstract," as it appears in § 14-254, with reference to the unlawful use of the funds of the bank, is correctly charged under an instruction to the jury defining it as the taking from or withdrawing from the bank, with the intent to injure or defraud. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143 (1924).

"Embezzle" means to misappropriate as well as to convert to one's own use. *State v. Maslin*, 195 N. C. 537, 143 S. E. 3 (1928), citing *State v. Lanier*, 89 N. C. 517 (1883); *State v. Foust*, 114 N. C. 842, 19 S. E. 275 (1894).

Conviction of Depositor.—In order to convict a depositor of a bank who has abstracted funds from the bank in collu-

sion with its cashier, it is not required that he himself was an officer of the bank or that he was present at the time the money was feloniously "abstracted," under the provisions of § 14-254; and he may be convicted thereunder when the bill of indictment substantially follows the language of the statute and the evidence is sufficient to sustain the charge therein. This is not applicable to the provisions of this section as passed in 1921. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143 (1924).

Same—Necessity of Being Present.—Though the depositor was not present at the time the offense was committed, he may be convicted as a principal under the counts of the indictment so charging the offense. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143 (1924).

Allegation That All Defendants Were Officers or Employees.—It is not necessary for an indictment, charging a conspiracy to violate the provisions of this section, to allege that all of the defendants were officers or employees of the bank, the indictment being sufficient if it alleges that some of the defendants were officers or employees of the bank and that the other defendants conspired with them to do the unlawful act. *State v. Davis*, 203 N. C. 13, 164 S. E. 737 (1932).

Alleging Corporation Is a Bank.—Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the State of North Carolina, it is not defective for failing to particularize that it was a bank, within the contemplation of the statute under which the indictment had been drawn. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47 (1923).

In a prosecution under this section and § 14-254 it was not necessary to aver or

to prove that the money or funds had been committed by the bank to the custody of the defendant or that there had been any breach of trust or confidence except that which arose out of the relation between the bank and the defendant. Nor was it necessary to charge in the very words that the defendant had converted the property to his own use. The words "did embezzle" sufficiently indicated the criminal act. The intent to defraud was sufficiently set out, under § 15-151, without specifically naming any particular victim of the preconceived purpose. And the indictment was sufficient though there was nothing to indicate the number of abstractions, if more than one. *State v. Maslin*, 195 N. C. 537, 143 S. E. 3 (1928), citing *State v. Switzer*, 187 N. C. 88, 121 S. E. 43 (1924).

Evidence.—In a prosecution under this section and § 14-254 expert parol evidence may be properly admitted to trace book entries, without contradicting them, so as to show that the officer of the bank had embezzled the bank's funds held in trust, as charged in the bill of indictment. In such case there was no invasion of the province of the jury by the expression of an opinion upon a fact in issue. *State v. Maslin*, 195 N. C. 537, 143 S. E. 3 (1928).

Variance as to Some Items.—In a prosecution of an officer of a bank for publishing a false report of the bank's condition in violation of this section, a variance between the allegations and proof as to some of the items of the report will not be fatal when there is no variance with respect to all the items, it being sufficient for conviction if the report as published was false in any particular as alleged in the indictment and was published with knowledge of such falsity and with a wrongful or unlawful intent. *State v. Davis*, 203 N. C. 47, 164 S. E. 732 (1932).

§ 53-130. Making false entries in banking accounts; misrepresenting assets and liabilities of banks.—If any person shall willfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any bank, or shall knowingly subscribe to or exhibit false papers, with intent to deceive any person authorized to examine into the affairs of such bank, or shall willfully and knowingly make, state or publish any false statement of the amount of the assets or liabilities of any bank, he shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the State's prison not less than four months nor more than ten years. (1903, c. 275, s. 27; Rev., s. 3326; C. S., s. 4402.)

§ 53-131. False certification of a check.—Whoever, being an officer, employee, agent, or director of a bank, certifies a check drawn on such bank, and willfully fails to forthwith charge the amount thereof against the account of the drawer thereof, or willfully certifies a check drawn on such bank unless the drawer

of such check has on deposit with the bank an amount of money subject to the payment of such check and equivalent to the amount therein specified, shall be guilty of a felony, and upon conviction shall be fined not more than five thousand dollars or imprisoned in the State prison for not more than five years, or both. (1921, c. 4, s. 84; C. S., s. 224(f).)

§ 53-132. Insolvent banks, receiving deposits in.—Any person, being an officer or employee of a bank, who receives, or being an officer thereof, permits an employee to receive money, checks, drafts, or other property as a deposit therein when he has knowledge that such bank is insolvent, shall be guilty of a felony, and upon conviction thereof shall be fined not more than five thousand dollars or imprisoned in the State prison not more than five years, or both. Provided, that in any indictment hereunder, insolvency shall not be deemed to include insolvency as defined under subsection (d) in the definition of insolvency under § 53-1. (1921, c. 4, s. 85; C. S., s. 224(g); 1927, c. 47, s. 17.)

Editor's Note.—The 1927 amendment added the proviso at the end of this section.

The word "insolvent," in this section, means when the bank cannot meet its depository liabilities in due course, and does not require that the condition of the bank should at the time be such as to enable it at any given time to pay all of its depositors in full at the time on demand. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616 (1924).

A bank is insolvent, within the meaning of this section, when the actual cash market value of its assets is not sufficient to pay its liabilities to its depositors and other creditors. *State v. Brewer*, 202 N. C. 187, 162 S. E. 363 (1932).

The word "knowledge," as used in the statute, is to be taken in its ordinary sense and according to its usual significance or acceptance. It means an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as to give him actual information concerning it. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616 (1924).

Who May Bring Action for Civil Liability.—A violation of this section by an employee, or by officers and directors of a bank, resulting in damages to a depositor, is a wrong to the depositor; he and not the bank or its receiver is entitled to maintain an action to recover the damages resulting from such wrong. See *Townsend v. Williams*, 117 N. C. 330, 23 S. E. 461 (1895); *Tate v. Bates*, 118 N. C. 287, 24 S. E. 482 (1896); *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478 (1896); *Houston v. Thornton*, 122 N. C. 365, 29 S. E.

827 (1898); *State v. Hightower*, 187 N. C. 300, 121 S. E. 616 (1924); *Russell v. Boone*, 188 N. C. 830, 125 S. E. 926 (1924); *Bane v. Powell*, 192 N. C. 387, 135 S. E. 118 (1926).

The right of a depositor in a bank, who has sustained damages, peculiar to himself, by the wrongful act of the officers and directors of the bank, to recover damages in an action brought by him against the officers and directors, is not affected by the decision in *Douglass v. Dawson*, 190 N. C. 458, 130 S. E. 195 (1925); the right is expressly recognized in the opinion in that case. *Bane v. Powell*, 192 N. C. 387, 135 S. E. 118 (1926).

Liability Not Bank Asset.—Sums for which bank officers and directors are liable for receiving or permitting receipt of deposit with knowledge of bank's insolvency, contrary to this section, are not assets of the bank. The wrong being only to the depositor, he need not allege, to maintain an action, that bank's receiver refused to sue on demand. *Bane v. Powell*, 192 N. C. 387, 135 S. E. 118 (1926).

Necessary Allegations.—In order for a depositor to maintain an action against the individual officers of an insolvent bank for permitting the deposits to be received it is necessary, among other things, to allege and prove the insolvency of the bank at the time the deposits were made, and the allegation that it was either insolvent then or the misconduct of the officials afterwards caused its insolvency, is insufficient, the alternative of the allegation being a wrong to the bank itself which may be sued upon by its receiver afterwards. *Wall v. Howard*, 194 N. C. 310, 139 S. E. 449 (1927).

Elements of Offense.—In order for a conviction under the provisions of this section, the State must prove beyond a reasonable doubt the actual receipt of the deposits by defendant officer of the bank

at the time when the bank was insolvent to his own knowledge, or that such officer permitted an employee of the bank to receive the deposits with knowledge of these facts. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616 (1924).

Evidence.—For the purpose of ascertaining the solvency or insolvency of a bank, it is permissible to go into an investigation of its assets and property as of the date when the deposit was made, and, of course, their value after that, or at the time of the trial, is competent as illustrating or bearing upon their worth at the time the deposit was charged to have been received. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616 (1924).

Same—Admissions.—Upon the trial of an officer of an insolvent bank under this section the officer's admissions that he knew of the insolvency of the bank at the time in question with his explanation thereof is competent testimony. *State v. Brewer*, 202 N. C. 187, 162 S. E. 363 (1932).

Same—Weight of Evidence.—Where the State bank examiner and another expert have been permitted to give their testimony as to the bank's insolvency at the

time of the crime, upon their investigation, without stating the basis of their opinions thereon, it may not be decided as a matter of law, upon conflicting evidence, that the defendant must have known of the insolvent condition testified to by the experts. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616 (1924).

Bank Examiner as Expert Witness.—In an action to convict an officer of a bank under this section, the testimony of the State bank examiner is to be received as that of an expert upon the question of the bank's insolvency. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616 (1924).

Certified Accountant as Witness.—Upon the trial of a bank official under the provisions of this section, testimony of a certified public accountant who had had experience in such matters and who had examined the books of the bank and had obtained from the directors, collectively and individually, information as to the value of its assets including lands and collateral, that the bank was insolvent at the time in question is not objectionable. *State v. Brewer*, 202 N. C. 187, 162 S. E. 363 (1932).

§ 53-133. Capital stock, advertising larger amount than that paid in.—It shall be unlawful for any bank to advertise in a newspaper, letterhead, or any other way, a larger capital stock than has been actually paid in in cash. Any bank violating this section shall be subject to a penalty of five hundred dollars for each and every offense. The penalty herein provided for shall be recovered by the State in a civil action in any court of competent jurisdiction, and it shall be the duty of the Attorney General to prosecute all such actions. (1921, c. 4, s. 86; C. S., s. 224(h).)

§ 53-134. Offenses declared misdemeanors; prosecution; employment of counsel; punishment.—Any offense against the banking laws of the State of North Carolina which is not elsewhere specifically declared to be a crime, or for which elsewhere a penalty is not specifically provided, is hereby declared to be a misdemeanor, and shall be punishable at the discretion of the court. The Commissioner of Banks is authorized and directed to prosecute all offenses against the banking laws of the State, and to that end is expressly authorized to employ counsel to prosecute in the inferior courts and to aid the solicitor in the superior courts. The Auditor of the State shall, upon the certificate of the Commissioner of Banks, accompanied by an itemized statement of the account, draw his warrant upon the State Treasurer to compensate the counsel so employed, and the State Treasurer shall pay the same out of the funds in the treasury and not otherwise appropriated. (Ex. Sess. 1921, c. 56, s. 4; C. S., s. 224(i); 1927, c. 47, s. 18; 1931, c. 243, s. 5.)

Editor's Note.—The 1927 amendment re-enacted this section in full, and the 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

Unlawful Act of Making Loans.—Under this section, the unlawful act of mak-

ing loans in violation of § 53-48 or § 53-111 is made a misdemeanor, and is punishable as such at the discretion of the court. *State v. Cooper*, 190 N. C. 528, 130 S. E. 180 (1925). See notes to §§ 53-48 and 53-111.

§ 53-135. **General corporation law to apply.**—All provisions of the law relating to private corporations, and particularly those enumerated in the chapter entitled "Corporations," not inconsistent with this chapter or with the business of banking, shall be applicable to banks. (1921, c. 4, s. 87; C. S., s. 224(j).)

Cited in *Cole v. Farmers Bank, etc.*,
Co., 221 N. C. 249, 20 S. E. (2d) 54
(1942).

ARTICLE 11.

Industrial Banks.

§ 53-136. **Industrial bank defined.**—The term "industrial bank," as used in this article shall be construed to mean any corporation organized or authorized under this article which is engaged in receiving, soliciting or accepting money or its equivalent on deposit and in lending money to be repaid in weekly, monthly, or other periodical installments or principal sums as a business: Provided, however, this definition shall not be construed to include building and loan associations, commercial banks, or credit unions. (1923, c. 225, s. 1; C. S., s. 225(a); 1945, c. 743, s. 1.)

Editor's Note.—Prior to the 1945 amendment this section related only to corporations engaged in lending money. The amendment substituted at the end of the section the words "commercial banks, or credit unions" for the words "or commercial or savings banks."

§ 53-137. **Manner of organization.**—Any number of persons, not less than five, may organize an industrial bank by setting forth in a certificate of incorporation, under their hands and seals, the following:

1. The name of the industrial bank.
2. The location of its principal office in this State.
3. The nature of its business.
4. The amount of its authorized capital stock which shall be divided into shares of ten, twenty, twenty-five, fifty, or one hundred dollars each: Provided, fractional shares may be issued for the purpose of complying with the requirements of § 53-88.
5. The names and post-office addresses of subscribers for stock, and the number of shares subscribed by each. The aggregate of such subscription shall be the amount of the capital with which the industrial bank will begin business.
6. Period, if any, limited for the duration of the industrial bank.

This section shall not apply to banks organized and doing business prior to the adoption of this section. (1923, c. 225, s. 2; C. S., s. 225(b); 1945, c. 743, s. 1.)

Editor's Note.—The 1945 amendment rewrote this section.

Suit to Compel Issuance of Charter.—Where plaintiffs applied for an industrial bank charter, and their application was not passed upon by the Secretary of State on the advice and recommendation of the Commissioner of Banks, acting in accordance with the statutes, and plaintiffs sued

to compel the issuance of a charter, alleging no capricious acts, bad faith or disregard of law by the State officers, the complaint did not state a cause of action and was not sufficient as a petition for certiorari or as an application for mandamus. *Pue v. Hood*, 222 N. C. 310, 22 S. E. (2d) 896 (1942).

§ 53-138. **Corporate title.**—Every corporation incorporated or reorganized pursuant to the provisions of this article shall be known as an industrial bank, and may use the word "bank" as part of its corporate title. (1923, c. 225, s. 3; C. S., s. 225(c).)

§ 53-139. **Capital stock.**—The amount of capital stock with which any industrial bank shall commence business shall not be less than twenty-five thousand dollars (\$25,000.00), in cities or towns of fifteen thousand population or less; nor less than fifty thousand dollars (\$50,000.00), in cities or towns whose population exceeds fifteen thousand but does not exceed twenty-five thousand;

nor less than one hundred thousand dollars (\$100,000.00), in cities or towns whose population exceeds twenty-five thousand; the population to be ascertained by the last preceding national census: Provided, that this section shall not apply to industrial banks organized and doing business prior to March 3, 1923. (1923, c. 225, s. 4; C. S., s. 225(d).)

§ 53-140. **Sales of capital stock; accounting; fees.**—The capital stock sold by any industrial bank in process of organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation for selling such stock. The Commissioner of Banks shall refuse authority to commence business to any industrial bank where commissions or fees have been paid, or have been contracted to be paid by it, or by anyone in its behalf to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1923, c. 225, s. 5; C. S., s. 225(e); 1931, c. 243, s. 5.)

Editor's Note. — The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission."

§ 53-141. **Powers.**—Industrial banks shall have the powers conferred by paragraphs 1, 2, 3, 5 and 7 of § 55-26, and paragraph 3 of § 53-43, such additional powers as may be necessary or incidental for the carrying out of their corporate purposes, and in addition thereto the following powers:

1. To discount and negotiate promissory notes, drafts, bills of exchange and other evidence of indebtedness, and to loan money on real or personal security and reserve lawful interest in advance upon such loans, and to discount or purchase notes, bills of exchange, acceptances or other choses in action.

2. Upon the making of a loan or discount, to deduct in advance, from the proceeds of such loan, interest at a rate not exceeding six per centum (6%) per annum upon the amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in installments.

3. To charge for loans made pursuant to this section a fee of two dollars and fifty cents on installment loans of fifty dollars or less and on loans in excess of fifty dollars, one dollar for each fifty dollars or fraction thereof loaned, up to and including two hundred and fifty dollars, and for loans in excess of two hundred and fifty dollars, one dollar for each two hundred and fifty dollars excess or fraction thereof, to cover expenses, including any examination or investigation of the character and circumstances of the borrower, comaker, or surety. An additional fee of five dollars may be charged on such loans where same are secured by mortgage on real estate. No charge shall be collected unless a loan shall have been made.

4. To establish branch offices or places of business within the county in which its principal office is located, and elsewhere in the State, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks in his discretion: Provided, that the Commissioner of Banks shall not authorize the establishment of any branch the paid-in capital of whose parent bank is not sufficient in amount to provide for the capital of at least twenty-five thousand dollars (\$25,000.00) for the parent bank and at least twenty-five thousand dollars (\$25,000.00) for each branch which it is proposed to be established in cities or towns of fifteen thousand population or less; nor less than fifty thousand dollars (\$50,000.00) in cities or towns whose population exceeds fifteen thousand but does not exceed twenty-five thousand; nor less than one hundred thousand dollars (\$100,000.00) in towns whose population exceeds twenty-five thousand.

5. Subject to the approval of the Commissioner of Banks and on the authority of its board of directors, or a majority thereof, to enter into such contracts, incur such obligations and generally to do and perform any and all such acts and things

whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of one thousand nine hundred and thirty-three (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporations.

6. To solicit, receive and accept money or its equivalent on deposit both in savings accounts and upon certificates of deposit.

7. Subject to the approval of the State Banking Commission, to solicit, receive and accept money or its equivalent on deposit subject to check. (1923, c. 225, s. 6; C. S., s. 225(f); 1925, c. 199, s. 1; 1931, c. 243, s. 5; 1935, c. 81, s. 2; 1939, c. 244, ss. 1, 2; 1943, c. 233; 1945, c. 283; 1949, c. 952, ss. 1, 2.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission," and the 1935 amendment added subsection 5. The 1939 amendment inserted the reference to § 53-43 in the opening paragraph and added subsection 6. The 1943 amendment

added subsection 7. The 1945 amendment increased the charge for a loan in subsection 3, and the 1949 amendment rewrote subsections 1 and 2.

For comment on the 1949 amendment, see 27 N. C. Law Rev. 425.

§ 53-142. Restriction on powers.—No industrial bank shall deposit any of its funds in any banking corporation unless such corporation has been designated as such depository by a vote of a majority of the directors, or of the executive committee, exclusive of any director who is an officer, director, or trustee of the depository so designated, present at any meeting duly called at which a quorum is in attendance, and approved by the Commissioner of Banks. (1923, c. 225, s. 7; C. S., s. 225(g); 1931, c. 243, s. 5; 1937, c. 220.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission," and the 1937

amendment struck out the former provision prohibiting loans for longer than one year.

§ 53-143. Investments; securities; loans; limitations.—The provisions of §§ 53-46, 53-48 and 53-49, with reference to the limitations of investments in securities, limitations of loans and suspensions of investment and loan limitations, shall be applicable to industrial banks. (1923, c. 225, s. 8; C. S., s. 225-(h); 1945, c. 127, s. 2.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 53-144. Supervision and examination.—Every industrial bank now or hereafter transacting the business of an industrial bank as defined by this article, whether as a separate business or in connection with any other business under the laws of and within this State, shall be subject to the provisions of this article, and shall be under the supervision of the Commissioner of Banks. The Commissioner of Banks shall exercise control of and supervision over the industrial banks doing business under this article, and it shall be his duty to execute and enforce, through the State bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to industrial banks as defined in this article. For the more complete and thorough enforcement of the provisions of this article, the

State Banking Commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this article, as may, in its opinion, be necessary to carry out the provisions of the laws relating to industrial banks as in this article defined, and as may be further necessary to insure such safe and conservative management of industrial banks under the supervision of the Commissioner of Banks as may provide adequate protection for the interest of creditors, stockholders, and the public, in their relations with such institutions. All industrial banks doing business under the provisions of this article shall conduct their business in a manner consistent with all laws relating to industrial banks, and all rules, regulations and instructions that may be promulgated or issued by the State Banking Commission. (1923, c. 225, s. 11; C. S., s. 225(k); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

Editor's Note.—The 1931 amendment substituted "Commissioner of Banks" for "Corporation Commission" and "chief State bank examiner" formerly appearing in this section.

§ 53-145. Sections of general law applicable.—Sections 53-1, 53-3, 53-4, 53-5, 53-6, 53-7, 53-8, 53-9, 53-10, 53-11, 53-12, 53-13, 53-18, 53-20, 53-22, 53-23, 53-42, 53-47, 53-50, 53-51, 53-54, 53-63, 53-64, 53-67, 53-68, 53-70, 53-71, 53-72, 53-73, 53-74, 53-78, 53-79, 53-80, 53-81, 53-82, 53-83, 53-85, 53-87, 53-88, 53-90, 53-91, 53-105, 53-106, 53-107, 53-108, 53-109, 53-110, 53-111, 53-112, 53-117, 53-118, 53-119, 53-120, 53-121, 53-122, 53-123, 53-124, 53-125, 53-126, 53-128, 53-129, 53-132, 53-133, 53-134, relating to the supervision and examination of commercial banks, shall be construed to be applicable to industrial banks, insofar as they are not inconsistent with the provisions of this article. Sections 53-19, 53-24, 53-37, 53-39, 53-40, 53-41, 53-44, 53-45, 53-58, 53-59, 53-61, 53-66, 53-75, 53-76, 53-77, 53-86, 53-113, 53-114, 53-115, 53-116, 53-135, 53-146, and 53-148 through 53-158, relating to commercial banks, shall be construed to be applicable to industrial banks. (1923, c. 225, s. 13; C. S., s. 225(m); 1927, c. 141; 1939, c. 244, s. 3; 1945, c. 743, s. 1.)

Editor's Note.—The 1939 amendment inserted 53-50 and 53-51 in the list of sections in the first sentence.

The 1945 amendment inserted in the first sentence the following sections: 53-6, 53-22, 53-23, 53-68, 53-70, 53-71, 53-72,

53-73, 53-74, 53-85, 53-103, 53-111, 53-112, 53-126 and 53-133. And it inserted in the second sentence the following sections: 53-58, 53-59, 53-61, 53-66, 53-113 and 53-135.

ARTICLE 12.

Joint Deposits.

§ 53-146. Deposits in two names.—When a deposit has been or is hereafter made in any bank, trust company, banking and trust company, or any other institution transacting business in this State, in the names of two persons, payable to either, or payable to either or the survivor, all or any part of the deposit, or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not; and the receipt or acquittance of the person so paid is a valid and sufficient discharge to the bank for payment so made. (1917, c. 243, s. 1; C. S., s. 230.)

Editor's Note.—For discussion of section, see 9 N. C. Law Rev. 14.

When Statute Applicable.—The certificate of deposit by a bank in the name of the husband, payable to himself "or" his wife does not fall within the provisions of this section. The statute applies only where the deposit is made in the names

of two persons and payable to either, nor can construing the word "or" as meaning "and" have the effect of creating a tenancy in common. *Jones v. Fullbright*, 197 N. C. 274, 148 S. E. 229 (1929).

Cited in *Redmond v. Farthing*, 217 N. C. 678, 9 S. E. (2d) 405 (1940).

§ 53-147: Repealed by Session Laws 1943, c. 543.

ARTICLE 13.

Conservation of Bank Assets and Issuance of Preferred Stock.

§ 53-148. **Provision for bank conservators; duties and powers.**—Whenever he shall deem it necessary, in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Commissioner of Banks may (with the approval of the Governor), appoint a conservator for such bank and require of such conservator such bond with such security as he may deem necessary and proper. The conservator, under the direction of the Commissioner of Banks, shall take possession of the books, records and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all such rights, powers and privileges, subject to the Commissioner of Banks, now possessed by or hereafter given to the Commissioner of Banks under § 53-20, as amended, as are necessary to conserve the assets of said bank. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto, shall be the same as those provided in § 53-20, as amended. All expenses of any such conservator shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien provided by this article or otherwise. The conservator shall receive as salary an amount no greater than that paid at the present time to employees of departments of the State government for similar services. (1933, c. 155, s. 1.)

Editor's Note.—For similarity to federal act, see 11 N. C. Law Rev. 196. As to conservators of estates of missing persons, see §§ 33-63 to 33-66.

§ 53-149. **Examination of bank.**—The Commissioner of Banks shall cause to be made such examination of the affairs of such bank as shall be necessary to inform him as to the financial condition of such bank. (1933, c. 155, s. 2.)

§ 53-150. **Termination of conservatorship.**—If the Commissioner of Banks shall become satisfied that it may safely be done, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business, subject to such terms, conditions, restrictions and limitations as he may prescribe. (1933, c. 155, s. 3.)

§ 53-151. **Special funds for paying depositors and creditors ratably; new deposits.**—While such bank is in the hands of the conservator appointed by the Commissioner of Banks, the Commissioner of Banks may require the conservator to set aside from unpledged assets and make available for withdrawal by depositors and payment to other creditors on a ratable basis, such amounts as, in the opinion of the Commissioner of Banks, may safely be used for this purpose; and the Commissioner of Banks, may, in his discretion, permit the conservator to receive deposits, but deposits received while the bank is in the hands of the conservator (as well as special or trust deposits received by any bank, under the orders of the Commissioner of Banks, since March 2, 1933), shall not be subject to any limitation as to payment or withdrawal, and such deposits shall be segregated and shall not be used to liquidate any indebtedness of such bank existing at the time that a conservator was appointed for it, or any subsequent indebtedness incurred for the purpose of liquidating any indebtedness of said bank existing at the time such conservator was appointed. Such deposits received while the bank is in the hands of the conservator, as well as the special or trust deposits received since March 2, 1933, shall be kept on hand in cash or on deposit with a federal reserve bank. In being transmitted to the federal reserve bank, said deposits shall be so marked and designated as to indicate to such federal reserve bank that they are special deposits. (1933, c. 155, s. 4.)

§ 53-152. **Reorganization on agreement of depositors and stock-**

holders.—By the agreement of (a) depositors and other creditors of any bank representing at least seventy-five per cent in amount of its total deposits and other liabilities as shown by the books of the banks, or (b) stockholders owning at least two-thirds of each class of its outstanding capital stock as shown by the books of the bank, or (c) both depositors and other creditors representing at least seventy-five per cent in amount of the total deposits and other liabilities, and stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank, any bank may effect such reorganization with the consent and approval of the Commissioner of Banks as by such agreement may be determined: Provided, however, that claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the per cent thereof as above provided.

When such reorganization becomes effective, all books, records and assets of such bank shall be disposed of in accordance with the provisions of the plan, and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed by the Commissioner of Banks. In any reorganization which shall have been approved, and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of organization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization: Provided, however, that no reorganization shall affect the lien of secured creditors. (1933, c. 155, s. 5.)

Editor's Note.—The provision in the second paragraph is identical with the federal act but its validity may be questioned on a constitutional ground not applicable to the federal government, i. e., impairment of contract. 11 N. C. Law Rev. 196.

§ 53-153. Segregation of recent deposits not effective after bank turned back to officers; notice of turning bank back to officers.—After fifteen days after the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without a reorganization as provided in § 53-152 hereof, the provisions of § 53-151 with respect to the segregation of deposits received while it is in the hands of the conservator, and with respect to the use of such deposits to liquidate the indebtedness of such bank, shall no longer be effective: Provided, that before the conservator shall turn back the affairs of the bank to its board of directors, he shall cause to be published in a newspaper published in the city, town or county in which such bank is located, and if no newspaper is published in such city, town or county, in a newspaper to be selected by the Commissioner of Banks, a notice in form approved by the Commissioner of Banks, stating the date on which the affairs of the bank will be returned to its board of directors, and that the said provisions of § 53-151 will not be effective after fifteen days after such date; and on the date of publication of such notice, the conservator shall immediately send to every person who is a depositor in such bank under § 53-151, a copy of such notice by registered mail, addressing it to the last known address of such persons shown by the records of the bank; and the conservator shall send similar notice in like manner to every person making deposit in such bank under § 53-151, after the date of such newspaper publication and before the time when the affairs of the bank are returned to its directors. (1933, c. 155, s. 6.)

§ 53-154. Issuance of preferred stock.—Notwithstanding any other provision of this article or any other law, and notwithstanding any of the provisions of its articles of incorporation or bylaws, any bank may, with the approval of the Commissioner of Banks, and by vote of stockholders owning a majority of the stock of such bank, upon not less than two days' notice given by

registered mail pursuant to action taken at a meeting of its board of directors (which may be held upon not less than one day's notice) issue preferred stock in such amount and with such par value as shall be approved by said Commissioner of Banks. A copy of the minutes of such directors' and stockholders' meetings, certified by the proper officer and under the corporate seal of the bank, and accompanied by the written approval of the Commissioner of Banks shall be immediately filed in the office of the Secretary of State, and when so filed, shall be deemed and treated as an amendment to the articles of incorporation of such bank.

No issue of preferred stock shall be valid until the par value of all stock so issued shall have been paid for in full in cash or in such manner as may be specifically approved by the Commissioner of Banks. (1933, c. 155, s. 7.)

§ 53-155. Rights and liabilities of preferred stockholders.—The holders of such preferred stock shall be entitled to cumulative dividends payable at a rate not exceeding six per centum per annum, but shall not be held individually responsible as such holders for any debts, contracts or engagements of such bank, and shall not be liable for assessments to restore impairments in the capital of such banks as now provided by law with reference to holders of common stock in banks. Notwithstanding any other provisions of law, the holders of such preferred stock shall have such voting rights and such stock shall be subject to retirement in such manner and on such terms and conditions as may be provided in the articles of incorporation or any amendment thereto, with the approval of the Commissioner of Banks.

No dividends shall be declared or paid on common stock until the cumulative dividends on the preferred stock shall have been paid in full; and if the bank is placed in liquidation, no payments shall be made to the holders of the common stock until the holders of the preferred stock shall have been paid in full the par value of such stock and all accumulated dividends. (1933, c. 155, s. 8.)

§ 53-156. Term "stock" not to include preferred stock; latter not to be used as collateral for loans.—Wherever in existing banking law, the words "stock," "stockholders," "capital" or "capital stock" are used, the same shall not be deemed to include preferred stock: Provided that no bank issuing preferred stock under the provisions hereof, shall be permitted at any time to make loans upon such preferred stock; provided further that in determining whether or not the minimum capital or capital stock required in §§ 53-2, 53-11, 53-62, 53-139, and 58-116, has been supplied to such bank or banking corporation, the Commissioner of Banks shall include preferred stock as capital or capital stock. (1933, c. 155, s. 9; 1935, c. 80.)

Editor's Note.—The 1935 amendment the capital stock has been supplied. Section 58-116, referred to in the proviso, has been repealed.

§ 53-157. Rights and liabilities of conservator.—The conservator appointed pursuant to the provisions of this article shall be subject to the provisions of and to the penalties prescribed by §§ 53-43, 53-129, and 53-131. (1933, c. 155, s. 10.)

§ 53-158. Naming of conservator not liquidation.—No power conferred in this article upon the Commissioner of Banks, when exercised, shall be deemed an act of possession for the purposes of liquidation; and whenever the Commissioner of Banks shall, with reference to any bank for which a conservator is appointed, deem that liquidation is necessary, he shall exercise the powers for the purposes of liquidation as provided in § 53-20 as amended. (1933, c. 155, s. 11.)

ARTICLE 14.

Banks Acting in a Fiduciary Capacity.

§ 53-159. **Banks may act as fiduciary.**—Any bank licensed by the Commissioner of Banks, where such powers or privileges are granted it in its charter, may be guardian, trustee, assignee, receiver, executor or administrator in this State without giving any bond; and the clerks of the superior courts, or other officers charged with the duty or clothed with the power of making such appointments, are authorized to appoint such bank to any such office. (1945, c. 743, s. 1.)

§ 53-160. **License to do business.**—Before any such bank is authorized to act in any fiduciary capacity without bond, it must be licensed by the Commissioner of Banks of the State. For such license the licensee shall pay to the State Banking Commission an annual license fee of two hundred dollars (\$200.00), which shall be remitted to the State Treasurer for the use of the Commissioner of Banks in the supervision of banks acting in a fiduciary capacity, insofar as it may be necessary, and the surplus, if any, shall remain in the State treasury for the use of the general fund of the State. (1945, c. 743, s. 1.)

§ 53-161. **Examination as to solvency.**—The Commissioner of Banks shall examine into the solvency of such bank, and shall, if he deem it necessary, at the expense of the bank, make or cause to be made an examination at its home office of its assets and liabilities. (1945, c. 743, s. 1.)

§ 53-162. **Certificate of solvency.**—After any such bank has been licensed by the Commissioner of Banks, a certificate issued by the Commissioner of Banks, showing the bank to be solvent to an amount not less than one hundred thousand dollars (\$100,000.00), shall authorize such bank to act in a fiduciary capacity without bond. There shall be no charge for the seal of this certificate. (1945, c. 743, s. 1.)

§ 53-163. **Clerk of superior court notified of license and revocation.**—The Commissioner of Banks, upon granting license to any such bank, shall immediately notify the clerk of the superior court of each county in the State that such bank has been licensed under this article, and, whenever the Commissioner of Banks is satisfied that any bank licensed by him has become insolvent, or is in imminent danger of insolvency, he shall revoke the license granted to such bank and notify the clerk of the superior court of each county in the State of the revocation. After such notification, the right of any such bank to act in a fiduciary capacity shall cease. (1945, c. 743, s. 1.)

ARTICLE 15.

Loan Agencies or Brokers.

§ 53-164. **Supervision by Commissioner of Banks; fees.**—Loan agencies or brokers, as defined in § 105-88, shall be under the supervision and control of the Commissioner of Banks. Such person, firms, or corporations (hereinafter referred to as "loan agencies or brokers") shall, for the purposes of defraying the necessary expenses of the Commissioner of Banks and his agents in supervising them, pay to the Commissioner of Banks the fees prescribed in § 53-122 at the times therein specified. (1945, c. 282, s. 1.)

§ 53-165. **Banking Commission to make rules and regulations.**—The State Banking Commission is hereby authorized, empowered and directed to make all rules and regulations deemed by the Commission to be necessary or desirable in providing for the protection of the public and the efficient management of the loan agencies or brokers, including regulations as may be deemed

necessary to prevent the renewal or making of new loans for the purpose of collecting additional fees on the same extension of credit, relating to the keeping of accurate and uniform books, records and accounts, and to give all necessary instructions with respect to such loaning agencies or brokers. And it shall be the duty of all such loaning agencies or brokers and their officers, agents and employees, to comply fully with all such rules, regulations and instructions, established and promulgated by the State Banking Commission. (1945, c. 282, s. 2.)

§ 53-166. **Charges not to exceed those of industrial banks on installment loans.**—Such loan agencies or brokers shall be authorized to charge not in excess of the same fees and the interest that may lawfully be charged by industrial banks on installment loans. Provided, however, that such fees shall not be charged more frequently than once each sixty days on any loan or renewal thereof. (1945, c. 282, s. 3.)

§ 53-167. **Violation a misdemeanor.**—Any person, firm or corporation violating any of the provisions of this article shall, upon conviction, be guilty of a misdemeanor and fined or imprisoned in the discretion of the court. (1945, c. 282, s. 4.)

§ 53-168. **Business of making certain loans on motor vehicles exempted.**—Nothing in this article shall be construed to apply to any person, firm or corporation engaged solely in the business of making loans of fifty dollars (\$50.00) or more secured by motor vehicles. (1945, c. 282, s. 4½.)

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Co-Operative Organizations.

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SUBCHAPTER I.

BUILDING AND LOAN ASSOCIATIONS.

ARTICLE 1.

Organization.

§ 54-1. **Application of term.**—The term "building and loan association," as used in this subchapter, shall apply to and include all corporations, companies, societies, or associations organized for the purpose of making loans to their members only, and of enabling their members to acquire real estate, make improvements thereon and remove encumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes. It shall be unlawful for any corporation, company, society, or association doing business in this State not so conducted to use in its corporate name the term "building and loan association" or "building association," or in any manner or device to hold itself out to the public as a building and loan association. (1905, c. 435, s. 16; Rev., s. 3881; C. S., s. 5169.)

§ 54-2. **Method of incorporation; powers.**—It shall be lawful for any persons in any city, town or county of this State, under any name by them to be assumed, to associate for the purpose of organizing and establishing a homestead and building and loan association, and, being so associated, they shall, on complying with this subchapter, be a body politic and corporate, and as such be capable in law to hold and dispose of property, both real and personal; may have and use a common seal; may choose a presiding and other officers; may enact bylaws for

the regulation of the affairs of such corporation, and compel the due observance of the same by fines and penalties; may sue and be sued, plead and be impleaded, answer and be answered in any court in this State, and do all acts necessary for the well ordering and good government of the affairs of such corporation, and shall exercise all and singular the powers incident to bodies politic and corporate: Provided, that before any such corporation shall be entitled to the privileges of this subchapter it shall file with the clerk of the superior court of the county where such corporation is designed to act a copy of the certificate of incorporation of such corporation, signed by at least seven members, to be recorded in the office of such clerk, and shall pay a tax of twenty-five dollars to the clerk, which tax shall be paid over by the clerk to the treasurer of the county, to the use of the school fund of the county. The clerk shall certify a copy of the charter to the Insurance Commissioner. The clerk shall not issue or record the same until duly authorized to do so by the Insurance Commissioner as hereinafter provided.

(a) Upon receipt of a copy of the certificate of incorporation of the proposed association, the Insurance Commissioner shall at once examine into all the facts connected with the formation of such proposed corporation, including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business for which it is organized, the Insurance Commissioner shall so certify to the clerk of court in the county in which organized, who shall thereupon issue and record such certificate of incorporation. But the Insurance Commissioner may refuse to so certify, if upon examination and investigation he has reason to believe that the proposed corporation is formed for any purpose other than a mutual building and loan business, or that the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation are not such as to command the confidence of the community in which said building and loan association is proposed to be located; or that the public convenience and advantage will not be promoted by its establishment; or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted or appropriated by an existing association in the same county, or so similar thereto as to be likely to mislead the public.

(b) Upon receipt of such certificate from the Insurance Commissioner, the clerk of court shall, if said certificate of incorporation be in accordance with law, issue and cause same to be recorded in the records of his office as hereinabove provided. (1905, c. 435, s. 1; Rev., s. 3877; C. S., s. 5170; 1931, c. 73.)

Cross References.—As to annual license tax, see §§ 54-25 and 105-73. As to power to merge, see § 54-12.1.

Editor's Note.—For brief comment on the 1931 amendment, see 9 N. C. Law Rev. 351.

§ 54-3. Amendments to certificate.—Any addition, alteration or amendment of the certificate of incorporation of any building and loan association shall be made at any annual or special meeting of such association, held in pursuance of the provisions of § 54-10, by a majority of the shareholders present in person or represented by proxy at any such meeting, and any such addition, alteration or amendment shall be signed, certified, and recorded as is provided in § 54-2. (1905, c. 435, s. 2; Rev., s. 3878; C. S., s. 5171; 1939, c. 128, s. 1.)

§ 54-4. Prior amendments validated.—All additions, alterations, or amendments of the certificate of any building and loan association made prior to March 17, 1939, and which failed to comply with all of the provisions of the statutes of North Carolina applicable thereto, be, and the same are hereby declared to be sufficient and valid to the same extent as if the provisions of said statutes had been fully complied with. (1939, c. 128, s. 2.)

§ 54-5. Form of certificate.—Substantially the following form shall be used by associations to be formed under this chapter:

CERTIFICATE OF INCORPORATION

This is to certify that we, the undersigned citizens of the State of North Carolina, hereby associate ourselves into a building and loan association under and by virtue of the provisions of subchapter I, entitled Building and Loan Associations, of chapter 54 of the North Carolina General Statutes, and by this certificate do set forth:

First. The name of said association is to be

Second. The location where its business is to be transacted is in the of in the county of and State of North Carolina, and the principal office of said corporation is to be at No., Street, in the of aforesaid.

Third. The object for which said association is formed is to enable the subscribers hereto to assist each other, and all who may become associated with them, in making loans to its members only, and to enable them to acquire real estate, making improvements thereon and removing encumbrances therefrom by the payment of periodical installments, and to accumulate a fund, to be paid by its members who do not obtain loans for the purposes aforesaid when the funds of said association shall amount to the sum of dollars per share of the first and subsequent classes or series.

Fourth. The amount fixed as the value of each share, when matured or full paid, is to be dollars. The number of shares to be subscribed before said association shall begin business shall be The maximum number of shares in this association at any one time to be in force shall be The number of shares subscribed for by the incorporators is, and the number of shares subscribed for by each of them is as follows:

| NAME | NUMBER OF SHARES |
|--------|------------------|
| | |
|; | |
| | |
| | |
| | |

In witness whereof, we have hereto set our hands and seals, the day of, A. D. 19...

..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)

Signed, sealed, and delivered in the presence of
(1905, c. 435, s. 27; Rev., s. 3879; C. S., s. 5172.)

§ 54-6. **When to begin business.**—Upon filing the certificate of incorporation with the clerk of the superior court of the county where the principal office of the corporation is located, and with the Insurance Commissioner, the company shall become a body politic and corporate, and shall be authorized to begin business, when licensed by the Insurance Commissioner. (Code, s. 2297; Rev., s. 3880; 1907, c. 959, s. 1; C. S., s. 5173.)

§ 54-7. **Chapter on corporations applicable.**—All of the provisions of law relating to private corporations, and particularly those enumerated in the chapter entitled Corporations, not inconsistent with this subchapter, or with the

business of building and loan associations, shall be applicable to building and loan associations. (Rev., s. 3882; C. S., s. 5174.)

§ 54-8. **Charters validated.**—The charters of all building and loan associations heretofore organized are hereby in all respects validated and confirmed, and all such associations shall have the powers and privileges of associations formed under this subchapter. (1905, c. 435, s. 27; Rev., s. 3883; C. S., s. 5175.)

§ 54-9. **May become members of and hold stock in federal home loan bank.**—Any building and loan association heretofore or hereafter organized under the laws of this State may subscribe to, purchase, hold, own and dispose of stock in any federal home loan bank, and may become members of any such bank authorized by or organized under an act of Congress entitled "The Federal Home Loan Bank Act," approved July 22, 1932. (1933, c. 20.)

§ 54-10. **Annual meetings.**—The annual meeting of any such association shall be held at such time and place as shall be fixed in the notice of said meeting. There shall be published once a week for two weeks preceding such meeting, in a newspaper published in the county or town where the association has its principal office, a notice, signed by the secretary, of such meeting, and the time and place where the same is to be held; and such further notice shall be given as the charter or bylaws of the association may require. Notice of special meetings of shareholders shall be given in a like manner. Unless otherwise provided, twenty-five shareholders, present in person or represented by proxy, shall constitute a quorum at any regular or special shareholders' meeting. If no newspaper be published in the county or town in which any association has its principal office, then the notice above provided may be published by posting same at a conspicuous place in the office of the association, and a like notice at the door of the county courthouse. (1933, c. 19.)

§ 54-11. **Conversion of building and loan associations into federal savings and loan associations.**—Any corporation organized and existing under the laws of this State and operating as a building and loan association may convert itself into a federal savings and loan association pursuant to an act of Congress, approved June thirteenth, nineteen hundred and thirty-three, entitled "Home Owners' Loan Act of Nineteen Hundred and Thirty-three," and any amendments thereto, with the same force and effect as though originally incorporated under such act of Congress, and the procedure to effect such conversion shall be as follows:

1. The directors shall submit a plan of conversion to the Insurance Commissioner, and he may approve the same, with or without amendment, or disapprove the plan. If he approve the plan, then same shall be submitted to the shareholders as provided in the next subsection.

2. A meeting of the shareholders shall be held upon not less than ten days' written notice to each shareholder, served personally or sent by mail to the last known address of such shareholder, postage prepaid, such notice to contain a statement of the time, place and purpose for which such meeting is called. It shall be regarded as sufficient notice of the purpose of said meeting if the call contain the following statement: "The purpose of said meeting being to consider the matter of the conversion of this corporation into a federal savings and loan association, pursuant to act of Congress approved June thirteenth, nineteen hundred and thirty-three." The secretary or other officer of the corporation shall make proof by affidavit at such meeting of due service of the notice or call for said meeting.

3. At the meeting of the shareholders of such corporation, called and held as above provided, such shareholders may, by affirmative vote of a majority of shareholders present, in person or by proxy, declare by resolution the determination to convert said corporation into a federal savings and loan association. A copy of the minutes of the proceedings of such meeting of the shareholders certified by the president or vice-president and secretary or assistant secretary of the corpo-

ration shall be filed in the office of the Insurance Commissioner of this State within five days after such meeting, and a like copy shall also be filed in the office of the clerk of the superior court of the county in which such corporation has its principal office. Each of said certified copies when so filed shall be presumptive evidence of the holding and the action of such meeting.

4. Within a reasonable time after the receipt of a certified copy of the minutes of said meeting the Insurance Commissioner shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the conversion and proceedings, and send same to the corporation. Such certificate shall be recorded in the office of the clerk of the superior court of the county in which the corporation has its principal office, and the original shall be held by the corporation. If the commissioner disapproves such proceedings he shall mark the certified copy of minutes in his office disapproved and notify the corporation to that effect.

5. Within sixty days after the approval of the proposed proceedings by the Insurance Commissioner, the officers of said corporation shall take such action, in the manner prescribed or authorized by the laws of the United States, as shall make it a federal savings and loan association, and there shall thereupon be filed in the office of the Insurance Commissioner a copy of the charter or authorization issued to such corporation by the federal home loan bank board, or a certificate showing the organization or conversion of such corporation into a federal savings and loan association, and upon such filing with the Insurance Commissioner the corporation shall cease to be a State corporation and shall be deemed to be converted into a federal savings and loan association.

6. Whenever any such corporation shall so convert itself into a federal savings and loan association it shall thereupon cease to be a corporation under the laws of this State, except that its corporate existence shall be deemed to be extended for the purpose of prosecuting or defending suits by or against it and of enabling it to close its concerns as a State corporation, and to dispose of and convey its property. At the time when such conversion becomes effective all the property of the State corporation, including all its right, title and interest in and to all property of whatever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the federal savings and loan association, which shall have, hold and enjoy the same in its right as fully and to the same extent as the same was possessed, held and enjoyed by the State corporation; and the federal savings and loan association as of the time of the taking effect of such conversion shall succeed to all the rights, obligations and relations of the State corporation.

7. Any such corporation may, instead of effecting the conversion above provided, at a meeting called and held as above outlined, authorize the sale of all or any portion of its assets, subject to the approval of the Insurance Commissioner, to a federal savings and loan association or to a building and loan association of this State, and subject to the approval of the Insurance Commissioner, may authorize the taking of stock in the association so buying the assets in payment thereof; and upon liquidation of the selling corporation the stock so received shall be distributed to its shareholders. In the event such sale shall be authorized, and approved by the Insurance Commissioner, the directors and officers shall have full power and authority to do any and everything necessary to carrying same into effect. (1935, c. 104.)

§ 54-12. Conversion of federal association into State association.—Any federal savings and loan association organized and existing under the Home Owners' Loan Act of one thousand nine hundred and thirty-three, as amended,

may convert into a building and loan association, pursuant to the provisions of this chapter, with the same force and effect as though originally incorporated under the provisions of this subchapter, by complying with the acts of Congress and the requirements of federal regulatory authority, and also by following the procedure as set out below:

1. The directors of such federal savings and loan association shall submit a plan of conversion to the federal home loan bank board (hereinafter referred to as "board") or other federal regulatory authority, and also to the Insurance Commissioner of the State of North Carolina. When such plan has been approved, either with or without amendment by both of said authorities, then said plan shall be submitted to the members of such association as provided in the next subsection.

2. A meeting of the members shall be held upon not less than ten days' written notice to each member, served personally or sent by mail to the last known address of such member, postage prepaid, such notice to contain a statement of the time, place and purpose for which such meeting is called. It shall be regarded as sufficient notice of the purpose of said meeting if the call contain the following statement: "The purpose of said meeting being to consider the matter of the conversion of this association into a building and loan association, pursuant to the provisions of the laws of the State of North Carolina." The secretary or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

3. At the meeting of the members of such association, called and held as above provided, such members may, by affirmative vote of fifty-one per cent or more of members present, in person or by proxy, declare by resolution the determination to convert said association into a building and loan association operating under the laws of this State. A copy of the minutes of the proceedings of such meeting of the members, certified by the president or vice-president and secretary or assistant secretary of the association, shall be filed with the federal home loan bank board within five days after such meeting. Such certified copy, when so filed, shall be presumptive evidence of the holding and the action of such meeting.

4. Within thirty days after the approval of said proceedings by the board, the officers of said association shall file with the clerk of the superior court of the county where such association is designed to act a copy of the certificate of incorporation of such association, signed by at least seven members, to be recorded in the office of such clerk. Such certificate of incorporation shall conform to the provisions of the laws of this State. The clerk shall certify a copy of the certificate to the Insurance Commissioner, and shall not issue or record the same until duly authorized to do so by the Insurance Commissioner. Upon receipt of a copy of the certificate of incorporation the Insurance Commissioner shall at once examine into the facts connected with the conversion of such association, and, if it appears that such association if converted will be lawfully entitled to commence business as a building and loan association pursuant to the laws of this State, the Insurance Commissioner shall so certify to the clerk of the court in the county in which the association will be located, who shall thereupon issue and record such certificate of incorporation. Upon the issuance and recordation of such certificate of incorporation the association shall file with the board a certified copy of same. Thereupon the association shall cease to be a federal savings and loan association and shall be deemed to be converted into a building and loan association under the laws of this State, whose corporate existence shall be deemed then to begin.

5. At the time when the corporate existence of said State association begins all the property of the said federal association, including all its rights, title and interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or trans-

fer, and without any further act or deed, be vested in and become the property of such State association, which shall have, hold and enjoy the same in its own right as fully and to the same extent as if the same was possessed, held or enjoyed by said federal association; and such State association shall be deemed to be a continuation of the entity and the identity of said federal association, operating under and pursuant to the laws of this State, and all the rights, obligations and relations of said federal association to or in respect to any person, estate, or creditor, depositor, trustee or beneficiary of any trust, and in or in respect to any executorship or trusteeship or other trust or fiduciary function, shall remain unimpaired, and such State association, as of said beginning of its corporate existence, shall by operation of this section succeed to all such rights, obligations, relations and trusts, and the duties and liabilities connected therewith, and shall execute and perform each and every such trust and relation in the same manner as if such State association had itself assumed the trust or relation, including the obligations and liabilities connected therewith. (1937, c. 12.)

§ 54-12.1. Merger of building and loan associations. — Any two or more building and loan associations organized or to be organized, or existing under the laws of this State and operating under the provisions of this subchapter, may merge into a single association which may be either one of said merging associations, and the procedure to effect such merger shall be as follows:

1. The directors, or a majority of them, of such associations as desire to merge, may, at separate meetings, enter into a written agreement of merger signed by them, and under the corporate seals of the respective associations, specifying each association to be merged and the association which is to receive into itself the merging association or associations, and prescribing the terms and conditions of the merger and the mode of carrying it into effect. Such merger agreement may provide the manner and basis of converting or exchanging the shares in the association or associations so merged for shares of the same or a different class of the receiving association.

2. Such merger agreement together with the copies of the minutes of the meetings of the respective boards of directors verified by the secretaries of the respective meetings shall be submitted to the Insurance Commissioner, who shall cause a careful investigation and examination to be made of the affairs of the associations proposing to merge, including a determination of their respective assets and liabilities. The reasonable cost and expenses of such examination shall be defrayed by each association so investigated and examined. If, as a result of such investigation, he shall conclude that the shareholders of each of the associations proposing to merge will be benefited thereby, he shall, in writing, approve same, or shall, if he deems that the proposed merger will not be in the interest of all members of the associations so merging, disapprove, in writing, the same. If he approve the merger agreement, then same shall be submitted, within thirty days after notice to such associations of such approval, to the shareholders of each of such associations, as provided in the next subsection.

3. A special meeting of the shareholders of each of said associations shall be held separately upon written notice to each shareholder of not less than twenty days, specifying the time, place and purpose for which such meeting is called and such notice shall be served personally or sent by mail, postage prepaid, to each shareholder at the last known address of such shareholder appearing upon the books of the association; of the time, place and object of which meeting due notice shall be given by publication at least once a week for four successive weeks in one or more newspapers published in the county wherein each such association has its principal office or conducts its business (and if there be no newspaper published in such county then in a newspaper published in an adjoining county). The secretary or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

4. At separate meetings of the shareholders of each of such associations, called and held as above provided, such shareholders representing a majority of the out-

standing shares of stock entitled to vote, by affirmative vote of at least two-thirds of the shareholders present, in person or by proxy, may declare by resolution the determination to merge into a single association upon terms of the merger agreement as shall have been agreed upon by the directors of the respective associations and as approved by the Insurance Commissioner. Members of the associations who do not attend the meetings or who do not vote thereat, shall, if the merger is so approved by the members, be deemed to consent to the merger. Upon the adoption of such resolution, a copy of the minutes of the proceedings of such meetings of the shareholders of the respective associations, certified by the president or vice-president and secretary or assistant secretary of the merging associations, shall be filed in the office of the Insurance Commissioner of this State, within ten days after such meetings, and within fifteen days after the receipt of a certified copy of the minutes of said meetings the Insurance Commissioner shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the merger and send same to each of said associations. Such certificate shall be filed and recorded in the office of the clerk of the superior court of the county or counties in this State in which the respective associations so merged shall have their original certificates of incorporation recorded; provided, that the only fees that shall be collected in connection with the merger of said associations shall be filing and recording fees. When such certificate is so filed, the merger agreement shall take effect according to its terms and shall be binding upon all the members of the associations so merging, and the same shall thence be taken and deemed to be the act of merger of such constituent building and loan associations under the laws of this State, and such record or certified copy thereof shall be evidence of the agreement and act of merger of said building and loan associations and the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such merger. If the Commissioner shall disapprove the proceedings he shall mark the certified copies of the meetings in his office disapproved and notify the associations to that effect.

5. Upon the merger of any association, as above provided, into another:

a. Its corporate existence shall be merged into that of the receiving association; and all and singular its rights, powers, privileges and franchises, and all of its property, including all right, title, interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest or asset of any conceivable value or benefit then existing belonging or pertaining to it, or which would inure to it under an unmerged existence, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of such receiving association which shall have, hold and enjoy the same in its own right as fully and to the same extent as if the same were possessed, held or enjoyed by the association or associations so merged; and such receiving association shall absorb fully and completely the association or associations so merged;

b. Its rights, liabilities, obligations and relations to any person shall remain unchanged, and the association into which it has been merged shall, by the merger, succeed to all the relations, obligations and liabilities, as though it had itself assumed or incurred the same, and no obligation or liability of a member in an association a party to the merger shall be affected by the merger, but the obligations and liabilities shall continue as they existed before the merger, unless otherwise provided in the merger agreement;

c. A pending action or other judicial proceeding to which any association that shall be so merged is a party, shall not be deemed to have abated or to have discontinued by reason of the merger, but may be prosecuted to final judgment, order or decree in the same manner as if the merger had not been made; or the receiving association may be substituted as a party to such action or proceeding, and any judgment, order or decree may be rendered for or against it that might have

been rendered for or against such other association if the merger had not occurred. (1943, c. 450, s. 1.)

ARTICLE 2.

Shares and Shareholders.

§ 54-13. Number of shares and entrance fee prescribed.—Any corporation created under and by virtue of this subchapter shall have power to declare in its certificate of incorporation the maximum number of shares of which the corporation shall consist to be in force at any one time, the par value of the same, to prescribe the entrance fee per share to be paid by each shareholder at the time of subscribing, to regulate the amount of the installments to be paid on each share, and the time at which the same shall be paid and payable: Provided, that not more than one per cent of the par value of each share of stock subscribed may be paid as commissions or other remuneration for the soliciting and sale of stock. (1905, c. 435, s. 3; Rev., s. 3887; C. S., s. 5176; 1931, c. 75.)

Editor's Note.—The 1931 amendment added the proviso. No penalty is attached for violation thereof, but the license of the association might be revoked under the provisions of § 54-28 if any prohibited payments were discovered through the annual

report (see § 54-26) or otherwise. 9 N. C. Law Rev. 351.

Applied in *Dorrity v. Greater Durham Bldg., etc., Ass'n*, 204 N. C. 698, 169 S. E. 640 (1933).

§ 54-14. Different classes of shares; dividends; reserve fund.—Every building and loan association doing business in this State shall be authorized to issue as many series or classes and kinds of shares and at such stated periods as may be provided for in its charter or bylaws: Provided, the dividends on paid-up stock shall be less than the association is earning, and such stock may have the right to share in the dividends between the rate paid and the earned per centum. Every association shall at all times have on hand and unpledged, investments in obligations of the United States government or the government of the State of North Carolina, or stock in the federal home loan bank, or bonds issued by the federal home loan bank, or on deposit in such bank or banks as may have been approved by a majority of the entire board of directors, an amount equal to at least five per centum of the aggregate amount of paid-up stock outstanding, as shown by the books of the association. When the aggregate of investment or funds in hand or on deposit as herein provided falls below the amount required under this section, the association shall make no new real estate loans until the required amount has been accumulated: Provided, that the refinancing, recasting or renewal of loans previously made, and/or loans made as a result of foreclosure sales under instruments held by the interested building and loan association, shall not be considered as new loans within the meaning of this section. (1905, c. 435, s. 6; Rev., s. 3889; 1907, c. 959, s. 3; 1919, c. 179, s. 3; C. S., s. 5177; 1931, c. 107; 1933, c. 26; 1941, c. 67.)

Editor's Note.—The 1933 amendment rewrote this section as changed by the 1931 amendment. And the 1941 amendment inserted the words "and unpledged" near the beginning of the second sentence.

For comment on the 1933 amendment,

see 11 N. C. Law Rev. 207.

Optional payment stock may be issued under this section. *Lumpkin v. Durham Bldg., etc., Co.*, 204 N. C. 563, 169 S. E. 156 (1933).

§ 54-15. Certificate issued and payment enforced.—Any such corporation shall have power to issue to each member a certificate of the shares held by him, and to enforce the payment of all installments and other dues due to the corporation from the members or shareholders by such fines and forfeitures as the corporation may from time to time provide in the bylaws or its certificate of incorporation. (1905, c. 435, s. 4; Rev., s. 3888; C. S., s. 5178.)

§ 54-16. New members admitted.—Any person applying for membership or shares in any corporation after the end of a month from the date of its in-

corporation may be required to pay, on subscribing, such sums or assessments as may from time to time be fixed and assessed in the manner provided by the corporation, in order to place such new member or shareholder on like footing with the original members and others holding shares at the time of such application. (1905, c. 435, s. 5; Rev., s. 3886; C. S., s. 5179.)

§ 54-17. Shareholders equally liable.—All shareholders shall occupy the same relative position as to debts, losses, and profits of the association: Provided, that this shall not prevent the payment of a lesser rate of dividend on paid-up stock as provided in § 54-14, but this provision shall not prevent any association from receiving dues in advance, allowing such a rate of interest for the anticipated payments of dues as may be agreed upon by the directors. No series or class of stock shall be paid off until fully matured: Provided, that this section shall not prevent the cashing in of any stock before maturity. (1905, c. 435, s. 7; Rev., s. 3884; 1907, c. 959, s. 2; 1919, c. 179, s. 2; C. S., s. 5180; 1931, c. 109.)

Editor's Note.—The 1931 amendment rewrote this section. For comment thereon, see 9 N. C. Law Rev. 352.

In General.—In case of the insolvency of a building and loan association, every person having stock therein, whether as creditor or debtor, must be considered a corporator, and every member indebted to it must be treated as a debtor. *Strauss v. Carolina Interstate Bldg., etc., Ass'n*, 117 N. C. 308, 23 S. E. 450 (1895); *Strauss v. Carolina Interstate Bldg., etc., Ass'n*, 118 N. C. 556, 24 S. E. 116 (1896). Such debtors are liable for authorized assessments to cover losses. *New Bern Bldg., etc., Ass'n v. Blalock*, 160 N. C. 490, 76 S. E. 532 (1912).

Where a corporation becomes the holder of stock in a building and loan association,

which becomes insolvent, it may be held liable on the same, as an incorporator, in the association issuing the stock. *Meares v. Monroe Land, etc., Co.*, 126 N. C. 662, 36 S. E. 130 (1900).

Stockholder and Debtor.—Where the borrower from a building and loan association takes out stock, to pay at maturity the debt secured by a mortgage on his building, he occupies, upon the bankruptcy of the association in the hands of a receiver in bankruptcy, two independent relations to the association; that of stockholder, and that of debtor to the association, and he is not entitled to have his payments made on his shares of stock credited to his debt, as against the claims of the other creditors. *Rendleman v. Stoessel*, 195 N. C. 640, 143 S. E. 219 (1928).

§ 54-18. Minors as shareholders.—Minors of the age of twelve years and upwards are authorized and empowered to become shareholders in and buy, sell, hold, pay dues on, withdraw, transfer, and otherwise deal in the shares in any such association in the same manner and with the same powers, rights, and liabilities, force and effect as though such minors were of full age. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this State. (1903, c. 728; 1905, c. 435, s. 1; Rev., s. 3885; C. S., s. 5181; 1939, c. 179.)

Editor's Note.—The 1939 amendment added the second sentence.

This section is a statutory exception to the general rule that contracts of infants are voidable at the option of the infant,

and when so avoided are void ab initio. *Coker v. Virginia-Carolina Joint-Stock Land Bank*, 208 N. C. 41, 178 S. E. 863 (1935).

§ 54-18.1. Shares issued in two or more names.—A single membership in an association may be held by two or more persons and the share or share account certificates may be issued in their names, and in the absence of written instructions to the contrary, consented to by the association, the value of such share or share account certificates and any dividends thereon may be paid by such association to any one or more of such persons whether the others be living or not, and the receipt or acquittance of the person so paid shall fully exonerate and discharge the association from all liability to any person having any interest in such account, and the last survivor of such persons may transfer such membership and the share or share account certificates to himself or any other person. Nothing herein contained shall be construed to repeal or modify any of the provisions of

§ 105-24 relating to the administration of the inheritance tax laws, or provisions of laws relating to inheritance tax, nor shall the provisions herein contained regulate the rights and liabilities of the parties having interest in such share or share account certificates as among themselves but shall regulate, govern and protect the associations in their dealings with members holding share or share account certificates as herein provided, and further provided that the provisions herein shall also apply to members of federal savings and loan associations having their principal offices in this State. (1947, c. 718.)

ARTICLE 3.

Loans.

§ 54-19. **Manner of making loans; security required.**—At such times as the bylaws shall designate, not less frequently than once a month, the board of directors shall hold meetings at which the funds in the treasury applicable for loans may be loaned: Provided, that between meetings of the board of directors any three members of said board may act as an executive committee and may, by unanimous vote, make such loans. Any loans so made or approved by the executive committee shall be reported to the board of directors at its next meeting. No loans shall be made by such association to anyone not a member thereof. Borrowers shall be required to give real estate security, either by way of mortgage or deed of trust, subject only to mortgages or deeds of trust to secure loans made by the association and undue taxes and special assessments: Provided, that the shares of any such association may be received as security for a loan on such shares of an amount not to exceed ninety per centum of the amount paid in as dues on such shares: Provided, further, that bonds issued as general obligations of the United States government and bonds issued as general obligations of the State of North Carolina may be received as security to an amount not exceeding ninety per centum of the face value of such bonds. (1905, c. 435, s. 8; Rev., s. 3890; 1907, c. 959, s. 4; 1919, c. 249; C. S., s. 5182; 1937, c. 11; 1941, c. 65.)

Cross References.—As to investment in bonds guaranteed by United States, see § 53-44. As to loans on mortgages, etc., issued under the Federal Housing Act, see § 53-45.

Editor's Note.—The 1937 amendment rewrote this section, and the 1941 amendment changed the wording of the proviso to the first sentence.

§ 54-20. **Direct reduction of principal.**—The board of directors of any building and loan association, heretofore or hereafter organized under the laws of this State, may, unless specifically prohibited by the certificate of incorporation, constitution or bylaws of the association, by resolution or bylaw, permit borrowing members to repay their indebtedness by a direct monthly or periodical reduction of principal method. In every such case the borrower shall in writing make such agreement with the association relative to the repayment of his indebtedness as the directors may require. The agreement shall stipulate that the borrower or debtor shall make periodical payments, not less frequently than once a month, until such mortgage indebtedness and advances, if any, made by the association for payment of taxes, assessments, insurance premiums and other purposes, as may be owing from the borrower to the association, with interest thereon, shall have been fully paid. The balance of any loan account under such direct reduction of principal method shall be determined monthly, quarterly or semiannually, in order to ascertain the amount then necessary to satisfy in full the mortgage obligation, and when so ascertained such amount shall be the amount due upon said loan at said time to said association or any representative or successor thereof. Any association permitting such method of repayment may adopt a plan by which the interest shall be computed periodically on the preceding balance, and such interest shall be added to that preceding balance, together with any and all advances and other charges above enumerated made for the benefit of the borrower during the said interest period, and then there shall be deducted from the total any and

all payments made by the borrower to the association during said period, or since the preceding balance was set up.

All payments made on a loan under such plan of direct periodical reduction shall be applied first to interest, and then to the principal of advances made for the account of the borrower and charged thereto, and to the principal of the loan. The board of directors may adopt any other direct periodic reduction of principal plan that will require complete repayment of such loans: Provided, no plan of payment shall be adopted that will not mature and pay off the loan within twenty years from the date of the making thereof: Provided further, the board of directors may authorize the renewal or extension of the time of repayment of any loan theretofore made. Every person who has obtained or shall obtain a loan upon this or any other plan, or who has assumed or shall assume payment of a loan theretofore made upon this or any other plan or who shall be obligated upon any loan held by an association, shall be by reason thereof a member of the association making or holding such loan and shall be deemed a member until such loan is fully paid or assumed by another person or persons acceptable to the association. Such association may issue certificates of stock or membership to such member, but certificates shall not be necessary or required. (1937, c. 18; 1945, c. 189, s. 1.)

Editor's Note.—The 1945 amendment substituted the last two sentences of the second paragraph in lieu of the former last sentence which read as follows: "No as-

sociation shall make any loan upon this plan to any person unless he be a member of such association."

§ 54-21. Insured and guaranteed loans.—(a) Notwithstanding any other provisions of law, any such association, incorporated under the laws of this State, is authorized to make any real estate mortgage loan, which is insured or guaranteed, in any manner, in whole or in part, by the United States or any instrumentality thereof, or for which there is a commitment to insure or guarantee; provided, the association making any insured or guaranteed second lien shall also hold the first lien on the property.

(b) And, further, notwithstanding any other provision of law, any such association, incorporated under the laws of this State, is authorized to make any real estate repair or improvement loan under Title I of an Act of Congress of the United States entitled "National Housing Act", as amended, when such loan is insured in whole or in part by the government of the United States or any instrumentality thereof; provided, however, no such loans may be made by any association when the total outstanding balance of principal and interest due the association on such loans shall equal or exceed the sum of its unencumbered contingent reserve and the insurance reserve accumulated to the credit of the association by reason of such loans. (1941, c. 64; 1945, c. 189, s. 2; 1947, c. 694.)

Editor's Note.—The 1945 amendment rewrote this section, and the 1947 amendment added subsection (b).

§ 54-21.1. Purchase of loans.—Any such association, incorporated under the laws of this State, is authorized to invest any funds on hand, in excess of the demands of its shareholders, in the purchase of loans of a type which the association would be permitted to make under this article; provided, that such purchase shall not be made until the purchaser has received the approval of two-thirds (2/3) of the entire membership of the board of directors, in a regular or called session, and provided, that separate appraisals be made on each property involved and a certificate of title be furnished by an approved attorney for the association. (1945, c. 189, s. 3.)

§ 54-21.2. Investments. —Any such association incorporated under the laws of this State is authorized to invest any funds on hand, in excess of the demands of its shareholders, in bonds or evidences of indebtedness of the United States government, or guaranteed by it, and bonds or other evidences of indebted-

ness of the State of North Carolina; provided, that nothing herein shall be construed as altering the provisions of § 54-14. (1945, c. 189, s. 4.)

§ 54-22. Repayment at any time.—Any member of such association who shall borrow from it shall have the right at any time prior to the maturing of the shares pledged as collateral for such loan to pay off and discharge his loan by paying the amount received by him, including the cost and expenses of making the loan, if the same has been deducted therefrom, with interest at the rate of six per cent per annum on the whole sum received by him to the date of settlement and all fines and dues then remaining unpaid. Upon such settlement he shall be credited with only the withdrawal value of his shares as fixed by the charter or bylaws, or by the directors of such association. In case of default by a shareholder who has borrowed from the association and a foreclosure of his mortgage or deed of trust, the amount of his indebtedness to such association shall be ascertained in the manner provided by this section. (1905, c. 435, s. 9; Rev., s. 3891; C. S., s. 5183.)

Cross Reference.—As to interest and usury laws in general, see § 24-1 et seq.

Stockholder Cannot Escape Payment of Losses.—Before availing himself of the privileges provided by this section the stockholder must have paid any assessments to meet losses of the corporation. *New Bern Bldg., etc., Ass'n v. Blalock*, 160 N. C. 490, 76 S. E. 532 (1912). See also *Mears v. Davis*, 121 N. C. 126, 28 S. E. 188 (1897).

Usury.—An illegal transaction cannot be settled. *Dickerson v. Bldg. Ass'n*, 89 N. C. 37 (1883). And the usury laws apply to the same extent as to natural persons. *Craven v. Ry. Co.*, 77 N. C. 289 (1877). These laws will be found as § 24-1 et seq. of the General Statutes, and they cannot be changed by special legislation. *Rowland v. Old Dominion Bldg., etc., Ass'n*, 116 N. C. 877, 22 S. E. 8 (1895). No subterfuge such as calling the charges "fines," "dues," etc., or calling the borrower a partner will prevent the transaction from being usurious. *Mills v. Bldg. Ass'n*, 75 N. C. 292 (1876); *Hollowell v. Southern Bldg., etc., Ass'n*, 120 N. C. 286, 26 S. E. 781 (1897). A full exposition of usury will be found in the notes to § 24-2, and the principles there stated are applicable when usury is charged by a building and loan association.

Same—Effect.—As stated in the notes to § 24-2 the effect of usury is the forfeiture of the entire interest, and when already paid the recovery back of twice the amount of interest. Cases applying this principle to building and loan associations

are: *Smith v. Old Dominion Bldg., etc., Ass'n*, 119 N. C. 249, 26 S. E. 41 (1896); *Hollowell v. Southern Bldg., etc., Ass'n*, 120 N. C. 286, 26 S. E. 781 (1897); *Cheek v. Iron Belt Bldg., etc., Ass'n*, 126 N. C. 242, 35 S. E. 463 (1900).

This rule is qualified, however, by the equitable doctrine that where the borrower seeks an affirmative relief, such as to prevent the foreclosure of his mortgage, equity will make payment of a legal rate of interest a prerequisite to the grant of relief. This principle is fully explained in the note to § 24-2. Building and loan association cases applying the same are: *Rowland v. Old Dominion Bldg., etc., Ass'n*, 118 N. C. 173, 24 S. E. 366 (1896); *Williams v. Maxwell*, 123 N. C. 586, 31 S. E. 821 (1898).

Forfeiture of Mortgage on Default.—A contract, by which the stock, taken out by a borrower and assigned to the association, when the mortgage is executed, is forfeited to the association on default, without allowance of credit on the mortgage for the payments made on the stock, is unconscionable, and, though upheld by the laws of the association's own state, will not be enforced in North Carolina. *Rowland v. Old Dominion Bldg., etc., Ass'n*, 116 N. C. 877, 22 S. E. 8 (1895).

Refusal to Make Loan.—On the association's refusal to make a loan to a subscriber, he is entitled to recover back money paid for shares of stock in the association. *Fagg v. Southern Bldg., etc., Ass'n*, 113 N. C. 364, 18 S. E. 655 (1893).

§ 54-23. Power to borrow money.—Any such association may in its certificate of incorporation, constitution or bylaws authorize the board of directors from time to time to borrow money, and the board of directors may from time to time, by resolution adopted by a vote of at least two-thirds of all the directors and duly recorded on the minutes, borrow money for the association on such terms and conditions as they may deem proper; but the total amount of money so bor-

rowed shall at no time exceed thirty-five per centum of the gross assets of such association. In order to secure obligations for money borrowed under the provisions of this section, any such association may assign its notes, bonds and mortgages and/or other property, including the right to repledge the shares of stock pledged as collateral security, without securing the consent of the owner thereto, as security for the repayment of its indebtedness as evidenced by its bond, obligation or note given for such borrowed money. (1905, c. 435, s. 10; Rev., s. 3892; 1909, c. 898; 1911, c. 61; 1913, c. 21; C. S., s. 5184; 1933, c. 18; 1941, c. 66.)

Editor's Note.—The 1933 amendment rewrote this section. For comment, see 11 N. C. Law Rev. 208.

The 1941 amendment substituted "thirty-five" for "thirty" in the last clause of the first sentence and omitted from the sentence a provision relating to the use of the money borrowed.

ARTICLE 4.

Under Control of Insurance Commissioner.

§ 54-24. Power of Insurance Commissioner.—The Insurance Commissioner of the State is hereby empowered and directed to perform all the duties and exercise all the powers as to building and loan associations, unless herein otherwise provided. (1905, c. 435, s. 24; Rev., s. 3893; C. S., s. 5185.)

§ 54-25. Annual license fees.—All domestic building and loan associations shall pay an annual license fee of twenty-five dollars and may be licensed upon filing with the Insurance Commissioner an application in such form as he may prescribe. Such license fee shall be used to defray the expenses incurred by the Insurance Commissioner in supervising building and loan associations. (1919, c. 179, s. 1; C. S., s. 5186.)

Cross Reference.—As to additional license tax, see § 105-73.

§ 54-26. Statement filed by association.—Every association doing business under this subchapter shall file in the office of the Insurance Commissioner, on or before the first day of February in each year, in such form as he shall prescribe, a statement of the business standing and financial condition of the applicant on the preceding thirty-first day of December, signed and sworn to by the principal, or chief managing agent, attorney, or officer thereof, before the Insurance Commissioner, or before a commissioner of affidavits for North Carolina, or before some notary public. (1905, c. 435, s. 11; Rev., s. 3894; 1907, c. 959, s. 5; C. S., s. 5187.)

§ 54-27. Statement examined, approved, and published; fees.—It shall be the duty of the Insurance Commissioner to receive and thoroughly examine each annual statement required by the subchapter, and if made in compliance with the requirements thereof, to publish an abstract of the same in one of the newspapers of the State, to be selected by the general agent or attorney making such statement, and at the expense of his principal. The Commissioner of Insurance shall collect a fee of five dollars from each association filing such statement, and the fees shall be paid into the State treasury to be credited to the general fund. (1905, c. 435, s. 12; Rev., s. 3895; C. S., s. 5188; 1945, c. 635.)

Editor's Note.—The 1945 amendment rewrote the second sentence.

§ 54-28. License revoked.—If the Insurance Commissioner shall become satisfied at any time that any statements made by any association licensed under this subchapter are untrue, or in case a general agent shall fail or refuse to obey the provisions of this subchapter, or if upon examination the Insurance Commissioner is of opinion that such association or company is insolvent, or has exceeded its powers, or has failed to comply with any provisions of law, or its mode of busi-

ness is not feasible for the purposes of carrying out successfully its plan, or that its condition is such as to render its further proceedings hazardous to the stockholders, he shall thereupon have power to revoke and cancel such license. (1905, c. 435, s. 13; Rev., s. 3896; 1907, c. 959, s. 6; C. S., s. 5189.)

§ 54-29. Examinations made; expense paid.—If at any time the Insurance Commissioner has good reason to think that the standing and responsibility of any building and loan association or company doing business in this State, or its mode of business, is of a doubtful character, or in his discretion whenever he deems it prudent to do so, it shall be his duty to examine and investigate everything relating to the business of such company, and to that end he is hereby authorized, if he deem it advisable, to appoint a suitable and competent person to make such investigation, who shall file with the Insurance Commissioner a full report of his finding in such case. The expenses and cost of such examination shall be defrayed by the company or association subjected to investigation, and each company or association doing business in this State shall stipulate in writing, to be filed with the Insurance Commissioner, that it will pay all reasonable cost and expenses of such examination when it shall become necessary. (1905, c. 435, ss. 14, 15; Rev., s. 3897; 1919, c. 179, s. 4; C. S., s. 5190.)

§ 54-30. Failing to exhibit books or making false statement a misdemeanor.—If any person, having in his possession or control any books, accounts, or papers of any building and loan association licensed by law, shall refuse to exhibit the same to the Insurance Commissioner, or his agents on demand, or shall knowingly or willfully make any false statement in regard to the same, he shall be guilty of a misdemeanor, and fined and imprisoned, at the discretion of the court. (1893, c. 434; 1899, c. 164; Rev., s. 3329; C. S., s. 5191.)

§ 54-31. Agent must obtain certificate.—It shall be unlawful for any person to solicit business or act as agent for any building and loan association or company without having procured from the Insurance Commissioner a certificate that such association or company for which he offers to act is duly licensed by the State to do business for the current year in which such person solicits business or offers to act as agent. The fee for such license shall be \$2.50, to be paid to the Insurance Commissioner at the time the certificate is issued; and no other license or fee shall be required for said business of an agent or solicitor so licensed. (1895, c. 444, s. 3; 1899, c. 154, s. 2, subsec. 20; Rev., s. 3898; 1907, c. 959, s. 7; C. S., s. 5192; 1933, c. 17.)

Editor's Note.—The 1933 amendment added the second sentence.

§ 54-32. Penalties imposed and recovered.—Every general agent or attorney of any building and loan company or association who shall fail or refuse to perform any duty required of him by this subchapter shall forfeit and pay to the Insurance Commissioner fifty dollars for the State for every such refusal, to be recovered before any justice of the peace at the suit of the Insurance Commissioner. (1893, c. 434, s. 2300g; 1899, c. 154, s. 2, subsec. 20; Rev., s. 3899; C. S., s. 5193.)

§ 54-33. Notice required before appointment of receivers.—No judge or court shall appoint a receiver for any building and loan association organized and incorporated under the laws of this State unless five days' advance notice of the motion, petition or application for appointment of a receiver shall have been given to such association and to the Insurance Commissioner of the State. (1933, c. 38.)

Editor's Note.—See 11 N. C. Law Rev. 208.

ARTICLE 5.

Foreign Associations.

§ 54-34. **Allowed to do business.**—A building and loan association of another state may be admitted to transact business in this State in the manner hereinafter provided, and no association not so admitted shall transact business in this State. (1905, c. 435, s. 17; Rev., s. 3900; C. S., s. 5194.)

§ 54-35. **Copy of charter and list of officers filed.**—Application for authority to transact business in this State shall be made to the Insurance Commissioner, and on making such application every such association shall file with the Insurance Commissioner a duly authenticated copy of its charter or certificate of incorporation, its constitution and bylaws, and thereafter certified copies of all amendments thereto, the names and addresses of its officers and directors, the compensation paid each officer, and a report of its condition, in such form as may be prescribed by the Insurance Commissioner, which shall be verified by oath of such officers and other persons as the Commissioner shall designate, and the Commissioner shall furnish blank forms for the report required, and may call for additional reports at such other times as may seem to him expedient. (1905, c. 435, s. 19; Rev., s. 3902; C. S., s. 5195.)

§ 54-36. **License granted.**—If it shall appear to the Insurance Commissioner by the report aforesaid and by an examination of the affairs of such association that it has good assets of sufficient value to cover all liabilities, and that its methods of doing business are safe and not contrary to the laws governing building and loan associations of this State, it may be admitted to transact business in this State upon a certificate of authority to be issued by the Insurance Commissioner, which shall only be issued when such association shall have complied with the further requirements of this article. (1905, c. 435, s. 20; Rev., s. 3903; C. S., s. 5196.)

§ 54-37. **Securities deposited.**—The Insurance Commissioner before issuing the certificate of authority aforesaid shall require every such association to deposit with the Commissioner such securities as he may approve, amounting to at least thirty thousand dollars, which securities shall be held by him in trust for the exclusive benefit and security of the creditors and shareholders of such association resident in this State, and he shall have authority to require it to deposit additional securities and to order a change in any of the securities so deposited at any time, and no change or transfer of the same shall be made or be effectual without his consent. Such deposit shall be maintained intact in the full sum required at all times, but the association making such deposit, so long as it shall continue solvent and comply with all the provisions of this subchapter applicable to it, may receive the dividends or interest on the securities deposited, and may from time to time, with the assent of the Commissioner, withdraw any of such securities on depositing with the Commissioner other like securities the par value of which shall be equal to such as may be withdrawn. (1905, c. 435, s. 21; Rev., s. 3904; C. S., s. 5197.)

§ 54-38. **Annual certificate; service of process.**—Such certificate of authority shall be for the current year only, and shall not be issued until such association shall, by a duly executed instrument filed with the Insurance Commissioner of the State, constitute the Insurance Commissioner and his successors in office its true and lawful attorney, upon whom all original process in any action or legal proceedings against it may be served, and therein shall agree that any original process against it which may be served upon the Commissioner shall be of the same force and validity as if served on the association, and that the authority thereof shall continue in force irrevocable so long as any liability of the association remains outstanding in this State. The service of such process shall be made

by leaving a copy of the same in the office of the Insurance Commissioner, with a fee of two dollars, to be taxed in the plaintiff's costs. When any original process is thus served, the Commissioner, by letter directed to the secretary, shall within two days after such service forward to the secretary a copy of the process served upon him, and such service shall be deemed sufficient service upon the association. The Commissioner shall keep a record of all such process, showing the day and hour of service. (1905, c. 435, s. 23; Rev., s. 3906; C. S., s. 5198.)

§ 54-39. Agent must have certificate of license; fees.—It shall be unlawful for any person to solicit business or act as agent for any foreign building and loan association or company doing business in this State without having first procured from the Insurance Commissioner a certificate that such association or company for which he offers to act is duly licensed by the State to do business for the current year in which such person solicits business or offers to act as agent. The Insurance Commissioner shall be entitled to a fee of one dollar for issuing each such certificate, to be paid by the company for which the same was issued. Any person violating the provisions of this section shall be guilty of a misdemeanor. (1895, c. 444, s. 3; 1905, c. 435, s. 18; Rev., ss. 3327, 3901; C. S., s. 5199.)

§ 54-40. Fees and expenses.—Every such association shall pay for filing a certified copy of its charter or certificate of incorporation twenty dollars; for filing original annual reports, twenty dollars; for certificate of authority, annually, two hundred and fifty dollars; for certificate for each agency, five dollars; and shall defray all expenses incurred in making any examination of its affairs as herein provided for; and the Insurance Commissioner may maintain an action in the name of the State against such association for the recovery of such expenses in any court of competent jurisdiction. (1905, c. 435, s. 22; Rev., s. 3905; C. S., s. 5200.)

§ 54-41. All contracts deemed made in this State.—Any contract made by any foreign association with any citizen of this State shall be deemed and considered a North Carolina contract, and shall be so construed by all the courts of this State according to the laws thereof. (1905, c. 435, s. 26; C. S., s. 5203.)

Foreign building and loan associations are subject to the State usury laws where loans are made at the home office. *Rowland v. Old Dominion Bldg., etc., Ass'n*, 115 N. C. 825, 18 S. E. 965 (1894); *Merooney v. Atlanta Bldg., etc., Ass'n*, 116 N. C. 882, 21 S. E. 924 (1895).

ARTICLE 6.

Withdrawals.

§ 54-42. Month's notice required for withdrawals.—Any shareholder in a building and loan association may withdraw all or any part of his or her holdings of unpledged or unhypothecated stock in such association by giving to the secretary of such association one month's written notice of his or her intention so to do, and the right of such shareholder to make such withdrawal shall accrue one month after the giving of such notice, subject to the conditions set out in § 54-43. (1933, c. 122, s. 1.)

Editor's Note.—See 11 N. C. Law Rev. 207, for review of this section and § 54-43.

§ 54-43. Withdrawal or maturity fund.—Whenever any shareholder whose stock has matured or whose right to withdraw his or her stock has accrued, as set out in § 54-42, has not been paid because of insufficiency of funds in the treasury of the association, the secretary of said association shall, under instruction from the directors, create a separate fund to be known as the "withdrawal or maturity fund" and into such fund shall be paid one-half of the net receipts of the association monthly. Net receipts shall mean the receipts of the

association from interest, installments, rent and other revenue producing sources, diminished by the expenses of the association, and by any sums directed by the board of directors to be set apart and held separately for the purpose of meeting bills payable or notes payable at the maturity thereof. From time to time as the board of directors may direct, the secretary shall make an equitable and ratable distribution of the funds in said "withdrawal or maturity fund" to the stockholders whose right to receive payment from said fund has accrued, as hereinbefore provided, at the date of such distribution. One-half of the net receipts of the association shall be added monthly to such fund so long as there remains any shareholder of the association entitled to receive a portion thereof as aforesaid. No shareholder whose stock has matured or whose right to withdraw his stock has accrued as hereinbefore set out, shall have the right to demand or receive any funds in excess of the amount equitably and ratably distributed as hereinbefore set out except on approval of the board of directors of such association and/or the Insurance Commissioner. (1933, c. 122, s. 2.)

ARTICLE 7.

Statements of Financial Condition of Associations.

§ 54-44. **Derogatory statements.**—Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any building and loan association, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1915, c. 273; C. S., s. 4231; 1921, c. 4, s. 82; 1931, c. 12.)

SUBCHAPTER II.

LAND AND LOAN ASSOCIATIONS.

ARTICLE 8.

Organization and Powers.

§ 54-45. **Application of term.**—The term "Land and Loan Associations" shall apply to and include all corporations, companies, societies or associations organized for the purpose of making loans to their members only, and of enabling their members to acquire real estate, make improvements thereon, and remove encumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, where the principles of building and loan associations and their work are adapted to the use of the farmers and the rural population.

It shall be unlawful for any corporation, company, society, or association doing business in this State not so conducted to use in its corporate name the term "land and loan association," or in any manner or device to hold itself out to the public as a land and loan association. (1915, c. 172, s. 1; C. S., s. 5204.)

§ 54-46. **Incorporation and powers.**—Land and loan associations shall be incorporated, supervised, and be subject to such regulations and have such privileges as are prescribed for building and loan associations under the laws of this State as they now are or may be hereafter enacted, except as prescribed in this article. (1915, c. 172, s. 2; C. S., s. 5205.)

Cross Reference.—As to powers of building and loan associations, see § 54-2.

§ 54-47. **Loans.**—The boards of directors of land and loan associations

may contract for loans to the amount of seventy-five per cent of the securities used by them as collateral, where the loans are on long time (three or more years), and for at least one per cent less than is charged by such associations on their loans to shareholders; and they may make short loans to their shareholders on their shares and personal endorsement or personal property. (1915, c. 172, s. 3; C. S., s. 5206.)

Cross Reference.—As to loans on mortgages, etc., issued under Federal Housing Act, see § 53-45.

§ 54-48. **Reserve associations.**—Associations to be known as “Reserve Land and Loan Associations” may be chartered and licensed as provided in this article, when they are organized and the stock therein is held by local land and loan associations, and shall have such powers, rights, and privileges as are accorded to other domestic associations, and they may conform to such laws, rules, and regulations as may be prescribed by the laws of the United States, or of this State, to enable them to receive moneys, bonds, or securities to be used in loans and to secure the same. Such reserve associations shall be under the supervision of the Insurance Commissioner as are building and loan associations. (1915, c. 172, s. 4; C. S., s. 5207.)

§ 54-49. **Land conservation and development bureau; land mortgage associations.**—Recognizing that agriculture is the most fundamental wealth-producing occupation of the State and that land is the basis of agriculture, the General Assembly of North Carolina does hereby authorize and direct the State Department of Agriculture to establish as a major division of its organization a land conservation and land development bureau. The function of this bureau shall be to promote conservation, rural home ownership, and the development of the land resources of the State through land mortgage associations under the following provisions. (1925, c. 223, s. 1.)

§ 54-50. **Number of incorporators; capital stock.**—Any number of persons, resident freeholders of the State, not less than fifteen, may associate to establish an association on the terms and conditions and subject to the liabilities hereinafter prescribed. The aggregate amount of the capital stock of any such association shall not be less than twenty thousand dollars (\$20,000). Such association shall mean a corporation organized under the laws of the State for the purpose of making loans upon agricultural lands, forest lands and dwelling houses within this State and known as a land mortgage association. (1925, c. 223, s. 2.)

§ 54-51. **Incorporation.**—The articles of incorporation shall be in writing signed and acknowledged by the incorporators and shall contain the following:

(1) The declaration that they are associating for the purpose of forming a land mortgage association under the provisions of this article.

(2) The name of such association, which shall be in no material respect similar to any other association in the same county.

(3) The name of the village, town or city, and the county where such association is to be located.

(4) The amount of capital stock, which shall be divided into shares of one hundred dollars each.

(5) The period for which such association is organized. (1925, c. 223, s. 3.)

§ 54-52. **Organization.**—The incorporators at their first annual meeting shall elect by ballot from their number a board of trustees of not less than six members who shall adopt a code of bylaws and a plan of organization approved by the Commissioner of Agriculture and the Corporation Commission. (1925, c. 223, s. 4.)

§ 54-53. **Corporate powers.**—Said land mortgage association shall have power: (a) To make loans, the conditions of which shall be approved by the Corporation Commission if the security taken therefor is to be used as the basis for a bond issue under subsection (c) hereof, and to accept as security for any such loan a first mortgage upon improved or partially improved agricultural lands within this State. Such loan shall not exceed, however, sixty-five per cent of the value of such real estate so conveyed, according to the appraisal made as herein provided.

(b) To purchase first mortgages, heretofore or hereafter issued against North Carolina agricultural lands, either improved or partially improved, from persons or firms resident of this State or corporations organized under the laws of this State engaged in the colonization or settlement of North Carolina lands and to whom such mortgages were issued, if, after investigation, the plan of settlement or colonization followed by such person, firm or corporation is approved by the Commissioner of Agriculture as beneficial to the settler or colonist, and if the lands against which such mortgages are issued are found by the said Commissioner to be in fact agricultural lands suitable for agricultural purposes and the terms and conditions of the loans made by such person, firm or corporation are just and reasonable, or from banks or trust companies organized under the laws of this State, or of the United States, to do business in this State, to which such mortgages were issued direct by the borrowers. Each such mortgage shall be payable on the amortization plan maturing in not less than twenty years. The request for an investigation leading to such a purchase of mortgages from persons, firms or corporations engaged in the settlement or colonization of North Carolina lands shall be accompanied by a deposit, the amount of such deposit to be determined by the Commissioner of Agriculture. Upon completion of the investigation the Commissioner of Agriculture shall render a statement of expense accompanied by a remittance of any unused balance of such deposit, but no mortgage shall be purchased until the lands against which the same is issued have been appraised as hereinafter provided for the appraisal of land for a loan by the land mortgage association and such mortgage is approved by all members of the loan committee.

(c) To issue bonds secured by the pledge of the mortgage so taken or purchased.

(d) To pledge the notes and mortgages so taken or purchased under the provisions of subdivisions (a) and (b) hereof as security for the bonds of the land mortgage association referred to in subdivision (c) hereof. (1925, c. 223, s. 5.)

Cross References.—As to investment in issued under Federal Housing Act, see § bonds guaranteed by United States, see 53-45.

§ 53-44. As to loan on mortgages, etc.,

§ 54-54. **Restrictions.**—All mortgage obligations acquired by the company shall be subject to the following restrictions:

(a) Each such mortgage shall be a first and valid lien upon improved or partially improved agricultural lands within the State of North Carolina;

(b) Each such mortgage shall be a first and valid lien upon the whole and undivided fee and upon no lesser estate;

(c) Each such mortgage shall be given to secure a principal indebtedness not exceeding in amount fifteen per cent of the capital and surplus of the company;

(d) All such mortgages shall contain provisions for soil conservation;

(e) All such mortgages shall contain provisions for the time of commencing payments for annual or semiannual reduction of the indebtedness secured thereby, subject to the requirements as to repayment of loans and interest hereinafter provided;

(f) The company shall make no loan secured by mortgage of any real estate in which any officer or trustee of the company is interested either directly or indirectly, except upon the approval of two-thirds of all the trustees;

(g) A sufficient amount of the proceeds of any loan made upon lands upon which are buildings in course of construction or upon which land clearing or other improvements are being made shall be retained by the association and paid out only upon construction or improvement vouchers, countersigned by a duly authorized agent of the association. (1925, c. 223, s. 6.)

§ 54-55. **Mortgage forms; approval.**—The mortgages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately protect all parties thereto. The trustees shall provide the forms subject to the joint approval of the Corporation Commission and the Attorney General. (1925, c. 223, s. 7.)

§ 54-56. **Repayment of loan and interest.**—The prospective borrower may be required to pay all expenses incidental to the examination of title and appraisal of the property. The total amount shall include (a) the rate of interest agreed upon; and (b) a payment. (1925, c. 223, s. 8.)

§ 54-57. **Terms of payment.**—A borrower may repay his loan by installments of such frequency and amounts as may be agreed upon: Provided, that not less than one per cent of the original amount of the mortgage shall be paid upon the principal thereof annually, and commencing not later than the sixth year succeeding the year in which the loan was made the borrower may pay a larger installment upon the principal, or the whole of it, at any interest date, such payments to be in amounts equal to additions of one or more principal amortization payments. Such payment may be made in cash, or by tendering at par bonds of the associations. For failure to pay the interest or any installment required by the terms of the loan, the borrower may be fined as the bylaws may prescribe. But the borrower shall never be required to pay more than the specified installment, nor to pay the principal before it is due except as prescribed herein for partial repayment on account of depreciation and for foreclosure by the association. The borrower may on sixty days' notice repay the association his total indebtedness, or, without such notice, upon payment of sixty days' interest upon the principal unpaid. The borrower shall be entitled to a receipt for all installments as paid, and where the repayment is complete to a satisfaction of his note and mortgage. (1925, c. 223, s. 9.)

Cross Reference.—As to satisfaction of mortgages, see § 45-37 et seq.

§ 54-58. **Transfer of mortgaged lands.**—The acquirer of any lands mortgaged to a land mortgage association shall enter at once, on the acquisition of the land, into a written agreement with the association, attested by a notary, or a justice, and assume the personal responsibility for the indebtedness to the association attaching to such lands. This document must be presented to the trustees within fourteen days after demand. (1925, c. 223, s. 10.)

§ 54-59. **Calling in loans before due.**—Every land mortgage association shall have the power to call in loans upon sixty days' notice:

(a) When the person acquiring the lands upon which money has been loaned does not comply with the provisions of § 54-58 and fulfill the obligations incumbent upon him;

(b) When the debtor does not meet the obligation imposed upon him by his contract and the bylaws of the land mortgage association;

(c) When the mortgaged premises become subject to forced sale;

(d) When the mortgaged premises are depreciating in value because of lack of care, of failure to maintain and conserve or from other cause.

The trustees of the association, whenever necessary, shall provide for an inspection of the mortgaged premises by the State Department of Agriculture for

an investigation of the care which is being given said premises, and may employ an expert to inspect the soil with a view of determining whether or not the same is being depleted. (1925, c. 223, s. 11.)

§ 54-60. **Partial recall of debt.**—The association may require a suitable partial repayment of the debt if the mortgaged premises may have at any time become depreciated in value from any cause whatsoever. (1925, c. 223, s. 12.)

§ 54-61. **Foreclosure.**—Whenever any loan is called in and the borrower shall fail to pay the principal and interest due to the association as required by law and the notices given him, the land mortgage association may then foreclose upon the mortgaged premises as for a past due loan. But in no case shall a borrower be liable for a sum greater than the amount of the unpaid portion of the loan with any accretions of interest thereon and expenses incidental to the collection thereof. (1925, c. 223, s. 13.)

§ 54-62. **Appraisal of lands.**—Upon application for a loan the land mortgage association shall cause the lands which it is proposed to mortgage to the association to be appraised by a competent appraiser furnished it by the State Department of Agriculture. (1925, c. 223, s. 14.)

§ 54-63. **Preference prohibited; association borrowing money.**—No land mortgage association, and no officer or agent thereof, shall give any preference to any creditor by pledging any of the assets of such association as collateral security, except that any such association may borrow money for temporary purposes, and may pledge assets of the association as collateral security therefor. Whenever it shall appear that any land mortgage association has borrowed habitually for the purpose of reloaning, the Corporation Commission may require such association to pay off such amount so borrowed. (1925, c. 223, s. 15.)

§ 54-64. **Bond issues.**—(a) The bonds to be issued by any land mortgage association may be issued for such amounts, bearing such serial number, and date or dates, and be payable at such time and times, bear such rate of interest, and be redeemable at maturity or upon notice at such times and in such manner, as the land mortgage association may, subject to the approval of the Banking Commission, deem advisable.

(b) Each land mortgage association shall keep a register for the registration and transfer of bonds issued by it in which it shall register, or cause to be registered, all bonds upon presentation thereof for such purpose; and such register shall contain the post office address of all registered holders of bonds and shall, at all reasonable times, be open to the inspection of the Banking Commission, or any of its deputies, and to the State Treasurer. (1925, c. 223, s. 16.)

§ 54-65. **Deed of trust.**—(a) To secure the payment of such bonds, the land mortgage association shall issue a collateral deed of trust to the State Treasurer, pledging as security for such bonds the notes and mortgages taken or purchased, as provided herein, in an amount equal to or exceeding the aggregate amount of bonds issued or to be issued.

(b) The total amount of bonds actually outstanding shall not at any time exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and moneys as may be on deposit with the State Treasurer under the provisions hereof.

(c) The aggregate amount of the principal of all bonds issued by land mortgage associations and outstanding at any one time shall not exceed twenty times the amount of the capital and surplus of the company. (1925, c. 223, s. 17.)

§ 54-66. **Collaterals deposited with State Treasurer.**—All mortgages pledged to secure the payment of the bonds issued hereunder shall be deposited and left with the State Treasurer. The land mortgage association may, with the

approval of the State Treasurer, remove such mortgages from the custody of the State Treasurer, substituting in place thereof other of its mortgages, or money or State of North Carolina bonds or certificates of deposit, endorsed in blank, issued by State or national banks located in North Carolina, farm mortgage bonds issued under the provisions of the Federal Farm Loan Act approved July seventeenth, one thousand nine hundred and sixteen, or obligations of the United States Government, in an amount equal to or greater than the amount unpaid upon the notes secured by the mortgages withdrawn. (1925, c. 223, s. 18.)

§ 54-67. Redemption of bonds.—(a) Notice of redemption of bonds may on no account be given on the part of the holder thereof, but may be given by the association only for the purpose of affecting redemption in accordance with the conditions of the bonds and as provided by law and the bylaws.

(b) If the land mortgage association shall elect to redeem any bond prior to maturity, six months' notice of redemption shall be given and shall be effected by personal service upon the owner and holder of the bond, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the State Treasurer.

(c) The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice-president at a meeting of the trustees. (1925, c. 223, s. 19.)

Editor's Note.—It would seem that the word "affecting" in subsection (a) should read "effecting," however it appears as "af-

fecting" in the act from which this section was codified.

§ 54-68. Validity of bonds after maturity.—In case the holder of any bond outstanding shall not have presented the same for payment within the period of two years after its maturity or within two years after the date fixed for the redemption, as the case may be, then such bonds shall cease to be a lien upon the mortgages, moneys, and securities pledged to the State Treasurer and deposited with him as security therefor, but such bond shall still constitute, until the statute of limitation running against such bonds shall have expired, a single legal money claim or demand against the land mortgage association issuing the same, and be recoverable from it in a suit at law, and in no event shall any interest be collectible upon such bond after the maturity thereof or after the date fixed for its redemption. (1925, c. 223, s. 20.)

§ 54-69. Bonds as payment.—If the association gives notice to a debtor for repayment of the mortgage loan the latter must pay to the association in cash or in its bonds at par the face of the same so far as it has not yet been covered by his assets in the amortization and payments. (1925, c. 223, s. 21.)

§ 54-70. Bonds as investments.—The bonds of a land mortgage association shall be a legal investment for savings associations, trust companies, or other financial institutions chartered under the laws of this State and shall also be a legal investment for trustees, executors, administrators, or custodians of public or private funds, or corporations, partnerships or associations. (1925, c. 223, s. 22.)

§ 54-71. Applications of earnings; reserve fund.—The gross earnings of the association shall be ascertained annually, and there shall first be deducted therefrom the expenses incurred by the association for the preceding year and the balance thereof shall be set aside as a reserve fund for the payment of contingent losses, to an amount equal to two per cent of the capital stock outstanding, and until such reserve fund equals twenty per cent of the capital stock of such association. (1925, c. 223, s. 23.)

§ 54-72. Restriction on holding real estate.—No land mortgage association shall acquire real estate (other than for the occupation of its offices)

except to protect its interests in case any of the mortgages owned by it are foreclosed and the property therein described sold to pay the indebtedness secured thereby. All real estate so acquired shall be promptly sold. (1925, c. 223, s. 24.)

§ 54-73. **Banking laws applicable.**—The statutes relating to banks and banking in this State, that is, §§ 53-1 to 53-158, in so far as applicable and not in conflict with the provisions hereof shall apply to land mortgage associations. (1925, c. 223, s. 25.)

SUBCHAPTER III.

CREDIT UNIONS.

ARTICLE 9.

Superintendent of Credit Unions.

§ 54-74. **Office created.**—There shall be established in the State Department of Agriculture a superintendent of credit unions and such assistants as may be necessary. (1915, c. 115, s. 1; C. S., s. 5208; 1925, c. 73, s. 4; 1935, c. 87.)

Editor's Note.—The 1925 amendment rewrote this section. Prior to the 1935 amendment, this subchapter was entitled Savings and Loan Associations and the article headings conformed thereto.

§ 54-75. **Duties of the officer.**—The duties of the superintendent of credit unions shall be as follows:

1. To organize and conduct, in the State Department of Agriculture, a bureau of information in regard to co-operative associations and rural and industrial credits.

2. Upon the application of three persons residing in the State of North Carolina, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local credit union in the State.

3. To maintain an educational campaign in the State looking to the promotion and organization of credit unions; and upon the written request of twelve bona fide residents of any particular locality in this State expressing a desire to form a local credit union at such locality, the superintendent or one of his assistants shall proceed as promptly as convenient to such locality and advise and assist such organizers to establish the institution in question.

4. To examine at least once a year, and oftener if such examination be deemed necessary by the superintendent or his assistant, the credit unions formed under this subchapter. A report of such examination shall be filed with the State Department of Agriculture, and a copy mailed to the credit union at its proper address. (1915, c. 115, s. 1; C. S., s. 5209; 1925, c. 73, ss. 2, 3, 5, 6; 1935, c. 87.)

Editor's Note.—The 1925 amendment first clause of this section and made other inserted the words "and industrial" in the changes.

ARTICLE 10.

Incorporation of Credit Unions.

§ 54-76. **Applications filed.**—Seven or more persons employed or residing in the State may become a credit union by making, signing, and acknowledging a certificate which shall contain:

1. The name of the proposed credit union which shall include the words "credit union."

2. A statement that incorporation is desired under this article.

3. The conditions, whether of residence, of occupation, or otherwise, which shall qualify persons for membership.

4. The par value of the shares, which shall not exceed twenty-five dollars.

5. The city, village, or town in which its principal business office is to be located. If it is to be located in an incorporated city, the street address of the city shall be given. If the condition of its membership is employment by a certain individual, copartnership, or corporation, a statement that its office shall be with such individual, co-partnership, or corporation may be substituted for the street address.

6. The number of its directors, not less than five, all of whom must be members of and shareholders in the corporation.

7. The names and post-office addresses of the directors for the first year.

8. The names and post-office addresses of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation. (1915, c. 115, s. 2; C. S., s. 5210; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-77. **Bylaws adopted.**—At the time of filing the certificate the incorporators shall adopt bylaws which shall provide:

1. The name of corporation.

2. The purposes for which it is formed.

3. Qualifications for membership.

4. The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the number of members which constitute a quorum at the meetings, and the regulations as to voting.

5. The number of members of the board of directors, their powers and duties, and the compensation and duties of officers elected by the board of directors.

6. The number of members of the credit committee, their powers and duties.

7. The number of members of the supervisory committee, their powers and duties.

8. The par value of shares of capital stock.

9. The conditions upon which shares may be issued, paid in, transferred, and withdrawn.

10. The fines, if any, which shall be charged for failure to meet obligations to the corporation punctually.

11. The conditions upon which deposits may be received and withdrawn. Whether the proposed corporation shall, in addition, have power to borrow funds.

12. The manner in which the funds of the corporation shall be invested.

13. The conditions upon which loans may be made and repaid.

14. The maximum rate of interest that may be charged upon loans, not to exceed, however, the legal rate.

15. The method of receipting for money paid on account of shares, deposits, or loans.

16. The manner in which the reserve fund shall be accumulated.

17. The manner in which dividends shall be determined and paid to members.

18. The manner in which a voluntary dissolution of the corporation shall be effected. (1915, c. 115, s. 2; C. S., s. 5211.)

§ 54-78. **Certificate of incorporation.**—The bylaws acknowledged to have been adopted by all of the incorporators, together with the certificate of incorporation, shall be filed in the office of the superintendent of credit unions who shall approve the certificate of incorporation if he is satisfied that it is in conformity with this subchapter, and shall approve the bylaws if he is satisfied as to the character of the incorporators and that the bylaws are reasonable and will tend to give assurance that the affairs of the prospective credit union will be administered in accordance with this subchapter. Thereupon, the superintendent of credit unions shall issue to the corporation a certificate of approval, annexed to a duplicate of the certificate of incorporation and of the bylaws, which certificate of approval, together with the attached duplicate certificate of incorporation and duplicate bylaws, shall be filed in the office of the clerk of the superior court of the county in which the office of such credit union is situated, and upon

such filing the incorporators shall become and be a corporation. The county clerk shall charge the same filing fee for filing the certificate of approval, certificate of incorporation and bylaws as he is now allowed to charge for filing a certificate of incorporation of a corporation organized under the business corporations law of the State. (1915, c. 115, s. 2; C. S., s. 5212; 1925, c. 73, s. 3; 1935, c. 87.)

Cross Reference.—As to clerk's fee for filing certificate of incorporation, see § 55-159.

§ 54-79. **Amendment of bylaws.**—The bylaws adopted by the incorporators and approved by the superintendent of credit unions shall be the bylaws of the corporation, and no amendment to the bylaws shall become operative until such amendment shall have been approved by the superintendent of credit unions, and a copy thereof certified by him, with a certificate of his approval, shall be filed in the office of the clerk of the superior court of the county where the office of the credit union is located. Such approval may be given or withheld by the superintendent of credit unions at his discretion. The county clerk shall receive the same fee for filing as provided in § 54-78. (1915, c. 115, s. 3; C. S., s. 5213; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-80. **Restriction of use of terms.**—The use by any person, copartnership, association, or corporation except corporations formed under the provisions of this subchapter, of any name or title which contains the words "credit union" shall be a misdemeanor: Provided, that the provisions of this section shall not apply to associations or credit union leagues, the membership of which is composed entirely of corporations formed under the provisions of this subchapter. (1915, c. 115, s. 4; C. S., s. 5214; 1925, c. 73, s. 3; 1935, c. 87; 1941, c. 236.)

Editor's Note.—The 1941 amendment added the proviso.

§ 54-81. **Change of place of business.**—A credit union may change its place of business on the written approval of the superintendent of credit unions, which written approval shall be filed in the office of the superintendent of credit unions and a duplicate of the approval in the office of the clerk of the superior court of the county where its office was located, and a second duplicate in the office of the clerk of the superior court of the county in which the new office is to be located. Such approval of the superintendent may be given or withheld at his discretion. (1915, c. 115, s. 25; C. S., s. 5215; 1925, c. 73, s. 3; 1935, c. 87.)

ARTICLE 11.

Powers of Credit Unions.

§ 54-82. **General nature of business.**—A credit union may receive the savings of its members in payment for shares or on deposit; may loan to its members at reasonable rates of interest not exceeding the legal rate, or may invest as hereinafter provided the funds so accumulated, and may undertake such other activities relating to the purpose of the corporation as its bylaws may authorize. (1915, c. 115, s. 5; C. S., s. 5216; 1925, c. 73, s. 3; 1935, c. 87.)

Editor's Note.—For act relating to Employees' Credit Union, see Session withdrawal of deposits from the State Laws 1943, c. 781.

§ 54-83. **Receiving deposits.**—A credit union may receive on deposit the savings of its members and also nonmembers in such amounts and upon such terms as the board of directors may determine and the bylaws shall provide. (1915, c. 115, s. 16; C. S., s. 5217; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-84. **Borrowing money.**—If the bylaws so provide, a credit union

shall have power to borrow money from any source in addition to receiving deposits, but the aggregate amount of such indebtedness shall not at any one time exceed more than four (4) times the sum of its capital, surplus and reserve fund. (1915, c. 115, s. 17; C. S., s. 5218; 1925, c. 73, s. 10; 1935, c. 87.)

§ 54-85. Authority to execute contracts of guaranty in certain cases.

—A credit union may execute such contracts of guaranty as may be necessary to procure credit for its members: Provided, that the said contracts of guaranty shall not place on the said local credit union a liability arising in any one year in excess of ten (10) per cent of the total credit under the said contracts of guaranty handled through that association in a particular year; and provided further, that all such contracts shall be approved by the superintendent of credit unions and each such contract must bear his approval in writing before becoming effective. In assuming such liability the said credit union may require of the individual members being served such security as the board of directors of each such credit union may determine upon. (1925, c. 73, s. 11; 1935, c. 87.)

§ 54-86. Investment of funds.—The capital, deposits, undivided profits and reserve fund of the corporation may be invested in one of the following ways, and in such way only:

1. They may be lent to the members of the corporation in accordance with the provisions of this subchapter.
2. They may be deposited to the credit of the corporation in savings banks, credit unions, building and loan associations, State banks or trust companies, incorporated under the laws of the State, or in national banks located therein.
3. A credit union shall keep on deposit at interest in any of such depositories as are enumerated in the next preceding paragraph so much of the reserve fund and capital stock as shall equal five (5) per cent of the total liabilities.
4. Not more than ten (10) per cent of the capital stock and reserve fund of a credit union may be invested in the stock of another local credit union and not more than twenty-five (25) per cent of the capital stock and reserve fund of a local association may be invested in the stock of a central association. (1915, c. 115, s. 18; 1917, c. 232, ss. 2, 3; C. S., s. 5219; 1925, c. 73, ss. 12, 13, 14; 1935, c. 87; 1939, c. 400, s. 1; 1947, c. 781.)

Cross Reference.—As to investment in bonds guaranteed by the United States, see § 53-44.

Editor's Note.—The 1925 amendment inserted the words "building and loan associations" in clause 2, and made changes

in clauses 3 and 4. The 1939 amendment changed clause 3, and the 1947 amendment struck out the former second sentence of clause 2 relating to the preference of bank deposits.

§ 54-87. Loans.—1. To Members.—A credit union may lend to its members for such purposes and upon such security and terms as the bylaws shall provide and the credit committee shall approve; but security must be taken for any loan in excess of fifty dollars. An endorsed note shall be deemed to be security within the meaning of this section.

2. Installment Loans.—A member who needs funds with which to purchase necessary supplies for growing crops may receive a loan in fixed monthly installments instead of in one sum.

3. Loans to Members of Committee.—The supervisory committee shall appoint a substitute to act on the credit committee in the place of any member in case such member makes application to borrow money from the credit union or becomes surety for any other member whose application for a loan is under consideration.

4. Loans to Persons Not Members Forbidden.—All officers and members of any committees in any way knowingly permitting or participating in making a loan of funds of a credit union to one not a member thereof shall be guilty of a misdemeanor. The credit union shall have the right to recover the amount of

such illegal loans from the borrower or from any officers or members of committees who knowingly permitted or participated in the making thereof, or from all of them jointly.

5. Repayment of Loans.—A borrower may repay the whole or any part of his loan on any day on which the office of the corporation is open for the transaction of business. (1915, c. 115, s. 19; 1917, c. 232, s. 4; C. S., s. 5220; 1925, c. 73, s. 3; 1935, c. 87.)

Cross Reference.—As to loans on mortgages, etc., issued under Federal Housing Act, see § 53-45.

§ 54-88. Rate of interest; penalty.—No corporation organized pursuant to this subchapter shall directly or indirectly charge or receive any interest, discount, or consideration, other than the entrance fee, greater than the legal rate.

Any corporation, any person, the several officers of any corporation, and the members of committees who shall violate the foregoing prohibition shall be guilty of a misdemeanor. The corporation shall also be subject to procedure by the superintendent of credit unions as prescribed herein in article fourteen. (1915, c. 115, s. 20; C. S., s. 5221; 1925, c. 73, s. 3; 1935, c. 87.)

Cross Reference.—As to interest and usury laws in general, see § 24-1 et seq.

§ 54-89. Interest or discount rate charged by agricultural association.—An agricultural credit corporation or association, organized under the laws of the State of North Carolina, may charge and collect by way of interest or discount on all loans made for agricultural purposes to farmers, growers and truckers of staple agricultural crops, fruits and vegetables, respectively, or for the purpose of raising, breeding, fattening, or marketing of livestock, a rate of interest or discount not to exceed three per centum per annum in excess of the rate of interest or rediscount rate charged by any federal intermediate credit bank to such agricultural credit corporation or association when rediscounting or purchasing from it the notes of such farmers, growers and truckers: Provided, that the total rate, both interest and rediscount, to the borrower shall not exceed eight per centum (8%) per annum. (1927, c. 101; 1929, c. 43, s. 1; 1931, c. 329.)

Cross Reference.—As to commission in lieu of interest, see §§ 44-57 and 44-58.

§ 54-90. Reserve fund.—All entrance fees, transfer fees, and fines shall, after the payment of organization expenses, be known as reserve income, and shall be added to the reserve fund of the corporation.

At the close of each fiscal year there shall be set apart to the reserve fund twenty per centum of the net income of the corporation which has accumulated during the year. But upon the recommendation of the board of directors, the members at an annual meeting may increase, and whenever such funds equal the amount of the capital may decrease, the proportion of profits which is required by this section to be set apart to the reserve fund. Nor shall the reserve fund in any case exceed the capital of the corporation plus fifty per centum of its other liabilities.

The reserve fund shall belong to the corporation and shall be held to meet contingencies, and shall not be distributed to the members except upon the dissolution of the corporation. (1915, c. 115, s. 21; C. S., s. 5222; 1939, c. 400, s. 2.)

Editor's Note.—The 1939 amendment near the beginning of the second paragraph substituted "twenty" for "twenty-five" graph.

§ 54-91. Dividends.—At the close of the fiscal year a credit union may declare a dividend not to exceed six per cent per annum from the income during the year and which remains after the deduction of expenses, losses, interest on deposits, and the amount required to be set apart to the reserve fund. Dividends shall be paid on all fully paid shares outstanding at the close of the fiscal year,

but shares which become fully paid during the year shall be entitled to a proportional part of such dividend calculated from the first day of the month following such payment in full. (1915, c. 115, s. 22; C. S., s. 5223; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-92. Voluntary dissolution.—At any meeting specially called to consider the subject, three-fourths of the members present and represented may vote to dissolve the corporation and upon such vote shall signify their consent to such dissolution in writing. Such corporation shall then file in the office of the superintendent of credit unions such consent, attested by its secretary or treasurer and its president or vice-president, with a statement of the names and residences of the existing board of directors of the corporation and the names and residences of its officers duly verified. The superintendent of credit unions, upon receipt of satisfactory proof of the solvency of the corporation, shall issue to such corporation, in duplicate, a certificate to the effect that such consent and statement have been filed and that it appears therefrom that such corporation has complied with this section. Such duplicate certificate shall be filed by the corporation in the office of the clerk of the superior court of the county in which the corporation has its place of business, and thereupon such corporation shall be dissolved and shall cease to carry on business except for the purpose of adjusting and winding up of its affairs. The corporation, by its board of directors, shall then proceed to adjust and wind up its business and affairs, with power to carry out its contracts, collect its accounts receivable, and to liquidate its assets and apply the same in discharge of debts and obligations of such corporation, and after paying and adequately providing for the payment of such debts and obligations, each share, according to the amount paid thereon, shall be entitled to its proportion of the balance of the assets. The corporation shall continue in existence for the purpose of paying, satisfying, and discharging any existing debts or obligations, collecting and distributing its assets, and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts and obligations until its business and affairs are fully adjusted and wound up. (1915, c. 115, s. 24; C. S., s. 5224; 1925, c. 73, ss. 3, 15; 1935, c. 87.)

Editor's Note.—The 1925 amendment substituted in the first sentence the words “three-fourths of the members present and represented” in lieu of the words “four-fifths of the entire membership of a corporation.”

§ 54-93. Savings institution; restriction of taxation.—The corporation shall be deemed an institution for savings, and together with all accumulations therein shall not be taxable under any law which shall exempt building and loan associations or institutions for savings from taxation; nor shall any law passed taxing corporations in any form, or the shares thereof, or the accumulations therein, be deemed to include corporations doing business in pursuance of the provisions of this subchapter, unless they are specifically named in such law. The shares of credit unions, being hereby regarded as a system for saving, shall not be subject to any stock-transfer tax either when issued by the corporation or transferred from one member to another. (1915, c. 115, s. 26; C. S., s. 5225; 1925, c. 73, ss. 3, 16; 1935, c. 87.)

Editor's Note.—The 1925 amendment substituted, in the first clause of this section, the words “building and loan associations” for the words “savings banks.”

ARTICLE 12.

Shares in the Corporation.

§ 54-94. Ownership and transfer of shares.—The capital of a credit union shall consist of the payments that have been made to it by the several members thereof on the shares. Shares may be subscribed for and paid in such manner as the bylaws shall prescribe. The credit union shall have a lien on the shares

of any member and upon any dividends payable thereon for and to the extent of any loan made to him and of any dues or fines payable by him. The credit union may, upon the resignation or expulsion of a member, cancel the shares of such member and apply the withdrawal value of such shares towards the liquidation of the member's indebtedness.

A credit union may, if the bylaws so provide, charge an entrance fee for each share subscribed, to be paid by the shareholder upon his election to membership.

Fully paid shares of a credit union may be transferred to any person eligible for membership, upon such terms as the bylaws may provide, and the payment of a transfer fee shall not exceed twenty-five cents per share. (1915, c. 115, s. 13; C. S., s. 5226; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-95. **Shares and deposits for minors and in trust.**—Shares may be issued and deposits received in the name of a minor, and such shares and deposits may, in the discretion of the directors, be withdrawn by such minor or his parent or guardian, and in either case payments made on such withdrawals shall be valid. If shares are held or deposits made in trust, the name and residence of the beneficiary shall be disclosed and the account shall be kept in the name of such holder as trustee for such person. Such shares or deposits may, upon the death of the trustee, be withdrawn by the person for whom the shares were held or for whom such deposits were made, or by his legal representatives. (1915, c. 115, s. 14; C. S., s. 5227.)

§ 54-96. **Fines and penalties.**—For failure by any member of a credit union to meet his payments on obligations when due, such fines and other penalties may be imposed upon the delinquent member as the bylaws provide. Such fines shall not exceed two per centum per month or a fraction thereof on amounts due, except that a minimum fine of five cents may be imposed. (1915, c. 115, s. 15; C. S., s. 5228; 1925, c. 73, s. 3; 1935, c. 87; 1939, c. 400, s. 3.)

§ 54-97. **Liability of shareholders.**—A shareholder of any such corporation, unless the bylaws so provide, shall not be individually liable for the payment of its debts for an amount in excess of the par value of the shares which he owns or for which he has subscribed. (1915, c. 115, s. 26; C. S., s. 5229.)

ARTICLE 13.

Members and Officers.

§ 54-98. **Who may become members.**—The membership of the corporation shall consist of those persons who have been duly elected to membership and who have subscribed for one or more shares and have paid for the same in whole or in part, together with the entrance fee as provided in the bylaws, and have complied with such other requirements as the bylaws may contain. No credit union shall ever pay any commission or offer compensation for the securing of members or on the sale of shares. (1915, c. 115, s. 6; C. S., s. 5230; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-99. **Expulsion and withdrawal of members.**—The board of directors may expel from the corporation any member who has not carried out his engagement with the corporation, or has been convicted of a criminal offense, or neglects or refuses to comply with the provisions of this subchapter or of the bylaws, or who habitually neglects to pay his debts, or shall become insolvent or bankrupt. The members at a regularly called meeting may expel from the corporation any member who has become intemperate or in any way financially irresponsible: no member shall be expelled until he has been informed in writing of the charges against him and an opportunity has been given him, after reasonable notice, to be heard thereon.

A member may withdraw from a credit union by filing a written notice of his intention to withdraw.

The amounts paid in on shares or deposits by an expelled or withdrawing member, with any dividends credited to his shares and any interest accrued on his deposits to the date of expulsion or withdrawal, shall be paid to such member, but in the order of expulsion or withdrawal and only as funds therefor become available, after deducting any amounts due to the corporation by such member. The member shall have no other or further right in the credit union or to any of its benefits, but such expulsion or withdrawal shall not operate to relieve the member from any remaining liability to the corporation. (1915, c. 115, s. 23; C. S., s. 5231; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-100. Meetings; right of voting.—The fiscal year of every such corporation shall end at the close of business on the thirty-first day of December. The annual meeting of the corporation shall be held at such time and place as the bylaws prescribe. Special meetings may be held by order of the directors or of the supervisory committee, and shall be held upon request in writing of ten per cent of the members. Notice of all meetings of the corporation shall be given in the manner prescribed in the bylaws. At all meetings of members or shareholders a member shall have one vote and but one vote, irrespective of the number of shares that may be held by him, and in case of sickness or other unavoidable absence of a member he shall be allowed to vote by proxy in writing, but no member present shall vote more than one such proxy. At any meeting the members may decide upon any question of interest to the corporation, and overrule the board of directors, and by a three-fourths vote of those present and represented, provided the notice of the meeting shall have specified the question to be considered, may vote to amend the bylaws. (1915, c. 115, s. 8; C. S., s. 5232.)

§ 54-101. Election of directors and committees.—1. Number Elected.—At the annual meeting the members shall elect a board of directors of not less than five members, a credit committee and a supervisory committee of not less than three members each. However, in credit unions whose business offices are located in places other than incorporated cities, the board of directors as such may also be the credit committee. Except as herein specified, no member of the board shall be a member of either of such committees, nor shall one person be a member of more than one of such committees. All members of committees and all directors, as well as all officers whom they may elect, shall be sworn, and shall hold their several offices for such term as may be determined by the bylaws.

2. Oath of Office.—The oath required of each director, officer, and member of committee shall be the oath of the individual taking the same that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such corporation, and will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to such corporation, and that he is the owner in good faith and in his own right on the books of the corporation of at least one share therein. Such oath shall be subscribed by the individual making it and certified by the officer before whom it is taken, and shall immediately be transmitted to the superintendent of credit unions and filed and preserved in his office. (1915, c. 115, s. 9; C. S., s. 5233; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-102. Duties of board of directors.—1. Elect Executive Officers.—At their first meeting and at each first meeting in the fiscal year, the board of directors shall elect from their number a president, vice-president, a secretary, and a treasurer, who shall be the executive officers of the corporation. The offices of secretary and treasurer may, if the bylaws so provide, be held by one person.

2. General Management.—The board of directors shall have the general management of the affairs, funds, and records of the corporation, shall meet as often as may be necessary, and, unless the bylaws shall specifically reserve all or any of these duties to the members, it shall be the special duty of the directors:

1. To act upon all applications for membership and the expulsion of members.

2. To fix the amount of the surety bond which shall be required of each officer having the custody of funds.

3. To determine from time to time the rate of interest which shall be allowed on deposits and charged on loans.

4. To fix the maximum number of shares which may be held by and the maximum amount which may be lent to any one member; to declare dividends; and to recommend amendments to the bylaws.

5. To fill vacancies in the board of directors or in the credit committees until the election and qualification of successors.

6. To have charge of the investment of the funds of the corporation except loans to members, and to perform such other duties as the members may from time to time authorize.

3. Compensation.—No member of the board of directors or of the credit or supervisory committees shall receive any compensation for his services as a member of the board or committees. But the officers elected by the board of directors may receive such compensation as the members may authorize. (1915, c. 115, s. 10; C. S., s. 5234.)

§ 54-103. **Duties of credit committee.**—The credit committee shall approve every loan or advance made by the corporation to members. Every application for a loan shall be made in writing and shall state the purpose for which the loan is desired and the security offered. No loan shall be made unless it has received the unanimous approval of those members of the committee who were present when it was considered, who shall constitute at least a majority of the committee, nor if any member of the committee shall disapprove thereof; but the applicant for a loan may appeal from the decisions of the credit committee to the board of directors. The credit committee shall meet as often as may be required after due notice has been given to each member. (1915, c. 115, s. 11; C. S., s. 5235.)

§ 54-104. **Duties of supervisory committee.**—The supervisory committee shall inspect the securities, cash, and accounts of the corporation and supervise the acts of its board of directors, credit committee, and officers. At any time the supervisory committee, by a unanimous vote, may suspend the credit committee or any member of the board of directors, or any officer elected by the board, and by a majority vote may call a meeting of the shareholders to consider any violation of this subchapter or of the bylaws, or any practice of the corporation which, in the opinion of said committee, is unsafe and unauthorized. Within seven days after the suspension of the credit committee, the supervisory committee shall cause notice to be given of a special meeting of the members to take such action relative to such suspension as may seem necessary. The supervisory committee shall fill vacancies in their own number until the next regular meeting of the members.

At the close of each fiscal year the supervisory committee shall make a thorough audit of the receipts, disbursements, income, assets, and liabilities of the corporation for the fiscal year, and shall make a full report thereon to the directors. This report shall be read at the annual meeting of the members and shall be filed and preserved with the records of the corporation. (1915, c. 115, s. 12; C. S., s. 5236.)

ARTICLE 14.

Supervision and Control.

§ 54-105. **Subject to superintendent of credit unions.**—Corporations organized under the provisions of this subchapter shall be subject to the supervision of the superintendent of credit unions. (1915, c. 115, s. 7; C. S., s. 5237; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-106. **Reports; penalties; fees.**—1. Every corporation organized under this subchapter shall, in January and in July of each year, make a report of condition to the superintendent of credit unions giving such information as he shall re-

quire, which reports shall be verified by oath of the treasurer and by oath of a majority of the supervisory committee, and shall make such other and further reports under like oath as the superintendent shall demand at any time.

2. Each credit union applying on or after July first, one thousand nine hundred forty one, for a certificate to do business under the provisions of this subchapter shall, before receiving such certificate, pay into the office of the superintendent of credit unions a charter fee of five dollars (\$5.00).

3. Each credit union subject to supervision and examination by the superintendent of credit unions, including credit unions in process of voluntary liquidation, shall pay into the office of the superintendent of credit unions supervisory fees as follows: (a) two dollars and fifty cents (\$2.50) for the first one thousand dollars (\$1,000.00) of assets and fifty cents (\$.50) for each additional thousand dollars (\$1,000.00) of assets, or fraction thereof, payable during the month of July each year on the basis of total assets as shown by its report of condition made to the superintendent of credit unions as of the previous June thirtieth, or the date most nearly approximating same of each year; and (b) two dollars and fifty cents (\$2.50) for the first one thousand dollars (\$1,000.00) of assets and fifty cents (\$.50) for each additional thousand dollars (\$1,000.00) of assets, or fraction thereof, payable during the month of January each year on the basis of total assets as shown by its report of condition made to the superintendent of credit unions as of the previous December thirty-first, or the date most nearly approximating same of each year: Provided, that no credit union shall be required to pay any supervisory fee until the expiration of twelve months from the date of the issuance of a certificate of incorporation to such credit union.

4. Any such corporation which neglects to make semiannual reports as provided in paragraph 1 of this section, or any of the other reports required by the superintendent of credit unions at the time fixed by the superintendent, shall forfeit to the superintendent of credit unions five dollars (\$5.00) for each day such neglect continues; and, furthermore, the superintendent of credit unions shall have authority, in his discretion, to revoke the certificate of incorporation and take possession of the assets and business of any corporation failing to pay the fees required in this section after serving notice of at least fifteen (15) days upon such corporation of his intention so to do.

5. Moneys collected under this section shall be deposited with the State Treasurer of North Carolina and expended, under the terms of the Executive Budget Act, to defray expenses incurred by the office of the superintendent of credit unions in carrying out its supervisory and auditing functions. (1915, c. 115, s. 7; C. S., s. 5238; 1925, c. 73, ss. 3, 7; 1935, c. 87; 1941, c. 235.)

Editor's Note.—Prior to the 1925 amendment it was required that the report referred to in paragraph 1 should "be verified by the oath of the president, treasurer and secretary, as well as by the oath of a majority of the members of the supervisory committee." Prior to the 1941 amendment annual reports were required. The amendment changed the provision relating to penalties and added paragraphs 2, 3 and 5.

§ 54-107. Annual examinations required.—The superintendent of credit unions shall cause every such corporation to be examined once a year and whenever he deems it necessary. The examiners appointed by him shall be given free access to all books, papers, securities, and other sources of information in respect to the corporation; and for the purpose of such examination the superintendent shall have power and authority to subpoena and examine personally, or by one of his deputies or examiners, witnesses on oath and documents, whether such witnesses are members of the corporation or not, and whether such documents are documents of the corporation or not. (1915, c. 115, s. 7; C. S., s. 5239; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-108. Revocation of certificate; liquidation.—If any such corporation shall neglect to make its annual report, as provided in this article, or any

other report required by the superintendent of credit unions, for more than fifteen days, or shall fail to pay the charges required, including the fines for delay in filing reports, the superintendent of credit unions shall give notice to such corporation of his intention to revoke the certificate of approval of the corporation for such neglect or failure, and if such neglect or failure continues for fifteen days after such notice, the said superintendent shall, at his discretion, revoke the certificate, and he, personally or by one of his deputies, shall take possession of the property and business of the corporation and retain possession until such time as he may permit it to resume business, or until its affairs be finally liquidated as provided in the banking laws of the State. (1915, c. 115, s. 7; C. S., s. 5240; 1925, c. 73, ss. 3, 8; 1935, c. 87.)

Editor's Note.—The 1925 amendment, quired by the superintendent of credit unions, as changed by the 1935 amendment, inserted the words "or any other report re-

§ 54-109. **Deficits supplied; business discontinued.**—If it shall appear to the superintendent of credit unions by any examination or report that any such corporation is insolvent, or that it has violated any of the provisions of this subchapter or any other law of the State, he may, by an order made over his hand and official seal, after a hearing or an opportunity for a hearing given the accused corporation, direct any such corporation to discontinue the illegal methods or practices mentioned in the order to make good any deficit. A deficit, in the discretion of the superintendent of credit unions, may be made good by an assessment on the members in proportion to the shares held by each member. If any such corporation shall not comply with such order within the time stipulated after the same shall have been delivered in person or shall have been mailed to the last address filed by such corporation in the office of the superintendent of credit unions (provided, that not more than thirty (30) days shall be allowed) the superintendent shall thereupon take possession of the property and business of such corporation and retain such possession until such time as he may permit it to resume business or its affairs be finally liquidated, as provided in the banking law of the State. (1915, c. 115, s. 7; C. S., s. 5241; 1925, c. 73, ss. 3, 9; 1935, c. 87.)

Editor's Note.—The 1925 amendment rewrote the third sentence.

ARTICLE 15.

Central Associations.

§ 54-110. **Central association.**—(1) Upon application of seven or more credit unions for a central corporation for the purpose of securing credit and discounting notes with any outside agency, and to act as a clearinghouse in the settlement of these accounts, the superintendent of credit unions shall, upon receipt and investigation of charters and bylaws signed by the secretary-treasurers of the several credit unions, approve same if he is satisfied they are in conformity with and give reasonable assurance that the affairs of the corporation will be administered in accordance with this article.

(2) The procedure and plan of organization, method of operation, officers and their duties, supervision, liquidation and dissolution shall be the same as with any local credit union; except that the membership of a central credit union shall be institutional and only local credit unions can become members, unless the bylaws otherwise prescribe.

(3) Any local credit union can become a member of a central association by subscribing to any number of shares and paying for same, in whole or in part, not to be in excess of twenty-five per cent (25%) of their share capital and reserve fund.

(4) Deposits in the central association may be accepted from any source in such amounts and upon such terms as the board of directors may determine and the bylaws shall prescribe.

(5) The secretary-treasurer shall cast the one vote of local member credit unions in its annual election of officers and at all meetings of the member associations unless the bylaws otherwise prescribe.

(6) A central credit union shall not charge more than three-fourths ($\frac{3}{4}$) of one per cent for discounting paper, provided that no discount rate shall make the interest higher than the legal rate.

(7) Section 54-84 shall not apply to a central association, and such an association shall have power to borrow money from any source in amounts not in excess of ten times the amount of its capital and reserve fund.

(8) A central credit union shall not be taxable under any law which shall exempt any local credit union. (1925, c. 73, s. 17; 1935, c. 87.)

SUBCHAPTER IV.

CO-OPERATIVE ASSOCIATIONS.

ARTICLE 16.

Organization of Associations.

§ 54-111. **Nature of the association.**—Any number of persons, not less than five, may associate themselves as a mutual association, society, company, or exchange, for the purpose of conducting any agricultural, housing, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business on the mutual plan. For the purposes of this subchapter, the words association, company, corporation, exchange, society, or union shall be construed to mean the same; provided that the membership of agricultural organizations incorporated under this subchapter shall consist of producers of agricultural products, handled by such organizations or by organizations owned and controlled by such producers; provided further, that the membership of housing organizations incorporated under this subchapter shall consist only of veterans. (1915, c. 144, s. 1; C. S., s. 5242; 1925, c. 179, ss. 1, 2; 1931, c. 447; 1949, c. 1042, ss. 1, 2(a).)

Editor's Note.—The 1925 amendment substituted "mutual" for "co-operative" throughout this subchapter. It also enlarged the scope of the subchapter by adding to the list of associations, etc., which may be organized hereunder, the following: horticulture, forestry, telephone, elec-

tric light, power, storage, refrigeration, flume, irrigation, water and sewerage. The 1931 amendment added the first proviso to this section, and the 1949 amendment added the last proviso, in addition to inserting "housing" in the list of associations, etc.

§ 54-111.1. **Low-rent veterans' housing projects; nonprofit co-operative housing corporations.**—There may be organized under the laws of this State low-rent veterans' housing projects which may be converted into projects with federal assistance, if and when such federal assistance becomes available; and nonprofit co-operative ownership housing corporations the permanent occupancy of the dwelling of which is restricted to members of such corporation all of whom must be veterans, or a project constructed by a nonprofit corporation organized for the purpose of construction of homes for members of the corporation all of whom shall be veterans, at prices, costs, or charges comparable to the prices, costs, or charges proposed to be charged such members. Provided, however, that nothing contained in this section shall be construed as exempting any property of any such association from ad valorem taxation. (1949, c. 1042, s. 3.)

§ 54-112. **Use of term restricted.**—No corporation or association hereafter organized or doing business for profit in this State shall be entitled to use the term "mutual" as part of its corporate or other business name or title, unless it has complied with the provisions of this subchapter; and any corporation or association violating the provisions of this section may be enjoined from doing busi-

ness under such name at the instance of any shareholder of any association legally organized under this subchapter. (1915, c. 144, s. 18; C. S., s. 5243; 1925, c. 179, s. 1; 1945, c. 635.)

Editor's Note.—The 1945 amendment doing business" for the words "hereinafter substituted, near the beginning of the section, the words "hereafter organized or organized for doing business."

§ 54-113. **Articles of agreement.**—The persons desiring to organize such association shall sign and acknowledge written articles which shall contain the name of the association and the names and residences of the persons forming the same. Such articles shall also contain a statement of the purposes of the association and shall designate the city, town, or village where its principal place of business shall be located. The articles shall also state the amount of authorized capital stock, the number of shares subscribed, and the par value of each. No shareholder in any corporation organized under this subchapter shall be personally liable for any debt of the corporation. (1915, c. 144, s. 2; C. S., s. 5244.)

§ 54-114. **Certificate of incorporation.**—The original articles of incorporation of corporations organized under this subchapter, or a true copy thereof, verified as such by the affidavits of two of the signers thereof, shall be filed with the Secretary of State. A like verified copy of such articles and certificate of the Secretary of State, showing the date when such articles were filed with and accepted by the Secretary of State, within thirty days of such filing and acceptance, shall be filed with and recorded by the clerk of the superior court of the county in which the principal place of business of the corporation is to be located, and no corporation shall, until such articles be left for record, have legal existence. The clerk of court shall forthwith transmit to the Secretary of State a certificate stating the time when such copy was recorded. Upon a receipt of such certificate, the Secretary of State shall issue a certificate of incorporation. (1915, c. 144, s. 3; C. S., s. 5245.)

§ 54-115. **Fees for incorporation.**—For filing the articles of incorporation of corporations organized under this subchapter, there shall be paid the Secretary of State ten dollars and his fees allowed by law, and for the filing of an amendment to such articles, five dollars and his fees allowed by law: Provided, that when the authorized capital stock of such corporations shall be less than one thousand dollars, such fee for filing either the articles of incorporation or amendments thereto shall be two dollars. For recording copy of such articles, the clerk of court shall receive a fee of fifty cents, to be paid by the person presenting such papers for record. (1915, c. 144, s. 4; C. S., s. 5246.)

§ 54-116. **Bylaws adopted.**—At the time of making the articles of incorporation the incorporators shall make bylaws which shall provide:

1. The name of the corporation.
2. The purposes for which it is formed.
3. Qualifications for membership.
4. The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the number of members which shall constitute a quorum at the meetings, and regulations as to voting.
5. The number of members of the board of directors; powers and duties; the compensation and duties of officers elected by the board of directors.
6. In the case of selling agencies or productive societies, regulations for grading.
7. In the case of selling agencies or productive societies, regulations governing the sale of products by the members through the organization.
8. The par value of the shares of capital stock.
9. The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
10. The manner in which the reserve fund shall be accumulated.

11. The manner in which the dividends shall be determined and paid to members.

12. Associations, societies, companies or exchanges, organized hereunder to engage in the telephone or electric light business upon a mutual basis, shall adopt a bylaw limiting the patrons and subscribers to members of the association. (1915, c. 144, s. 5; C. S., s. 5247; 1925, c. 179, s. 4.)

Editor's Note.—The 1925 amendment added subsection 12.

§ 54-117. General corporation law applied; dealing in products of, or renting to, nonmembers.—All mutual associations shall be maintained in accordance with the general corporation law, except as otherwise provided for in this subchapter. And no corporation or association hereafter organized under this subchapter for doing business in this State shall be permitted to deal in the products of nonmembers to an amount greater in value than such as are handled by it for members: Provided, no housing corporation or association hereafter organized under this subchapter shall be permitted to rent to nonmembers for a period longer than ninety days. (1915, c. 144, s. 17; C. S., s. 5248; 1925, c. 179, s. 1; 1931, c. 447, s. 2; 1949, c. 1042, s. 2(b).)

Editor's Note.—The 1931 amendment added the second sentence, and the 1949 amendment added the proviso.

§ 54-118. Other corporations admitted.—All mutual corporations, companies, or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business, shall have the benefit of all of the provisions of this subchapter, and be bound thereby on filing with the Secretary of State a written declaration, signed and sworn to by the president and secretary, to the effect that the mutual company or association has by a majority vote of its shareholders decided to accept the benefits of and to be bound by the provisions of this subchapter. No association organized under this subchapter shall be required to do or perform anything not specifically required herein, in order to become a corporation. (1915, c. 144, s. 16; C. S., s. 5249; 1925, c. 179, s. 1.)

ARTICLE 17.

Stockholders and Officers.

§ 54-119. Certificate for stock fully paid.—Certificates of stock shall not be issued to any subscriber until fully paid, but the bylaws of the association may allow subscribers to vote as shareholders: Provided, part of the stock subscribed for has been paid in cash. (1915, c. 144, s. 11; C. S., s. 5250.)

§ 54-120. Ownership of shares limited.—No shareholder in any such association shall own shares of a greater aggregate par value than twenty per cent of the paid-in capital stock, except as hereinafter provided, or be entitled to more than one vote. A mutual association shall reserve the right of purchasing the stock of any member whose stock is for sale, and may restrict the transfer of stock to such persons as are made eligible to membership in the bylaws. (1915, c. 144, s. 9; C. S., s. 5251; 1925, c. 179, s. 1.)

§ 54-121. Shares issued on purchase of business.—Whenever an association, created under this subchapter, shall purchase the business of another association or person, it may pay for the same in whole or in part by issuing to the selling association or persons shares of its capital stock to an amount which at par value would equal the fair market value of the business so purchased, and in such case the transfer to the association of such business at such valuation shall be equivalent to payment in cash for the shares of stock so issued. (1915, c. 144, s. 10; C. S., s. 5252.)

§ 54-122. **Absent members voting.**—At any regularly called general or special meeting of the shareholders a written vote received by mail from any absent shareholder, and signed by him, may be read in such meeting, and shall be equivalent to a vote of such of the shareholders so signing: Provided, he has been previously notified in writing of the exact motion or resolution upon which such vote is taken, and a copy of same is forwarded with and attached to the vote so mailed by him. In case of sickness or other unavoidable absence of a member, he shall be allowed to vote by proxy in writing; but no member shall vote more than one such proxy. (1915, c. 144, s. 12; C. S., s. 5253.)

§ 54-123. **Directors and other officers.**—Every such association shall be managed by a board of not less than five directors. The directors shall be elected by and from the stockholders of the association at such time and for such term of office as the bylaws may prescribe, and shall hold office for the time for which elected and until their successors are elected and shall enter upon the discharge of such duties as are prescribed in the bylaws; but a majority of the stockholders shall have the power at any regular or special stockholders' meeting, legally called, to remove any director or officer for cause, and fill the vacancy, and thereupon the director or officer so removed shall cease to be a director or officer of the association. The officers of every such association shall be a president, one or more vice-presidents, a secretary and treasurer, who shall be elected annually by the directors, and each of the officers must be a director of the association. The office of secretary and treasurer may be combined, and when so combined the person filling the office shall be secretary-treasurer. (1915, c. 144, s. 6; C. S., s. 5254.)

ARTICLE 18.

Powers and Duties.

§ 54-124. **Nature of business authorized.**—An association created under this subchapter shall have power to conduct any agricultural, housing, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, on the mutual plan. (1915, c. 144, s. 8; C. S., s. 5255; 1925, c. 179, ss. 1, 3; 1949, c. 1042, s. 2.)

Editor's Note.—The 1949 amendment inserted the word "housing."

§ 54-125. **Amendment of articles.**—The association may amend its articles of incorporation by a majority vote of its shareholders at any regular shareholders' meeting, or any special shareholders' meeting called for that purpose, on ten days' notice to the shareholders. The power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares: Provided, the amount of the capital stock shall not be diminished below the amount of the paid-up capital at the time the amendment is adopted. Within thirty days after the adoption of an amendment to its articles of incorporation, an association shall cause a copy of such amendment adopted to be recorded in the office of the Secretary of State and of the clerk of the court of the county where the principal place of business is located. (1915, c. 144, s. 7; C. S., s. 5256.)

§ 54-126. **Apportionment of earnings.**—The directors, subject to revision by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock, not exceeding six per cent per annum, then setting aside not less than ten per cent of the net profits for a reserve fund, until an amount has been accumulated in the reserve fund equal to thirty per cent of the paid-up capital stock, and not less than two per cent thereof for an educational fund to be used in teaching co-operation, and the

remainder of the net profits by uniform dividend upon the amount of purchasers of shareholders and upon the wages and salaries of employees, and one-half of such uniform dividend to nonshareholders on the amount of their purchase, which may be credited to the account of such nonshareholders on account of capital stock of the association; but in selling agencies such as fruit, truck, peanuts, and cotton growers' associations, and in productive associations such as creameries, canneries, warehouses, factories, and the like, dividends shall be prorated on raw materials delivered instead of on goods purchased. In case the association is both a selling and productive concern, or a service and distributing association the dividends may be on both raw material delivered and on goods or service purchased by patrons. (1915, c. 144, s. 13; C. S., s. 5257; 1925, c. 179, s. 5.)

Editor's Note.—The 1925 amendment "or a service and distributing association" inserted, in the last sentence, the words and "or service."

§ 54-127. **Time of distribution.**—The profits or net earnings of such associations shall be distributed to those entitled thereto, at such times as the by-laws shall prescribe, which shall be as often as once in twelve months. (1915, c. 144, s. 14; C. S., s. 5258.)

§ 54-128. **Annual reports.**—Every association organized under the provisions of this subchapter shall annually, on or before the first day of March of each year, make a report to the Secretary of State; such report shall contain the name of the company, its principal place of business in this State, and generally a statement as to its business, showing total amount of business transacted, amount of capital stock subscribed for and paid in, number of shareholders, total expenses of operation, amount of indebtedness or liabilities, and its profits and losses. A copy of such report shall also be filed with the division of markets in the Department of Agriculture. (1915, c. 144, s. 15; C. S., s. 5259.)

SUBCHAPTER V.

MARKETING ASSOCIATIONS.

ARTICLE 19.

Purpose and Organization.

§ 54-129. **Declaration of policy.**—In order to promote, foster, and encourage the intelligent and orderly producing and marketing of agricultural products through co-operation, and to eliminate speculation and waste, and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer, and to stabilize the marketing problems of agricultural products, this subchapter is enacted. (1921, c. 87, s. 1; C. S., s. 5259(a); 1935, c. 230, s. 1.)

Editor's Note.—The 1935 amendment inserted the words "producing and."

For discussion of co-operative marketing, see 1 N. C. Law Rev. 216, and 2 N. C. Law Rev. 222.

Statute Is Valid.—The Co-operative Marketing Act, this subchapter, was construed and its validity sustained in Tobacco Growers Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174 (1923), cited in Tobacco Growers Co-op. Ass'n v. Bissett, 187 N. C. 180, 121 S. E. 446 (1924). See Tobacco Growers Co-op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631 (1924);

Tobacco Growers Co-op. Ass'n v. Battle, 187 N. C. 260, 121 S. E. 629 (1924).

Collateral Attack on Organization.—In Pittman v. Tobacco Growers Co-op. Ass'n, 187 N. C. 340, 121 S. E. 634 (1924), it was held that the validity of the association cannot be assailed by alleging an insufficient number of signers. This is a collateral attack and is not a direct attack by the State upon a quo warrant to vitiate the incorporation.

Withdrawal of Charter.—It was held in Tobacco Growers Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174 (1923), that

since an association formed under this subchapter had no capital, stock, surplus or credit except as given by the statute, the

legislature may withdraw its charter at any time.

§ 54-130. Definitions.—As used in this subchapter—

(a) The term “agricultural products” shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee, and any farm products;

(b) The term “member” shall include actual members of associations without capital stock and holders of stock in associations organized with capital stock;

(c) The term “association” means any corporation organized under this subchapter; and

(d) The term “person” shall include individuals, firms, partnerships, corporations, and associations.

Associations organized hereunder shall be deemed nonprofit, inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers.

This subchapter shall be referred to as the “Co-operative Marketing Act.” (1921, c. 87, s. 2; C. S., s. 5259(b); 1935, c. 436, s. 1.)

Editor’s Note.—The 1935 amendment ceded the word “stock” the second time it eliminated “common” which formerly pre- appears in subsection (b).

§ 54-131. Who may organize.—Five (5) or more persons engaged in the production of agricultural products may form a nonprofit, co-operative association, with or without capital stock, under the provisions of this subchapter. (1921, c. 87, s. 3; C. S., s. 5259(c).)

§ 54-132. Purposes.—An association may be organized to engage in any activity in connection with the producing, marketing or selling of the agricultural products of its members and other farmers, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, of the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein. (1921, c. 87, s. 4; C. S., s. 5259(d); 1933, c. 350, s. 2; 1935, c. 230, s. 2.)

Editor’s Note.—The 1933 amendment the 1935 amendment inserted the word inserted, near the beginning of this section, the words “and other farmers,” and “producing.”

§ 54-133. Preliminary investigation.—Every group of persons contemplating the organization of an association under this subchapter is urged to communicate with the chief of the division of markets, who will inform it whatever a survey of the marketing conditions affecting the commodities to be handled by the proposed association indicates regarding probable success. (1921, c. 87, s. 5; C. S., s. 5259(e).)

§ 54-134. Articles of incorporation.—Each association formed under this subchapter must prepare and file articles of incorporation, setting forth:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The place where its principal business will be transacted.

(d) The term for which it is to exist, not exceeding fifty (50) years.

(e) The names and addresses (not less than five) of those who are to serve as directors for the first term or until the election of their successors.

(f) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the article shall set forth the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and this association shall have the power to admit new mem-

bers who shall be entitled to share in the property of the association with the old members in accordance with such general rule or rules. This provision of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or the vote of three-fourths of the members.

(g) If organized with capital stock, the amount of such stock and the number of such shares into which it is divided and the par value thereof. The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and extent of the preference and the privileges granted to each.

In addition to the foregoing, the petition for articles of incorporation may contain any provision consistent with law with respect to management, regulation, government, financing, indebtedness, membership, the establishment of voting districts and the election of delegates for representative purposes, the issuance, retirement and transfer of its stock, if formed with capital stock, or any provisions relative to the way or manner in which it shall operate with respect to its members, officers, or directors, and any other provisions relating to its affairs; provided that nothing set forth in this paragraph shall be construed as limiting any of the rights or powers otherwise given to such associations.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this State; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this State, and other places, as prima facie evidence of the facts contained therein, and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the chief of the division of markets. (1921, c. 87, s. 8; C. S., s. 5259(f); 1935, c. 230, ss. 3, 4.)

Editor's Note.—The 1935 amendment changed subsection (e) and inserted the next to the last paragraph.

When Agreement Becomes Binding.—The agreement to form an association

under this subchapter becomes binding at once upon its being accepted by the association after incorporation. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174 (1923).

§ 54-135. **Amendments to articles of incorporation.**—The articles of incorporation may be altered or amended at any regular meeting, or any special meeting called for that purpose. An amendment must first be approved by two-thirds of the directors and then adopted by a vote representing a majority of a quorum of the members attending a meeting of which notice of the proposed amendment shall have been given. Amendments to the articles of incorporation, when so adopted, shall be filed in accordance with the provisions of the general corporation law of this State. (1921, c. 87, s. 9; C. S., s. 5259(g); 1935, c. 230, s. 5.)

Cross Reference.—As to filing amendments to articles of incorporation generally, see § 55-31.

Editor's Note.—Prior to the 1935

amendment the adoption was by a majority of all members rather than by a majority of the quorum attending the meeting.

§ 54-136. **Bylaws.**—Each association incorporated under this subchapter must, within thirty (30) days after its incorporation, adopt for its government and management a code of bylaws, not inconsistent with the powers granted by this subchapter. A majority vote of a quorum of the members or stockholders attending a meeting, of which notice of the proposed bylaw or bylaws shall have been given, is sufficient to adopt or amend the bylaws. Each association under its bylaws may also provide for any or all of the following matters:

(a) The time, place, and manner of calling and conducting its meetings.

- (b) The number of stockholders or members constituting a quorum.
- (c) The right of members or stockholders to vote by proxy or by mail, or by both, and the conditions, manner, form, and effects of such votes.
- (d) The number of directors constituting a quorum.
- (e) The qualifications, compensations, and duties and terms of office of directors and officers; time of their election, and the mode and manner of giving notice thereof.
- (f) Penalties for violations of the bylaws.
- (g) The amount of entrance, organization, and membership fees, if any; the manner and method of collection of the same, and the purposes for which they may be used.
- (h) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association, the charge, if any, to be paid by each member or stockholder for services rendered by the association to him, and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.
- (i) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time, and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members, and of the shares of common stock; the conditions upon which, and the time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association, and mode, manner, and effect of the expulsion of a member; manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion of a member the board of directors shall equitably and conclusively appraise his property interests in the association, and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal. (1921, c. 87, s. 10; C. S., s. 5259(h); 1935, c. 230, s. 6.)

Editor's Note.—Prior to the 1935 amendment the majority vote of all members was required instead of a majority vote of a quorum attending the meeting.

§ 54-137. General and special meetings; how called.—In its bylaws each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time, and ten per cent of the members or stockholders may file a petition stating the specific business to be brought before the association, and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least ten days prior to the meeting: Provided, however, that the bylaws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association. (1921, c. 87, s. 11; C. S., s. 5259(i).)

§ 54-138. Conflicting laws not to apply.—Any provisions of law which are in conflict with this subchapter shall not be construed as applying to the associations herein provided for. (1921, c. 87, s. 20; C. S., s. 5259(j).)

§ 54-139. Limitation of use of term "co-operative".—No person, firm, or corporation, or association hereafter organized or doing business in this State shall be entitled to use the word "co-operative" as part of its corporate or other business name or title unless it has complied with the provisions of this subchapter. (1921, c. 87, s. 21; C. S., s. 5259(k).)

§ 54-140. Association heretofore organized may adopt the provisions of this subchapter.—Any corporation or association organized under previously existing statutes may, by a majority vote of its stockholders or members, be brought under the provisions of this subchapter by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors, upon forms supplied by the Secretary of State, to the effect that the corporation or association has by a majority vote of its stockholders or members decided to accept the benefits and be bound by the provisions of this subchapter. Articles of incorporation shall be filed as required in § 54-134, except that they shall be signed by the members of the board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation. (1921, c. 87, s. 24; C. S., s. 5259(1).)

Cross Reference.—As to fee for filing amendment to articles of incorporation, see § 54-144.

§ 54-141. Associations not in restraint of trade.—No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily, nor shall the marketing contracts or agreements between the association and its members, or any agreements authorized in this subchapter be considered illegal or in restraint of trade. (1921, c. 87, s. 26; C. S., s. 5259(m).)

Purpose, Effect and Validity.—This subchapter is an enabling act whereby an organization among tobacco growers may be formed by the voluntary act of those joining therein for handling the product of its members; and the statute, and the organization formed in pursuance thereof, are not objectionable as being in restraint of interstate commerce, or contrary to the law against monopolies or the public policy or Constitution of this State. Tobacco Growers Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174 (1923).

The legal presumption is in favor of the validity of the marketing contract made by a member with a co-operative association, in an action by the latter against the former for its breach, which presumption will only yield when its illegal character

plainly appears; and in this case there is nothing appearing that would indicate the association proposed to sell the member's tobacco for a greater sum than its true or actual value, or that it was acting in violation of the anti-trust law, or in restraint of trade. Tobacco Growers Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174 (1923).

Governmental Control as Affecting.—The governmental control to be exercised as herein prescribed renders the co-operative plan for the protection of its own members incapable of exercise to the extent of a monopoly or restraint of trade prohibited by law. Tobacco Growers Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174 (1923).

§ 54-142. Application of general corporation laws.—The provisions of the general corporation laws of this State, and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this subchapter. (1921, c. 87, s. 28; C. S., s. 5259(o).)

Effect of Period Limiting Existence.—A charter provision that a co-operative marketing association shall exist for five years does not contemplate that the asso-

ciation shall hold over the crops raised in one year for one or more successive years. Tobacco Growers Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174 (1923).

§ 54-143. Annual license fees.—Each association organized hereunder shall pay an annual license fee of ten dollars (\$10), but shall be exempted from all franchise or license taxes. (1921, c. 87, s. 29; C. S., s. 5259(p).)

§ 54-144. Filing fees.—For filing articles of incorporation, an association organized hereunder shall pay ten dollars (\$10); and for filing an amendment

to the articles, two dollars and one-half (\$2.50). (1921, c. 87, s. 30; C. S., s. 5259(q).)

ARTICLE 20.

Members and Officers.

§ 54-145. **Members.**—(a) Under the terms and conditions prescribed in its bylaws, an association may admit as members, or issue common stock, only to persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent part of the crop raised on the leased premises.

(b) If a member of a nonstock association be other than a natural person, such member may be represented by any individual, associate, officer, or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations, organized hereunder. (1921, c. 87, s. 7; C. S., s. 5259(r).)

§ 54-146. **Directors; election.**—(a) The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stockholders from their own number. The bylaws may provide that the territory in which the association has members shall be divided into districts, and that the directors shall be elected according to such districts. In such case the bylaws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The bylaws may provide that primary elections should be held in each district to elect the directors apportioned to such districts, and the result of all such primary elections must be ratified by the next regular meeting of the association.

(b) The bylaws shall provide that one or more directors shall be appointed by the director of agricultural extension or any other public official or commission. The directors so appointed need not be members or stockholders of the association, but shall have the same powers and rights as other directors.

(c) An association may provide a fair remuneration for the time actually spent by its officers and directors in its service. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association, or to any other kind of contract differing from terms generally current in that district.

(d) When a vacancy on the board of directors occurs, other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the bylaws provide for an election of directors by districts. In such case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy: Provided, that this subsection shall not apply to the director or directors appointed under the provisions of subsection (b) of this section: Provided further, that any vacancy occurring in the office of a director appointed under subsection (b) of this section shall be filled in the same manner as the original appointment was made. (1921, c. 87, s. 12; C. S., s. 5259(s).)

§ 54-147. **Election of officers.**—The directors shall elect from their number a president and one or more vice-presidents. They shall also elect a secretary and treasurer, who need not be directors, and they may combine the two latter offices and designate the combined office as secretary-treasurer. The treasurer may be a bank or any depository, and as such shall not be considered an officer, but as a function of the board of directors. In such case the secretary shall perform the usual accounting duties of the treasurer, excepting that the

funds shall be deposited only as authorized by the board of directors. (1921, c. 87, s. 13; C. S., s. 5259(t).)

§ 54-148. Stock; membership certificates; when issued; voting; liability; limitation on transfer of ownership.—(a) When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

(b) No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note, but such retention as security shall not affect the members' right to vote.

(c) Except for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

(d) A co-operative association, incorporated under this subchapter, may fix or limit in its bylaws the amount of stock which one member might own in said association.

(e) No member or stockholder shall be entitled to more than one vote.

(f) Any association organized with stock under this subchapter may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

(g) The bylaws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association, and such restrictions must be printed upon every certificate of stock subject thereto.

(h) The association may at any time, except when the debts of the association exceed fifty per cent (50%) of the assets thereof, buy in or purchase its common stock at book value thereof as conclusively determined by the board of directors, and pay for it in cash within one (1) year thereafter. (1921, c. 87, s. 14; C. S., s. 5259(u); 1935, c. 436, s. 2.)

Editor's Note.—The 1935 amendment rewrote subsection (d).

§ 54-149. Removal of officer or director.—Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by ten per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association, and by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer against whom such charges have been brought shall be informed in writing of the charges previous to the meeting, and shall have an opportunity at the meeting to be heard in person or by counsel, and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the bylaws provide for election of directors by districts, with primary elections in each district, then the petition for removal of a director must be signed by twenty per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director. By a vote of the majority of that district, the director in question shall be removed from office: Provided, that this section shall not apply to directors appointed under subsection (b) of § 54-146. (1921, c. 87, s. 15; C. S., s. 5259(v).)

§ 54-150. **Referendum.**—Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership of the stockholders for decision at the next special or regular meeting: Provided, however, that a special meeting may be called for the purpose. (1921, c. 87, s. 16; C. S., s. 5259(w).)

ARTICLE 21.

Powers, Duties, and Liabilities.

§ 54-151. **Powers.**—Each association incorporated under this subchapter shall have the following powers:

(a) To engage in any activity in connection with the producing, marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members and other farmers; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No such association, during any fiscal year thereof, shall deal in or handle products, machinery, equipment, supplies, and/or perform services for and on behalf of nonmembers to an amount greater in value than such as are dealt in, handled, and/or performed by it for and on behalf of members during the same period.

(b) To borrow money and to make advances to members and other farmers who deliver agricultural products to the association.

(c) To act as the agent or representative of any member or members in any of the above-mentioned activities.

(d) To purchase or otherwise acquire, and to hold, own, and exercise all rights or ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association, or engaged in the financing of the association.

(e) To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the bylaws.

(f) To buy, hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association, or incidental thereto.

(g) To do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition, to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights and powers, and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this subchapter; and to do any such thing anywhere. (1921, c. 87, s. 6; C. S., s. 5259(x); 1933, c. 350, ss. 3, 4; 1935, c. 230, ss. 7-9.)

Cross Reference.—As to formation of subsidiary companies, see § 54-158 and note.

Editor's Note. — Prior to the 1933 amendment the association could not handle the agricultural products of a nonmem-

ber. See 11 N. C. Law Rev. 212. The 1935 amendment inserted the word "producing" near the beginning of subsection (a), changed the last sentence of that subsection and added the last clause of subsection (d).

§ 54-152. **Marketing contract.**—(a) The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricul-

tural products or specified commodities exclusively to or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products of its members, with or without taking title thereto, and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including interest on preferred stock, not exceeding eight per cent per annum, and reserve for retiring the stock, if any; and other proper reserves; and interest not exceeding eight per cent per annum upon common stock.

(b) The bylaws and the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State.

(c) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract, and to a decree of specific performance thereof. Pending the adjudication of such an action, and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member. (1921, c. 87, s. 17; C. S., s. 5259(y).)

Validity of Standard Contract.—The provisions of the standard contract made by the Tobacco Growers Co-operative Association, formed under the provisions of this subchapter, whereby a member agreed to sell and deliver to it all of the tobacco owned and produced by or for him or acquired by him as landlord or lessor during certain years, was held valid and enforceable. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174 (1923); *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 121 S. E. 631 (1924); *Tobacco Growers Co-op. Ass'n v. Battle*, 187 N. C. 260, 121 S. E. 629 (1924).

Remedies for Breach of Contract by Member.—Upon the breach by a member of a co-operative association of a contract for the sole handling of his crop by the association, the recovery of liquidated damages and costs, and equitable relief by injunction to prevent the further breach of the contract, and a decree of specific performance, can be had, and also pending the adjudication of such actions, a temporary restraining order may be had against the member upon the filing of a verified complaint showing the breach of the contract, with the filing of sufficient bond. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174 (1923).

Liquidated Damages.—The fact that a co-operative marketing contract provides for liquidated damages does not give the association an adequate remedy at law against the members selling their tobacco otherwise than as provided in the mar-

keting contract. *Tobacco Growers Co-op. Ass'n v. Pollock*, 187 N. C. 409, 121 S. E. 763 (1924).

Same—Specific Performance. — Injuries from the breach of marketing contract by a member with the Tobacco Growers Co-operative Association, formed under the provisions of this subchapter, cannot be adequately compensated for in damages, and the equitable remedy of specific performance as allowed by the statute will be upheld by the courts. *Tobacco Growers Co-op. Ass'n v. Battle*, 187 N. C. 260, 121 S. E. 629 (1924).

Injunctive Relief. — Upon an alleged breach of a co-operative marketing contract on the part of a member the equitable remedy by injunction is available to the association. *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 121 S. E. 631 (1924).

When Restraining Order Not Continued.—The temporary restraining order obtained under the provisions of the statute will not be continued if the breach of the contract complained of was caused by the association's own default, or if the continuance of the temporary restraining order will work greater injury than its dissolution by the court. *Tobacco Growers Co-op. Ass'n v. Bland*, 187 N. C. 356, 121 S. E. 636 (1924).

The general denial by a co-operative marketing association of owing defendant member anything under the contract, without detailed statement as to the account between them from information available to it, was insufficient against the

defense that the defendant was forced to sell a small portion of crop to maintain his livelihood because of a failure of the association to pay for bulk of crop under contract; and an order of the superior court judge dissolving the restraining order upon defendant's giving a proper bond for plaintiff's protection was proper under the evidence in this case. *Tobacco Growers Co-op. Ass'n v. Bland*, 187 N. C. 356, 121 S. E. 636 (1924).

Same—Effect of Lien on Crop.—The fact that the member of a co-operative association gave a lien on his crop for advancements does not invade the rights of the association under the marketing contract so as to require that an injunction against selling the crops should be continued until the final hearing. *Tobacco Growers Co-op. Ass'n v. Harvey & Son Co.*, 189 N. C. 494, 127 S. E. 545 (1925).

Continuation of Injunction to Final Hearing.—The right given to injunctive relief against a member breaching his contract, upon filing the bond and verified complaint showing such breach, or threatened breach, relates only to the initial process and does not, and is not, intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing upon the issues, under approved principles of law and equity. *Tobacco Growers Co-op. Ass'n v. Bland*, 187 N. C. 356, 121 S. E. 636 (1924).

Where defendant member has admitted breaking his contract with the association, and avows that he expects to continue doing so, a temporary injunction should be continued until the final hearing. *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 121 S. E. 631 (1924).

Where the defendant resists injunctive relief upon the ground that he had not become a member, and the plaintiff's evidence tends strongly to show to the contrary, it was held that the injunction should be continued to the hearing upon the principle that the plaintiff has established an apparent right to the relief sought, and that the writ is reasonably necessary to protect the property pending the inquiry. *Tobacco Growers Co-op. Ass'n v. Battle*, 187 N. C. 260, 121 S. E. 629 (1924); *Tobacco Growers Co-op. Ass'n v. Spikes*, 187 N. C. 367, 121 S. E. 636 (1924).

Same—Safeguarding Rights of Mortgagee.—A preliminary order restraining a member of a co-operative association from disposing of the tobacco embraced in his contract in breach thereof will not be dissolved by reason of a defense set up by

the member that the tobacco was the subject of a lien for supplies necessary for its cultivation. The restraining order should be continued to the hearing, safeguarding the rights of the mortgagee to be asserted by his appropriate action. *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 121 S. E. 631 (1924).

Lack of Justification for Breach of Contract.—A penalty in a small sum erroneously attempted to be imposed on a member by the tobacco marketing association, under its contract for the failure to market the tobacco of his nonmember tenant, is not of sufficient proportionate importance to justify an entire severance of the contract relation by the member thereof. *Tobacco Growers Co-op. Ass'n v. Bland*, 187 N. C. 356, 121 S. E. 636 (1924).

Justification for Breach Shown by Parol.—Where a member of a co-operative marketing association, formed under the statute, resists the performance of marketing his tobacco with the association under the usual and written contract, he may show by parol that he had never been a member thereof or obligated by the contract sued on, for the failure of the association to obtain a certain membership within the territory. *Tobacco Growers Co-op. Ass'n v. Moss*, 187 N. C. 421, 121 S. E. 738 (1924).

Evasive Answer of Member Respecting Breach.—In proceedings for injunctive relief by a co-operative marketing association against a member wherein it definitely alleges that the defendant has breached his contract and declares his purpose to dispose of his tobacco in breach thereof, the defendant's answer not admitting the allegations, but demanding strict proof, is too evasive or illusive to be a denial of plaintiff's allegation, or received as sufficient evidence upon the question of injunctive relief. *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 121 S. E. 631 (1924).

Right of Member to Place Lien on Crop.—In *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 121 S. E. 631 (1924), it was held that a member of the Tobacco Growers Co-operative Association may place a mortgage or crop lien on his crop for the current year for the purpose of enabling him to successfully cultivate and produce the same. The contract between the parties clearly contemplates such a mortgage, and good policy requires that such a privilege should never be withdrawn.

Rights of Lien Holder.—The mortgagee or lien holder for supplies furnished to an

association member to produce his crop has a right to demand and receive of the member, or to enforce delivery by any appropriate procedure, a sufficient amount of the tobacco or other property included in his mortgage, to satisfy his claims to the extent that the same constitute a valid lien superior to the rights and interests of the association under its contract. If such a lien and the amount and extent of it cannot be agreed upon and adjusted it would seem that the lien claimant should become or be made a party of record, that authoritative and final disposition should be made of the matter. *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 121 S. E. 631 (1924).

Liability of Member for Act of Non-member Tenant.—The member of a co-operative association is not liable for a penalty on account of the failure of his tenant to market tobacco through the association until and unless he receives the tenant's crop as payment for rent, etc. He is then liable for as much as is received. *Tobacco Growers Co-op. Ass'n v. Bissett*, 187 N. C. 180, 121 S. E. 446 (1924).

Avoiding Contract for Fraud.—In order to render void for fraud in its procurement a tobacco marketing contract made in conformity with the provisions of this section, it is required that the member seeking to do so must introduce evidence of the fraud he relies on, as well as allege it. *Tobacco Growers Co-op. Ass'n v.*

Chilton, 190 N. C. 602, 130 S. E. 312 (1925); *Simpson v. Tobacco Growers Co-op. Ass'n*, 190 N. C. 603, 130 S. E. 507 (1925).

In order to avoid a written contract, made under this section, for fraudulent misrepresentations of the association's agent, it must not only be shown that the statements complained of were false, but that the plaintiff was at the time ignorant of their falsity and relied thereon to his damage, and he must show facts sufficient to make out a case of fraud with all the material elements required in such instances. *Simpson v. Tobacco Growers Co-op. Ass'n*, 190 N. C. 603, 130 S. E. 507 (1925).

Where an agent of the Tobacco Growers Co-operative Association falsely represents to a prospective member certain material advantages that induce him to sign the membership contract, without affording him, an illiterate man, an opportunity to become informed as to its contents, and he, within a reasonable time afterwards, is informed of this misrepresentation, and requests the agent to take his name off the books as a member and cancel the contract, the law will avoid the contract for the fraud. The cases in which the representations were only promissory in character, not amounting to a factual representation, do not apply. *Dunbar v. Tobacco Growers Co-op. Ass'n*, 190 N. C. 680, 130 S. E. 505 (1925).

§ 54-153. Purchasing business of other associations, persons, firms, or corporations; payment; stock issued.—Whenever an association organized hereunder with preferred capital stock, shall purchase the stock or any property, or any interest in any property of any person, firm, or corporation or association, it may by agreement with the other party or parties to the transaction discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest shares of its preferred capital stock to an amount which at par value would equal a fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for shares of stock issued. (1921, c. 87, s. 18; C. S., s. 5259(z).)

§ 54-154. Annual reports.—Each association formed under this subchapter shall prepare and make out an annual report on forms furnished by the division of markets, containing the name of the association, its principal place of business, and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up, and the number of stockholders of a stock association or the number of members and the amount of membership fees received, if a nonstock association; the total expenses of the operations; the amount of its indebtedness, or liability, and its balance sheets. (1921, c. 87, s. 19; C. S., s. 5259(aa).)

§ 54-155. Interest in other corporations or associations.—An association may organize, form, operate, own, control, have interest in, own stock

of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing, or selling of the agricultural products handled by the association, or the by-products thereof. If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association, or to any other person, and such legal warehouse receipts shall be considered as adequate collateral to the extent of the current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipt shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association. (1921, c. 87, s. 22; C. S., s. 5259(bb).)

§ 54-156. Contracts and agreements with other associations.—Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements, and make all necessary and proper stipulations, agreements and contracts and arrangements with any other co-operative corporation, association, or associations, formed in this or in any other state, for the co-operative and more economical carrying on of its business, or any part or parts thereof. Any two or more associations may by agreement between them, unite in employing and using or may separately employ and use the same methods, means, and agencies for carrying on and conducting their respective businesses. (1921, c. 87, s. 23; C. S., s. 5259(cc).)

§ 54-157. Breach of marketing contract of co-operative association; spreading false reports about the finances or management thereof; misdemeanor.—Any person or persons, or any corporation whose officers or employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars (\$100), and not more than one thousand dollars (\$1,000), for such offense and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars (\$500) for each such offense: Provided, that this section shall not apply to a bona fide creditor of any member or stockholder of such association, or the agents or attorney of any such bona fide creditor, endeavoring to make collection of the indebtedness. (1921, c. 87, s. 25; C. S., s. 5259(dd).)

§ 54-158. Co-operative associations may form subsidiaries.—Nothing in this subchapter shall prevent an association organizing, forming, operating, owning, controlling, having an interest in, owning stock of, or being a member of any other corporation (hereinafter referred to as a subsidiary corporation) from including or having included in the charter or bylaws of such subsidiary corporation provisions for the control or management of said subsidiary corporation by such association to such extent as shall by votes of the board of directors of such association, and the majority of the stockholders of such subsidiary corporation, be declared to be for the best interests of said association and said subsidiary corporation respectively. Such provisions may be so included in any such charter or bylaws and may by way of illustration, but not of limitation, include the following:

1. Representation of said association on the board of directors or other governing body of said subsidiary corporation, upon such terms as may be deemed advisable.

2. Ownership by an association of an interest or interests in a subsidiary corporation represented by stock of any class thereof, or otherwise, to such extent and upon such terms, and with such voting power, as may be deemed advisable.

3. Participation by said association in the profits of such subsidiary corporation to such extent and upon such terms as shall be deemed advisable. (1933, c. 350, s. 1.)

Formation of Subsidiary Companies.— That an organization of tobacco growers had formed subsidiary companies to cure tobacco, redry it, etc., was held unobjectionable even prior to the enactment of this section. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174 (1923).

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ARTICLE 1.*Definitions.*

§ 55-1. **Definitions.**—The following words and phrases where used in this chapter, unless differently defined or described, have the meanings and references stated below:

1. "Corporation" refers to a corporation which may be created and organized under this chapter, or under any other general or any special act.
2. "Certificate of incorporation" is the instrument filed by the incorporators and by which the corporation is formed.
3. The words "special act" refer to the act of the legislature enacted for the purpose of creating the corporation.
4. The word "charter" means either "certificate of incorporation" or "special act," together with all appropriate parts of this chapter and its amendments.
5. "Court," "superior court," or "judge of the superior court" means the judge of the superior court resident in the district or holding the courts of the district in which the corporation affected has its principal place of business.
6. "Receiver" as used in this chapter includes receivers and trustees appointed by the court, as herein provided. (Code, s. 668; 1901, c. 2, ss. 7, 74, 111; Rev., ss. 1136, 1222, 1247; C. S., s. 1113.)

Cross References.—For constitutional provisions regarding corporations, see Constitution, Art. VIII. As to the requirements of the certificate of incorpora-

tion, see § 55-3. As to jurisdiction of superior courts upon dissolution of a corporation, see § 55-134. As to receivers of corporations, see § 55-147 et seq.

ARTICLE 2.*Formation.*

§ 55-2. **How created.**—Three or more persons who desire to engage in any business, or to form any company, society, or association, not unlawful, except railroads other than street railways, or banking or insurance, or building and loan associations, may be incorporated in the following manner only (except those corporations which are to be and remain under the patronage and control of the State, and which are created by the State for charitable, educational and reformatory purposes): Such persons shall, by a certificate of incorporation, under their hands and seals, set forth—

Cross References.—As to the constitutional power of the legislature to form

corporations, see Constitution, Art. VIII, § 1. As to legislature's power to amend

this chapter and charters of corporations, see § 55-36. As to requirements for incorporating banks, see § 53-2 et seq. As to establishments of railroads, see § 60-9 et seq. As to creating insurance companies, see § 58-73. As to incorporating buildings and loan associations, see § 54-2; land and loan associations, see § 54-46; credit unions, see § 54-76 et seq.; co-operative associations, see § 54-111 et seq.; marketing associations, see § 54-131 et seq.; hospital service corporations, see § 57-2.

Editor's Note.—The 1945 amendment rewrote the exception clause appearing within the parentheses.

Strict Construction.—The requirements of this section should be strictly construed. *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107 (1893).

1. The name of the corporation. No name can be assumed which is already in use by (a) a domestic corporation, or (b) a foreign corporation authorized to do business under the laws of this State, or (c) a corporation which has heretofore or may hereafter sell its good will to any other person, firm or corporation, and notice thereof has been or may hereafter be filed in the office of the Secretary of State of North Carolina, and the filing fee of twenty-five dollars paid to the said Secretary of State: Provided, however, that the purchaser of the good will of such corporation, or his or its assigns, may be permitted to use the same name, or one similar thereto, of the corporation whose good will it has purchased. The prohibition of this paragraph shall extend to names so nearly resembling or deceptively similar to such existing corporate names as may be likely to mislead or deceive the public or tend to confusion of identity. The name adopted must end with the word "company," "corporation," "incorporated" or the abbreviation "inc.," and will not be accepted for filing unless approved by the Secretary of State.

Cross References.—As to necessity of displaying the name of the corporation, see § 55-37. As to use of the word "trust" in name, see § 53-127. As to use of the term "building and loan association" in a name, see § 54-1. As to use of "land and loan association," see § 54-45. As to use of "credit union," see § 54-80. As to restriction of use of term "mutual" as part of corporate name, see § 54-112. As to limitation of use of term "co-operative," see § 54-139.

Editor's Note.—Prior to the 1935 amendment this paragraph read as fol-

Position of Corporators and Promoters.—The promoters of a corporation are held to the duties of trustees and the obligation of directors. They may not take a secret or undisclosed profit in the organization by way of shares therein or otherwise. *Goodman v. White*, 174 N. C. 399, 93 S. E. 906 (1917).

When Corporate Powers Granted by Special Act.—When corporate powers are granted by a special, instead of a general, act of the legislature, there must be evidence of acceptance by the incorporators and compliance with all the conditions precedent prescribed by law, in order to show affirmatively that the corporation is lawfully organized. *Powell Brothers v. McMullan Lumber Co.*, 153 N. C. 52, 68 S. E. 926 (1910).

lows: "No name can be assumed already in use by another domestic corporation, or so similar as to cause uncertainty or confusion, and the name adopted must end with the word 'company,' 'corporation' or 'incorporated.'"

The 1939 amendment added the requirement as to approval by the Secretary of State, and substituted the part of the third sentence after the word "so" for the words "similar in sound or appearance to such existing corporate names as may tend to confusion of identity."

2. The location of its principal office in the State.

Cross Reference.—As to change in principal office, see § 55-34.

3. The object or objects for which the corporation is to be formed.

Corporation Limited to Objects Stated.—A charter of incorporation creating a company for the purpose of effecting a communication by a plank-road between designated points, with the privilege of

taking tolls, did not authorize the company to establish a stage line upon their road, nor to contract for carrying the United States mail. *Wiswell v. Greenville Plank-Road Co.*, 56 N. C. 183 (1857).

Need Not Use All Powers.—The fact that a corporation avails itself of only one of several privileges granted by its char-

ter does not invalidate the act of incorporation. *Wadesboro Cotton Mills Co. v. Burns*, 114 N. C. 353, 19 S. E. 238 (1894).

4. The amount of the total authorized capital stock, the number of shares into which it is divided, the par value of each share, the amount of capital stock with which it will commence business, and, if there is more than one class of stock, a description of the different classes. The provisions of this subsection shall not apply to religious, charitable, nonprofit social or literary corporations, unless they desire to have a capital stock. If they desire to have no capital stock, that fact and the conditions of membership shall be stated.

Cross Reference.—As to making provision for future exchange of par value stock for nonpar value stock, see § 55-80.

Editor's Note.—The 1920 amendment struck out the words "with the terms on which the respective classes of stock are created," formerly appearing at the end

of the first sentence of this paragraph.

The 1924 amendment inserted in the second sentence the words "nonprofit social" immediately after the word "charitable," thus adding to the list of corporations to which the paragraph does not apply.

5. The names and post-office addresses of the subscribers for stock and the number of shares subscribed for by each; the aggregate of the subscriptions shall be the amount of capital with which the corporation will commence business. If there is to be no capital stock, the certificate must contain the names and post-office addresses of the incorporators.

Editor's Note.—Formerly it was not required that the number of shares taken by each subscriber be set out in the certificate of incorporation. In *Cotton Mills v. Cotton Mills*, 115 N. C. 475, 20 S. E. 770

(1894), the court says that although this was not at that time required it was the usual practice to set them out and should have been required by statute.

6. The period, if any, limited for the duration of the corporation.

Cross Reference.—As to period of existence if no limit given, see § 55-26, paragraph 1.

Limit of Corporate Existence.—It is unquestionably true that a corporation whose term of existence is fixed and limited in the act which creates it cannot endure be-

yond the prescribed time, unless its existence is prolonged by the same authority or continued for the purpose of adjusting and closing its business, and no judicial proceedings are required to terminate it. *Asheville Division v. Aston*, 92 N. C. 578 (1885).

7. The certificate of incorporation may also contain any provision, consistent with the laws of this State, for the regulation of the affairs of the corporation, or creating, defining, limiting and regulating its powers, directors and stockholders, or any class or classes of the latter. (Const., Art. 8, s. 1; Code, s. 677; 1885, cc. 19, 190; 1889, c. 170; 1891, c. 257; 1893, cc. 244, 318; 1897, c. 204; 1899, c. 618; 1901, c. 2, s. 8, cc. 6, 41, 47; 1903, c. 453; Rev., s. 1137; 1911, c. 213, s. 1; 1913, c. 5, s. 1; C. S., s. 1114; Ex. Sess. 1920, c. 55; 1924, c. 98; 1935, cc. 166, 320; 1939, c. 222; 1945, c. 635.)

§ 55-3. Requirements as to certificate of incorporation.—The certificate of incorporation shall be signed by the original stock subscribers, or a majority of them, and must be acknowledged before an officer duly authorized under the laws of this State to take the proof or acknowledgment of deeds. The certificate shall then be filed in the office of the Secretary of State, and there remain of record, and he shall, if it is in accordance with law, cause it to be recorded in his office in a book to be kept for that purpose and known as the Corporation Book. Upon the payment of the organization tax and fees, the Secretary of State shall certify under his official seal a copy of the certificate of incorporation and probates, which certified copy shall be forthwith recorded in the office of the clerk of the superior court of the county where the principal office of the corporation in this State is, or is to be, established, in a book to be known

as the Record of Incorporations. The certificate, or a copy thereof, duly certified by the Secretary of State, or by the clerk of the superior court of the county in which it is recorded, is evidence in all courts and places, and in all judicial proceedings is prima facie evidence of the complete incorporation and organization of the corporation purporting thereby to have been established. (Code, ss. 678, 679, 682; 1901, c. 2, s. 9; 1903, c. 343; Rev., s. 1139; C. S., s. 1115.)

Cross References.—As to taxes for filing the certificate, see § 55-158. As to amending the certificate, see §§ 55-30 and 55-31. As to the effect of errors or omissions in the certificate, see § 55-8. As to fees for recording, see § 55-159.

Record of Incorporations Admissible in Evidence.—Under the former wording of this section, which provided that the letters of incorporation or copies duly certified by the clerk should be admissible in evidence, it was held that the Record of Incorporations book was also admissible as prima facie evidence of the complete organization and incorporation of the company. *Iron Co. v. Abernathy*, 94 N. C. 545 (1886).

Proof of Existence of Corporation—By Reputation.—The existence of a corporation may be proved by reputation. Existence or nonexistence is a fact and may

be proved as other facts. *Gulf States Steel Co. v. Ford*, 173 N. C. 195, 91 S. E. 84 (1917).

Same—By Written Contract.—Where a written contract entered into between the parties furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and the plaintiff's existence as a corporation is denied, the contract may properly be introduced upon this disputed fact. *Otis Elevator Co. v. Cape Fear Hotel Co.*, 172 N. C. 319, 90 S. E. 253 (1916).

Same—Copies Prima Facie Evidence.—Copies of letters of incorporation are admissible to show prima facie the existence of a corporation, and the corporation cannot avoid its liability for debts because in fact it had but an inchoate existence. *Marshall v. Macon County Bank*, 108 N. C. 639, 13 S. E. 182 (1891).

§ 55-4. When incorporators become corporation.—From the date the certificate of incorporation is filed in the office of the Secretary of State, the stock subscribers, their successors and assigns, are a body corporate by the name specified in the certificate, subject to amendment and dissolution as provided in this chapter. (1901, c. 2, s. 10; Rev., s. 1140; C. S., s. 1116.)

Cross References.—As to when a building and loan association becomes a body corporate, see § 54-6; a co-operative association, see § 54-114; a credit union, see § 54-78; a bank, see § 53-5.

Corporations Formed by Special Act and under General Law Distinguished.—When corporate powers are granted by a special act of the legislature, there must be evidence of the acceptance by the incorporators of the privileges conferred and compliance with all conditions precedent prescribed by law in order to show affirmatively that the corporation is lawfully organized. It is otherwise when the corporation is formed under the general law, for by the signing of the articles of agreement, and the due recording thereof, the incorporators become a body politic for the purposes set forth in the agreement. *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453 (1894).

No Requirement for Stock Issue.—There is no requirement of the statute that the stock should be issued or paid up before a valid organization can be effected or corporate action taken. *Fayetteville Street Ry. v. Aberdeen R. R.*,

142 N. C. 423, 55 S. E. 345 (1906). See *Powell Brothers v. McMullan Lumber Co.*, 153 N. C. 52, 68 S. E. 926 (1910).

Adoption of Bylaws Not Necessary.—By signing and recording the articles of incorporation three or more persons become a body corporate, and it is not necessary for the exercise of such powers as are conferred by statute on corporations that the one so formed shall issue certificates of stock or adopt bylaws. *Powell Brothers v. McMullan Lumber Co.*, 153 N. C. 52, 68 S. E. 926 (1910).

Date Corporation Begins to Do Business.—While incorporators become a body corporate from the date the certificate of incorporation is filed in the office of the Secretary of State, there is no presumption that the corporation is organized and doing business as such from that time, the time from which it begins to do business as a corporation being a question of fact to be proved as any other fact. *Hammond v. Williams*, 215 N. C. 657, 3 S. E. (2d) 437 (1939).

De Jure and De Facto Existence.—A corporation de jure is said to exist when persons holding a charter have made sub-

stantial compliance with the provisions of the same, looking to its proper organization, while a corporation de facto is one where the parties having a charter or law authorizing it have in good faith made a colorable compliance with such requirements, and have proceeded in the exercise of the corporate powers or a part of them. *Wood v. Staton*, 174 N. C. 245, 93 S. E. 794 (1917).

Same—Distinctions.—So far as the State is concerned, the ultimate distinction between a corporation de jure and a corporation de facto is that the former, having made substantial compliance with the char-

ter requirements looking to the proper organization, can successfully resist a suit instituted by the State or its officers for the direct purpose of annulling the charter, while the latter cannot; but as to private persons holding claims against them, the individual incorporators, in either case, are not personally liable for debts, except and to the extent that the charter and law applicable may so provide. *Wood v. Staton*, 174 N. C. 245, 93 S. E. 794 (1917).

Applied in *Britt v. Howell*, 210 N. C. 475, 187 S. E. 566 (1936).

§ 55-5. Incorporators act until directors elected.—Until directors are elected the signers of the certificate of incorporation shall have the direction of the affairs of the corporation, and may take proper steps to obtain the necessary subscription to stock and to perfect the organization of the corporation. (1901, c. 2, s. 11; Rev., s. 1141; C. S., s. 1117.)

Subscribers May Release Member.—Under this section the management of a corporation, before the first directors are elected, vests entirely in the subscribers, and, before the rights of creditors have supervened, the subscribers or stockholders

may, by the consent of each and all of them and within the limits of the charter, release one from his subscription to the stock. *Boushall v. Myatt*, 167 N. C. 328, 83 S. E. (2d) 352 (1914).

§ 55-6. First meeting; notice.—The first meeting of every corporation shall be called by a notice, signed by a majority of the incorporators, designating the time, place, and purpose of the meeting, which notice shall be published at least two weeks before the meeting, in a newspaper of the county where the corporation is established; or the meeting may be called without publication, if two days' notice is personally served on all the incorporators; or if all the incorporators in writing waive notice and fix a time and place of meeting, no notice or publication is required. (Code, s. 665; 1901, c. 2, s. 18; Rev., s. 1142; C. S., s. 1118.)

Cross References.—As to stockholders' meetings generally, see § 55-105. As to meeting called by three stockholders, see § 55-106.

Waiver of Notice.—The strict requirements as to notice, being intended to protect stockholders, may be waived by the stockholders, and when they are waived, the meeting and all proceedings are as valid as they would be had the full statutory notice been given. *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453 (1894).

Meeting Outside of State.—Though the first meeting of stockholders may have been held outside of the State, that fact cannot be shown by the body assuming the powers of a corporation in order to avoid its liability, nor by its debtors for the purpose of evading their accountability under contracts made with it, but the State only can set up that fact. *Tuckasegee Mining Co. v. Goodhue*, 118 N. C. 981, 24 S. E. 797 (1896).

§ 55-7. Death of incorporators; vacancy filled.—When one or more of the incorporators of any corporation die before the corporation has been organized pursuant to law, the survivor or survivors may, in writing, designate others who may take the place and act instead of the deceased, in the organization; and the organization so effected by their aid is as effectual in law as if it had been effected by all the original incorporators. (1901, c. 2, s. 36; Rev., s. 1143; C. S., s. 1119.)

§ 55-8. Errors or omissions in certificate of incorporation.—Whenever in the certificate of incorporation under any general law there is an error or omission in the recital of the act under which the corporation is created or an

error or omission of any matter required to be stated therein, it is lawful for the corporation to correct the error or supply the omission in the following manner: The board of directors shall pass a resolution declaring that the error or omission exists and that the corporation desires to correct it, and shall call a meeting of the stockholders to take action upon the resolution. The stockholders' meeting shall be held upon such notice as the bylaws provide, and in the absence of such provision, upon ten days' notice, given personally or by mail. If two-thirds in interest of all the stockholders vote in favor of the correction of the error or omission, a certificate of their action shall be made and signed by the president and secretary under the corporate seal; which certificate shall be acknowledged as in the case of deeds of real estate, and, together with the written consent in person or by proxy of two-thirds in interest of all the stockholders of the corporation, shall be filed in the office of the Secretary of State. Upon the filing thereof, in conformity with this section, the certificate of incorporation has the same force and effect as if it had been originally drafted in conformity with the amendment so made. (1901, c. 2, s. 109; Rev., s. 1144; C. S., s. 1120.)

Cross References.—As to amendments amendments before payment of stock, see generally, see § 55-31 et seq. As to § 55-30.

§ 55-9. Street railways.—Corporations may be organized under the provisions of this chapter for the purpose of building, maintaining or operating street railways. The term street railways, wherever used in this chapter, includes railways operated either by steam or electricity, or other motive power, used and operated as means of communication between different points in the same municipality, or between points in municipalities lying adjacent or near to each other, or between the municipality in which is the home office of the company and the territory contiguous thereto, and such railways may carry and deliver freights. No such railway may operate a line extending in any direction more than one hundred miles from the municipality in which is located its home office, or in any city or town without the consent of the municipal authorities thereof. (1901, cc. 6, 41; 1903, c. 350; Rev., s. 1138; Ex. Sess. 1913, c. 70, s. 1; C. S., s. 1121.)

§ 55-10: Repealed by Session Laws 1943, c. 543.

§ 55-11. Public parks and drives.—Three or more persons may be incorporated under this chapter for the purpose of creating and maintaining public parks and drives. It is not necessary, however, to set forth in the certificate of incorporation of any corporation created for such purpose the amount of authorized capital stock, the number of shares into which the same is divided, the par value of such stock, or the amount of capital stock with which it will commence business. Any corporation created hereunder shall have full power and authority to lay out, manage, and control parks and drives within the State, under such rules and regulations as the corporation may prescribe, and shall have power to purchase and hold property and take gifts or donations for such purpose. It may hold property and exercise such powers and trust for any town, city, township, or county, in connection with which said parks and drives shall be maintained. Any city, town, township, or county, holding such property, may vest and transfer the same to any such corporation for the purpose of controlling and maintaining the same as public parks and drives under such regulations and subject to such conditions as may be determined upon by such city, town, township, or county. All such lands as the corporation may acquire shall be held in trust as public parks and drives, and shall be held open to the public under such rules, laws, and regulations as the corporation may adopt through its board of directors; and it shall have power and authority to make and adopt all such laws and regulations as it may determine upon for the reasonable management of such parks and drives. All property owned by it and appropriated exclusively for public parks and drives shall not be subject to taxation, and no such corporation shall

be liable in damages on account of the construction or maintenance of any such parks or drives. (1911, c. 155, ss. 1, 2, 3, 4; C. S., s. 1123.)

Local Modification.—Mecklenburg: 1945, c. 304; Scotland: 1939, c. 359, § 1.

§ 55-12: Repealed by Session Laws 1943, c. 543.

§ 55-13. **Certain religious, etc., associations deemed incorporated.**—In all cases where a religious, educational or charitable association has been formed prior to January first, one thousand eight hundred and ninety-four, and has since said date been acting as a corporation, exercising the powers and performing the duties of religious, educational or charitable corporations as prescribed by the laws of this State, then such association shall be conclusively presumed to have been duly and regularly organized and existing as a corporation under the laws of this State on January first, one thousand eight hundred and ninety-four, and all of its acts as a corporation from and after said date, if otherwise valid, are hereby declared to be valid corporate acts. (1919, c. 137; C. S., s. 1125.)

ARTICLE 3.

North Carolina State Thrift Society.

§§ 55-14 to 55-25: Transferred to §§ 115-383 to 115-394.

Editor's Note.—Acts 1943, c. 543, transferred that they be appropriately renumbered. transferred these sections to chapter 115, to follow immediately after § 115-382, and di-

ARTICLE 4.

Powers and Restrictions.

§ 55-26. **Express powers.**—Every corporation has power—

1. To have succession, by its corporate name, for the period limited in its charter, and when the charter contains no time limit, for a period of sixty years.

2. To sue and be sued in any court.

3. To make, use, and alter a common seal.

4. To purchase, acquire by devise or bequest, hold and convey real and personal property in or out of the State, and to mortgage the same and its franchises.

5. To elect and appoint, in such manner as it determines to be proper, all necessary officers and agents, fix their compensation, and define their duties and obligations. And when there devolves upon an officer or agent of a corporation such duties and responsibilities that a financial loss would result to the corporation from the death and consequent loss of the services of such officer or agent, the corporation has an insurable interest in, and the power to insure the life of, the officer or agent for its benefit, and in all cases where a religious, educational or charitable corporation or institution shall be, or has been, named as beneficiary in any policy of life insurance by a friend, student, former student or any person who for any reason is loyal to such corporation or institution and has himself or herself paid the premiums on said policy, then such corporation or institution shall be deemed to have an insurable interest in the life of such person.

6. To conduct business in this State, other states, the District of Columbia, the territories, dependencies and colonies of the United States, and in foreign countries, and have offices in or out of the State.

7. To make bylaws and regulations, consistent with its charter and the laws of the State, for its own government, and for the due and orderly conduct of its affairs and management of its property.

8. To wind up and dissolve itself, or be wound up and dissolved, in the manner hereafter mentioned.

9. To sell, transfer and convey any part of its corporate property in the course of its regular business.

10. To sell, transfer and convey any part of its corporate real or personal property when authorized so to do by its board of directors.

11. To sell, transfer and convey all of its corporate property when authorized so to do by its board of directors and approved by a two-thirds vote of the stock entitled to vote at any stockholders' meeting, notice of which contains notice of the proposed sale: Provided, paragraphs nine, ten and eleven of this section shall not be construed as authorizing any public utility corporation to sell or convey all of its property otherwise than under the terms prescribed in its charter, or as authorizing the sale of stock in bulk, in violation of the Bulk Sales Law.

12. To make contributions or gifts to corporations, trusts, community chests, funds, foundations, or associations organized and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, when such contributions or gifts are authorized or approved by its board of directors: Provided, that such contributions or gifts during any income year of the corporation do not exceed five per centum (5%) of its net income as computed under article four, Schedule D, of chapter one hundred five, of the General Statutes, disregarding for such purpose the aggregate amount of such contributions or gifts: Provided, further, that the assets of the corporation exceed its liabilities immediately after any such contribution or gift is made. (Code, ss. 663, 666, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1; Rev., s. 1128; 1909, c. 507, s. 1; C. S., s. 1126; 1925, cc. 235, 298; 1929, c. 269; 1939, c. 279; 1945, c. 775.)

I. In General.

II. Suits by and against Corporations.

III. The Common Seal.

IV. Rights as to Property.

V. The Officers; Conducting Business; Bylaws and Dissolution.

Cross References.

As to powers of building and loan associations, see § 54-2; of land and loan associations, see § 54-46; of credit unions, see § 54-82 et seq.; of co-operative associations, see § 54-124 et seq.; of marketing associations, see §§ 54-151, 54-152. As to powers of banks, see § 53-43 et seq. As to powers of railroads and other carriers, see § 60-37 et seq. As to corporate power of eminent domain, see § 40-1 et seq. As to powers of a municipal corporation, see § 160-2. As to powers of consolidated corporations, see § 55-170. As to corporate conveyance and when same is void as to torts, see § 55-40. As to mortgaged property of public service corporations subject to execution, see § 55-44. As to directors and officers, see § 55-48 et seq. As to election of directors, see §§ 55-112, 55-113. As to dissolution, see § 55-121 et seq.

I. IN GENERAL.

Editor's Note.—Before 1925 this section enumerated eight general powers. By the 1925 amendment, paragraph 9, containing an additional power with several provisos, was added, and the 1929 amendment added another proviso thereto. The 1939 amendment struck out such paragraph as

amended and inserted the present paragraphs 9, 10 and 11 in lieu thereof. See discussion of former paragraph 9 in 3 N. C. Law Rev. 137.

The 1925 amendment also made an addition to paragraph 5 of this section. Formerly the paragraph ended with the word "benefit," near the middle of the present second sentence of the paragraph. In 3 N. C. Law Rev. 147 this amendment is discussed and it is concluded that although the legislature intended to extend the doctrine of insurable interest, it has merely stated a well-established rule of insurance law.

The 1945 amendment added subsection 12.

Cited in *Independence Trust Co. v. Keesler*, 206 N. C. 12, 173 S. E. 53 (1934).

II. SUITS BY AND AGAINST CORPORATIONS.

Suits Must Be in Corporate Name.—A suit against a corporation must be brought against it in its corporate name, and not against its officers or agents. *Britain v. Newland*, 19 N. C. 363 (1837); *Young v. Barden*, 90 N. C. 424 (1884). However, in case of insolvency, where a receiver has been appointed, he may sue either in his own name or in that of the corporation. *Davis v. Mfg. Co.*, 114 N. C. 321, 19 S. E. 371 (1894); *Smathers v. Bank*, 135 N. C. 410, 47 S. E. 893 (1904).

Misnomer Immaterial.—A misnomer does not vitiate, provided the identity of

the corporation with that intended by the parties is apparent, whether it is in a deed, or in a judgment, or in a criminal proceeding. *Gordon v. Pintsch Gas Co.*, 178 N. C. 435, 100 S. E. 878 (1919). See *McCrea v. Starr*, 5 N. C. 252 (1809); *Asheville Division v. Aston*, 92 N. C. 579 (1885).

Same Liability as Natural Person.—A corporation is now held liable to civil and criminal actions under the same conditions and circumstances as natural persons are. *Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 392 (1899).

Paragraph 2 Has No Application to Governmental Agencies.—The general authority to sue and be sued conferred on corporations by this section has reference only to private and quasi-public corporations, and not to corporations like the State Prison, which are merely governmental agencies. As to these the authority to be sued must be expressly given. *Moody v. State's Prison*, 128 N. C. 12, 38 S. E. 131 (1901).

Same—State Highway Commission.—This section, giving corporations the right to sue and be sued, does not apply to the State Highway Commission, a governmental agency of the State, but only to private and quasi-private corporations. *Carpenter v. Atlantic, etc., Ry. Co.*, 184 N. C. 400, 114 S. E. 693 (1922).

Suits against Cities and Towns.—As to cities and towns, though by their charters they are broadly authorized "to sue and be sued," it is well settled that this suability does not create any liability for damages caused by the torts of their officers and agents when acting in a governmental capacity. *McIlhenney v. Wilmington*, 127 N. C. 146, 37 S. E. 187 (1900); *Moody v. State's Prison*, 128 N. C. 12, 38 S. E. 131 (1901).

Suits against Counties.—Counties can be sued only in such cases and for such causes of action as are authorized by statute, and such cases do not embrace liabilities for negligence or other torts of their officers and agents. *White v. Commissioners*, 90 N. C. 437 (1884); *Manuel v. Commissioners*, 98 N. C. 9, 3 S. E. 829 (1887); *Threadgill v. Commissioners*, 99 N. C. 352, 6 S. E. 189 (1888); *Pritchard v. Commissioners*, 126 N. C. 908, 36 S. E. 353 (1900); *Bell v. Commissioners*, 127 N. C. 85, 37 S. E. 136 (1900); *Moody v. State's Prison*, 128 N. C. 12, 38 S. E. 131 (1901).

Liability for Slander.—A corporation may be held liable for slander when the defamatory words are uttered by express authority of the company or by one

of its officers or agents in the course of his employment, and authority for their utterances may be fairly and reasonably inferred under relevant and sufficient circumstances. *Cotton v. Fisheries Products Co.*, 177 N. C. 56, 97 S. E. 712 (1919).

III. THE COMMON SEAL.

An Inherent Power.—The power to have a common seal and to alter or renew the same at will is frequently conferred on corporations by statute, but such a power is one of the incidental and implied powers of every corporation when not expressly conferred. *Bailey v. Hassell*, 184 N. C. 450, 115 S. E. 166 (1922).

Any Device May Be Used.—While it is required for the sufficiency of the deed of a corporation to convey its lands that the corporate seal should be affixed to the instrument, any device used for the corporate seal will be sufficient, provided it was intended for and used as the seal of the corporation, and had been adopted by proper action of the corporation for that purpose. *Bailey v. Hassell*, 184 N. C. 450, 115 S. E. 166 (1922).

The simple word "seal" with a scroll adopted as the seal of a corporation and used by it on a deed to its lands according to resolutions of the stockholders and directors thereof at separate meetings held for the purpose, when all were present, is sufficient. *Bailey v. Hassell*, 184 N. C. 450, 115 S. E. 166 (1922).

IV. RIGHTS AS TO PROPERTY.

Corporate Property Does Not Belong to Stockholders.—The property of a corporation belongs to it, and not to the stockholders. They only have an interest in such property through their relation to the company, and in this respect the State is like any other stockholder. *Marshall v. Western N. C. Railroad Co.*, 92 N. C. 322 (1885).

Same—Where State a Stockholder.—Where the State is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for, by becoming such, it lays aside its charter as a sovereign and places itself on a footing of equality with the individual stockholders. *Marshall v. Western N. C. Railroad Co.*, 92 N. C. 322 (1885).

Corporation May Hold Estates in Fee.—Although the existence of a corporation be limited to a certain number of years, yet the corporation is capable of holding

estates in fee. *Asheville Division v. Aston*, 92 N. C. 579 (1885).

Property Not Forfeited upon Suspension of Business.—A corporation, chartered for the purpose of promoting temperance, does not forfeit real estate which it has purchased because it ceases to pursue the objects for which it was incorporated. *Asheville Division v. Aston*, 92 N. C. 579 (1885).

Where Powers Exceeded.—Where a corporation takes a conveyance of lands for use beyond its charter powers, the deed is not void, but only voidable upon the objection of the State. *Cross v. Seaboard Air Line R. Co.*, 172 N. C. 119, 90 S. E. 14 (1916).

Ejectment and Trespass Will Lie.—Corporations, in contemplation of the law, are capable of having actual possession of the land, and whatever may have been supposed to the contrary in the distant past, it is now settled that the actions of ejectment and trespass lie against them. *Young v. Barden*, 90 N. C. 424 (1884).

Adverse Possession.—A corporation may acquire land by showing sufficient adverse possession for the statutory period. *Cross v. Seaboard Air Line R. Co.*, 172 N. C. 119, 90 S. E. 14 (1916).

Right to Dispose of Property.—A private corporation may dispose of its property without express authority of the legislature. *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453 (1894).

Same—Quasi-Public Corporation.—A strictly private corporation can lawfully sell any of its property, real or personal, just as an individual can; but such is not the case with corporations which are quasi-public and have duties to perform in which the public is interested. *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

Same—Example.—A corporation chartered for the purpose of mining and milling ores has the right, by implication of law, to buy and sell real estate essential to the successful prosecution of its business. *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

Necessity for Authorization by Directors to Sell Corporate Property.—Corporate directors are trustees of its property, and usually a corporation may sell, transfer and convey its corporate real estate only when authorized to do so by its board of directors. And the statutory provisions may be supplemented by stipulation in the corporation's bylaws. *Tuttle v. Junior Bldg. Corp.*, 228 N. C. 507, 46 S. E. (2d) 313 (1948).

In the absence of charter provisions or bylaws to the contrary, the president of a corporation is the general manager of its corporate affairs, and his contracts made in the name of the corporation in the general course of business and within the apparent scope of his authority are ordinarily enforceable, but ordinarily he has no power to sell or contract to sell the real or personal property of the corporation without authority from its board of directors. *Tuttle v. Junior Bldg. Corp.*, 228 N. C. 507, 46 S. E. (2d) 313 (1948).

Corporation Having General Power to Buy and Sell Realty.—Paragraph 11, which requires the holders of two-thirds of the stock to approve the action of the directors of a corporation in selling the entire corporate property, does not apply to the sale of realty by a corporation having general power to buy and sell real estate, and the fact that such corporation is an incorporated fraternal association and contracts to sell its building designated as the fraternal order building does not bring the transaction within the statute when the building is not used for a permanent office, home or other facility in carrying on its business. *Tuttle v. Junior Bldg. Corp.*, 227 N. C. 146, 41 S. E. (2d) 365 (1947).

Right to Mortgage Property.—Corporations other than railroad companies have a general power to mortgage their property, unless prohibited by some provision in the charter, the right to mortgage being a natural result of the right to incur an indebtedness. *Antietam Paper Co. v. Chronicle Pub. Co.*, 115 N. C. 143, 20 S. E. 366 (1894).

V. THE OFFICERS; CONDUCTING BUSINESS; BYLAWS AND DISSOLUTION.

Power to Insure Life of Officer.—Formerly a manufacturing corporation engaged in the operation of a cotton mill had no implied power to insure the life of its president, at least beyond the period of his connection with the company. *Victor v. Louise Cotton Mills*, 148 N. C. 107, 61 S. E. 648 (1908); *Victor v. Chadwick Mfg. Co.*, 148 N. C. 119, 61 S. E. 653 (1908). These cases were decided when the section did not contain the present provision as to insurable interest. The question of implied power would of course no longer arise.

A corporation may transact business anywhere, unless prohibited by its charter or excluded by local laws. *Garrett v. Bear*, 144 N. C. 23, 56 S. E. 479 (1907).

§ 55-27. Bylaws.—A corporation may, by its bylaws, when consistent with its charter, determine the manner of calling and conducting all meetings; the number of members that constitute a quorum, but in no case shall more than a majority of shares or amount of interest be required to be represented at any meeting in order to constitute a quorum, and if the quorum is not so determined by the corporation, a majority in interest of the stockholders, represented either in person or by proxy, constitutes a quorum; the number of shares that will entitle the members to one or more votes; the mode of voting by proxy; the mode of selling shares for the nonpayment of assessments; the tenure of office of the several officers, and the manner in which vacancies in any of the offices shall be filled till a regular election; and they may annex suitable penalties to such bylaws, not exceeding in any case the sum of twenty dollars for any one offense. The power to make and alter bylaws is in the stockholders, but a corporation may, in the certificate of incorporation, confer that power upon the directors. Bylaws made by the directors under power so conferred may be altered or repealed by the stockholders. (Code, s. 664; 1901, c. 2, ss. 12, 13; Rev., ss. 1145, 1146; C. S., s. 1127.)

Cross References.—As to power to make bylaws, see § 55-26, paragraph 7. As to bylaws of insurance companies, see § 58-75. As to bylaws of building and loan association, see § 54-2; of a land and loan association, see § 54-52; of a credit union, see § 54-77; of a co-operative association, see § 54-116; of a marketing association, see § 54-136. As to power to determine, by bylaw, the number of shares a stockholder must hold to qualify as director, see § 55-48.

Extent to Which Stockholder Is Bound by Bylaws.—The principle by which a shareholder in a corporation is bound by a corporate resolution, regularly passed pursuant to its charter and bylaws, prevails only in reference to his status and

rights as a shareholder, and not where he deals independently with it as one of its customers in the line of its business. *Cardwell v. Garrison*, 179 N. C. 476, 103 S. E. 3 (1920).

Bylaw to Sell Defaulting Subscriber's Stock.—Under this section a corporation is empowered to provide by its bylaws for the sale of shares of a subscriber who makes default in paying the assessments. *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 27 S. E. 1001 (1897).

Strangers Must Have Notice.—The bylaws of the corporation are not evidence for it against strangers who deal with it, unless brought home to their knowledge and assented to by them. *Smith v. N. C. R. R. Co.*, 68 N. C. 107 (1873).

§ 55-28. Implied powers.—In addition to the powers enumerated in §§ 55-26 and 55-27 and the powers specified in its charter, every corporation, its officers, directors and stockholders, possess all the powers and privileges contained in this chapter so far as they are necessary or convenient to the attainment of the objects set forth in such charter, and shall be governed by the provisions and be subject to the restrictions and liabilities in this chapter contained, so far as they are applicable to and not inconsistent with such charter; and no corporation may possess or exercise any other corporate powers, except such incidental powers as are necessary to the exercise of the powers so given. Nothing in this chapter shall authorize or empower corporations organized under this chapter to lease, operate, maintain, manage or control any railroad except street railways. (Code, s. 701; 1897, c. 204; 1901, c. 2, s. 4, c. 6; Rev., s. 1129; C. S., s. 1128.)

Cross References.—As to express powers, see § 55-26. As to powers of street railways, see § 55-9. As to power of the legislature to amend or repeal corporate charter, see § 55-36.

In General.—Corporations possess by legal implication such powers as are essential to the exercise of the powers expressly conferred and necessary to attain the main objects for which they were

formed. *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

Charter Subsequent to General Law Prevails.—Where a charter was granted to a corporation after the passage of a general law and the charter confers powers conflicting with the general law, then by this section the provisions of the charter prevail. *Carolina Power Co. v. Power Co.*, 171 N. C. 248, 88 S. E. 349 (1916).

Ultra Vires Acts.—It is true, as held by numerous courts, including our own, that the doctrine of ultra vires has been very much modified in recent years, and many contracts made in the course of business, especially when executed and benefits are received or liabilities are incurred, will be upheld and enforced which were formerly declared absolutely void. *Hutchins v. Bank*, 128 N. C. 72, 38 S. E. 252 (1901).

Same—State May Enjoin.—This modification of the doctrine does not involve the right in an appropriate case of the State to enjoin a threatened ultra vires act. *Victor v. Louise Cotton Mills*, 148

N. C. 107, 61 S. E. 648 (1908).

Same—Stockholder May Bring Action.

—If an act of a corporation is ultra vires, any one or more stockholders may by some appropriate method call it in question, and, unless by having consented to or acquiesced in it he is barred, have relief. *Victor v. Louise Cotton Mills*, 148 N. C. 107, 61 S. E. 648 (1908); *Lutterloh v. Fayetteville*, 149 N. C. 65, 62 S. E. 758 (1908).

The question whether acts are ultra vires is a conclusion of law to be drawn from the facts stated. *Spencer v. Railroad*, 137 N. C. 107, 49 S. E. 96 (1904).

§ 55-29. Banking powers not conferred by this chapter.—No corporation created under the provisions of this chapter shall have the power to carry on the business of discounting bills, notes or other evidences of debt, of receiving deposits of money, of buying gold or silver bullion or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan, or for circulation as money; but in the transaction of its business it may make and take and endorse, when necessary, all such bonds, notes and bills of exchange as the business may require. (Code, s. 684; 1901, c. 2, s. 5; Rev., s. 1134; C. S., s. 1129.)

Cross Reference.—As to banks and banking in general, see chapter 53.

Cited in *Independence Trust Co. v. Keesler*, 206 N. C. 12, 173 S. E. 53 (1934).

§ 55-30. Amendments before payment of stock.—The incorporators of a corporation, before the payment of any part of its capital, may file with the Secretary of State an amended certificate of incorporation, duly signed and acknowledged by the incorporators named in the original certificate, changing the original certificate of incorporation, in whole or in part, which amended certificate takes the place of the original one, and when recorded in the proper county is deemed to have been filed and recorded on the date of filing and recording the original certificate. The officers are entitled to the same fees for filing and recording the amended certificate of incorporation as if it were original; but there shall be charged no additional organization tax, except when the certificate is amended by increasing the capital stock, in which event such tax shall be paid upon the increase. (1901, c. 2, s. 28; Rev., s. 1174; C. S., s. 1130.)

Cross References.—As to the original certificate of incorporation, see § 55-3. As to taxes for filing, see § 55-158.

Subscriber Released by Fundamental

Change.—Any fundamental change in the charter of a corporation relieves a nonassenting subscriber from liability upon his stock. *Bank v. City*, 85 N. C. 433 (1881).

§ 55-31. Amendments, generally.—A corporation, whether organized under a special act or general laws, and which might now be created under the provisions of this chapter, may, in the manner set out below—

1. Change the nature or relinquish one or more branches of its business, or extend its business to such other branches as might have been inserted in its original certificate of incorporation.

2. Change its name.

3. Extend its corporate existence.

4. Increase or decrease its capital stock.

5. Change the par value of the shares of its capital stock.

6. Create one or more classes of preferred stock.

7. Make any other desired amendment. In all cases the certificate of amendment can contain only such provisions as could be lawfully and properly inserted in an original certificate of incorporation filed at the time of making the amendment.

The board of directors shall pass a resolution declaring that the amendment is advisable, and call a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the bylaws provide, and in the absence of such provision, upon ten days' notice, given personally or by mail; if the holders of a majority of the shares of stock with voting powers vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary, under the corporate seal, acknowledged as in the case of deeds to real estate, and this certificate, together with the written assent, in person or by proxy, of said stockholders, shall be filed and recorded in the office of the Secretary of State. Upon such filing the Secretary of State shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, and thereupon the certificate of incorporation is amended accordingly. The certificate of the Secretary of State, under his official seal, that such certificate of amendment and assent have been filed in his office, is evidence of the amendment in all courts and places. A corporation which cannot now be created under the provisions of this chapter may, except as otherwise provided by law, in like manner increase or decrease its capital stock, or change its name, or extend its corporate existence: Provided, that before the Secretary of State shall issue a certificate of such amendment to any corporation possessing powers, franchises, privileges or immunities, which could not be obtained under this chapter, he shall forthwith transmit to the Commissioner of Banks or the Utilities Commission, as the case may be, a copy of said certificate and shall not issue or record the same until duly authorized so to do by the Commissioner of Banks or the Utilities Commission, as the case may be, as provided for the issuing of certificates of incorporation of banks in the chapter entitled, "Banks", provided that nothing herein shall be construed to require the increase of the capital stock of a bank renewing its charter over the capital of such bank at the time such renewal is applied for.

Any corporation organized on or after March 4, 1925, may insert a provision in its charter that amendments to said charter may be made or amendments to said charter in certain specified respects may be made only when such amendments shall be approved by the holders of such amount of the stock of the corporation (not less than a majority of the shares of stock with voting powers) or such amount of each class of stock as may be specified in said charter, and any corporation heretofore organized may by vote of the holders of a majority of the stock entitled to vote amend its charter at any stockholders' meeting, notice of which contains notice of the proposed amendment so as to provide the vote of stockholders (not less than a majority of the stock entitled to vote) required to enable the corporation to amend its charter or to amend it in certain specified respects: Provided, however, that no new class of stock shall hereafter be created by amendment of the charter or otherwise entitled to dividends or shares in distribution of assets in priority to any class of preferred stock already outstanding except with the consent of the holders of record of two-thirds (or such greater amount as may be specified in the charter) of the number of shares of such outstanding preferred stock having voting powers: Provided, that the provisions of this paragraph shall not apply to banks and building and loan associations. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 29, 30, 37; 1903, c. 516; Rev., ss. 1175, 1178; C. S., s. 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 1934, ss. 7, 8; 1941, c. 97, s. 5.)

Cross References.—As to amendments by charitable, educational, penal, or reformatory corporations, see § 55-33. As to amendment of certificate of incorporation of building and loan association, see § 54-3. As to amendment of articles of incorporation of a co-operative association, see § 54-125; of a marketing association,

see § 54-135. As to amendment of charter by railroad, see § 60-11. As to amendments changing shares with nominal or par value into shares without nominal or par value, see § 55-76.

Editor's Note.—This section has been amended several times.

The seventh subdivision formerly pro-

vided that any proposed amendment should require a favorable vote by "two-thirds in interest of each class of stockholders." By the 1925 amendment these words were stricken out and the words "the holders of a majority of the shares of stock" substituted therefor. However, it was provided that this amendment should not apply to banks and building and loan associations. See §§ 53-10, 53-11, 54-3 and 54-7.

The paragraph providing that a corporation may insert in its charter at the time of its organization a rule regulating amendments was also added by the 1925 amendment, and banks and building and loan associations were excepted from its operation. For a discussion of the effect of these amendments, see 3 N. C. Law Rev. 134.

The 1927 amendment made further changes. Paragraph 3 formerly contained a provision following the word "existence" which made the corporation, in extending its existence, waive and abandon any privileges, franchises or immunities which could not be obtained under this chapter. This provision was stricken out.

Paragraph 7 formerly contained the following provision: "A corporation which cannot now be created under the provisions of this chapter may in like manner

increase or decrease its capital stock or change its name." The 1927 amendment struck out the period at the end of that sentence and added the words "or extend its corporate existence" and the proviso which immediately follows.

Amendment Operates Prospectively. — Whether the law itself makes an amendment, or, as now, confers the power of amendment to the corporation, the amendment will not be construed to operate retrospectively to the detriment of rights already vested under the old charter. *Patterson v. Durham Hosiery Mills*, 214 N. C. 806, 200 S. E. 906 (1939).

A charter provision requiring consent of three-fourths in interest of the preferred stockholders to the issuing of bonds or securities of prior or equal rank is prospective in effect, and does not constitute a waiver of the right to the declaration of accrued, accumulated dividends, when earned, by permitting the interposing of new preferred stock by agreement of three-fourths of the preferred stockholders, nor does legislative authority to amend the charter extend to authority to defeat the vested right to the declaration of such dividends by amendment of the charter. *Patterson v. Durham Hosiery Mills*, 214 N. C. 806, 200 S. E. 906 (1939).

§ 55-32. Inadvertent omission to file amendment extending corporate existence.—Any private corporation chartered under the general laws of the State of North Carolina whose period of existence fixed in its charter has expired and which corporation has continued to act and do business as a corporation, but has through inadvertence, omitted to file an amendment extending the period of its corporate existence, may at any time after the expiration of the period of corporate existence set forth in its original charter, file an amended certificate in the office of the Secretary of State as provided by § 55-31 to extend or renew its corporate existence, as provided for in the amended certificate; provided, this section shall not serve to impair the validity of any contract or vested right in existence at the time of the filing of said amended charter. All acts of such a corporation, purporting to be the acts of the corporation, done or performed after the expiration of its period of existence and before the amendment to its charter, shall be legal and valid as the acts and deeds of said corporation. (1929, c. 271; 1935, c. 6.)

Editor's Note. — Prior to the 1935 amendment this section contained a seven-year limitation after the expiration of the

original period in which the amended certificate should be filed. This provision was omitted.

§ 55-33. Amendments by charitable, educational, penal, reformatory, etc., corporations.—A charitable, educational, social, ancestral, historical, penal, or reformatory corporation not under the patronage or control of the State, and any corporation, without capital stock, organized for the purpose of aiding in the work of any church, religious society or organization, or fraternal order whether organized under a special act or general laws, may change its name, extend its corporate existence, change the manner in which its directors, trustees or managers are elected or appointed, abolish its present method of electing such

officers and create a different method of election, and generally reorganize the manner of conducting such corporation, and make any other amendment of its charter desired, in the following manner: The board of directors, trustees, or managers shall pass a resolution declaring that the amendment is advisable, and call a meeting of trustees, managers, and directors to take action thereon. The meeting shall be held upon such notice as the bylaws provide, and in the absence of such provision, upon ten days' notice given personally or by mail. If two-thirds of the directors, trustees, or managers of the corporation vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary under the corporate seal, acknowledged as provided in the case of deeds to real estate, and such certificate, together with the written assent in person or proxy of two-thirds of the directors, trustees, or managers, shall be filed and recorded in the office of the Secretary of State, and upon filing it he shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, or in which the corporation is doing business, and thereupon the certificate of incorporation shall be deemed amended accordingly. Such certificate of amendment may contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making the amendment, and the certificate of the Secretary of State, under his official seal, that such certificate and assent has been filed in his office shall be taken and accepted as evidence of such amendment in all courts. (1917, c. 62, s. 1; C. S., s. 1132; 1925, cc. 42, 257.)

Editor's Note.—The words "social, ancestral, historical" were inserted in the first sentence of the section by the 1925 amendment. The amendment also inserted the following clause after the word

"State" in the first sentence: "and any corporation, without capital stock, organized for the purpose of aiding in the work of any church, religious society or organization, or fraternal order."

§ 55-34. Change of location of principal office.—The board of directors of a corporation organized under the laws of this State may, by resolution adopted at a regular or special meeting by a two-thirds vote of its members, change the location of the principal office of the corporation in the State. A copy of the resolution, signed by the president and secretary of the corporation and sealed with the corporate seal, shall be filed in the office of the Secretary of State. No certificate need be filed of the removal of an office from one point to another in the same town, city, or township. (1901, c. 2, s. 31; Rev., s. 1176; C. S., s. 1133.)

"Principal Place of Business." — The words "principal place of business," as used in § 1-79, must be regarded as synonymous with the words "principal office,"

as used in this section and §§ 55-2, paragraph 2, and 55-105. *Roberson v. Johnson Lumber Co.*, 153 N. C. 120, 68 S. E. 1064 (1910).

§ 55-35. Curative act; amendments prior to 1901.—All amendments to the plan of incorporation of any corporation organized under the provisions of the general laws of North Carolina prior to the passage of the act entitled "An act to revise the corporation law of North Carolina," being chapter two, public laws of nineteen hundred and one, are declared to be valid in all respects, whether such amendments were made in accordance with the provisions of chapter three hundred and eighty of the public laws of eighteen hundred and ninety-three or in accordance with the provisions of chapter two of the public laws of nineteen hundred and one; but no amendment shall be validated by this section unless it is an amendment of such nature as is authorized to be made under the provisions of chapter two of the public laws of nineteen hundred and one. (1905, c. 316; Rev., s. 1248; C. S., s. 1134.)

§ 55-36. Amendment or repeal of this chapter; a part of all charters.—This chapter may be amended or repealed by the legislature, and every

corporation is bound thereby; but such amendment or repeal shall not take away or impair any remedy against the corporation, or its officers, for any liability which has been previously incurred. This chapter and all amendments are a part of the charter of every corporation formed hereunder, so far as the same are applicable and appropriate to the objects of the corporation. (1901, c. 2, s. 7; Rev., s. 1136; C. S., s. 1135.)

§ 55-37. Name must be displayed.—The name of every corporation must be at all times conspicuously displayed at the entrance of its principal office in this State, and in default thereof for sixty days the corporation is liable to a penalty of one hundred dollars, to be recovered with costs, by the State, in an action to be prosecuted by or under the direction of the Attorney General. (1901, c. 2, s. 50; Rev., s. 1242; C. S., s. 1136.)

§ 55-38. Resident process agent.—Every corporation having property or doing business in this State, whether incorporated under its laws or not, shall have an officer or agent in the State upon whom process in all actions or proceedings against it can be served. A corporation failing to comply with the provisions of this section is liable to a forfeiture of its charter, or to the revocation of its license to do business in this State. In the latter event, process in an action or proceeding against the corporation may be served upon the Secretary of State by leaving a true copy thereof with him, and he shall mail the copy to the president, secretary or other officer of the corporation upon whom, if residing in this State, service could be made. For this service to be performed by the secretary, he shall receive a fee of fifty cents, to be paid by the party at whose instance the service was made. (1901, c. 5; Rev., s. 1243; C. S., s. 1137.)

Cross References.—As to service of process upon a corporation, see § 1-97, paragraph 1. As to service of process upon foreign insurance companies, see § 58-153. As to foreign corporations generally, see § 55-117 et seq. As to service of process against a foreign corporation in an action within the jurisdiction of the justice of peace, see § 7-143. As to service of summons in action for dissolution, or for appointment of a receiver, see § 55-131.

Section Constitutional.—This section is constitutional and valid. *Fisher v. Ins. Co.*, 136 N. C. 217, 48 S. E. 667 (1904); *Currie v. Mining Co.*, 157 N. C. 209, 72 S. E. 980 (1911).

The purpose of this section was, in recognition of reciprocal duties, to prevent a foreign corporation from accepting protection of our laws in the transaction of its ordinary business, create obligations and, by reason of its remoteness from any forum available to a local citizen, secure immunity from liability. *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 225 N. C. 198, 34 S. E. (2d) 78 (1945).

Within reasonable limits the statute should be liberally construed to accomplish its remedial purpose. *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 225 N. C. 198, 34 S. E. (2d) 78 (1945).

Formal Compliance Not Required.

Formal compliance with the statutory requirements for domesticating foreign corporations and the appointment of process agents is not required, but it is sufficient if such corporations doing business or holding property within the State have been continuously for the statutory period subject to valid service of process, so as to confer jurisdiction on our courts to render binding judgments in personam against them. *Anderson v. United States Fidelity Co.*, 174 N. C. 417, 93 S. E. 948 (1917).

Jurisdiction over Foreign Corporation.

A foreign corporation, having neither property nor process agent in this State and not having domesticated in North Carolina, must be engaged in business within the State in order to give our courts jurisdiction over it. *Lunceford v. Commercial Travelers Mutual Ass'n*, 190 N. C. 314, 129 S. E. 805 (1925).

Service on Secretary of State.—Every state has the undoubted right to provide for service of process upon any foreign corporation doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such an agent, service, in proper cases, may be made upon an officer designated by law. But the power to designate by statute the officer

upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. *Central Motor Lines v. Brooks Transp. Co.*, 225 N. C. 733, 36 S. E. (2d) 271, 162 A. L. R. 1419 (1945).

A federal land bank created by act of Congress and deriving its right to own property and to do business in this State solely through a Federal statute is not a foreign corporation exercising such functions under express or implied authority of this State, and this section is not applicable to such corporation, and our courts acquire no jurisdiction over it by service as provided in this section. *Leggett v. Federal Land Bank*, 204 N. C. 151, 167 S. E. 557 (1933).

Transitory Cause of Action Arising in Another State.—In an action by a non-resident plaintiff against a nonresident bus corporation, doing business in this State, to recover for personal injuries alleged to have been sustained through negligence of defendant occurring in Virginia, service of process upon the process agent appointed by the defendant under this section was ineffective. *Hamilton v. Atlantic Greyhound Corp.*, 220 N. C. 815, 18 S. E. (2d) 367 (1942).

In an action to recover damages for a tort occurring in New Jersey by a domestic corporation against a foreign corporation, formerly domesticated in North Carolina with a local process agent, but which had withdrawn all personnel and property from the State except an intrastate franchise for transportation of freight, it was held that service of process on the lessee of defendant's franchise was invalid, as was service on the Secretary of State under this section. *Central Motor Lines v. Brooks Transp. Co.*, 225 N. C. 733, 36 S. E. (2d) 271, 162 A. L. R. 1419 (1945).

Foreign Corporation May Plead Statute of Limitations.—A foreign corporation which has complied with the requirements of this section in maintaining an agent in this State upon whom process may be served, as well as a public service corporation doing business in this State, may plead the statute of limitations. *Volivar v. Richmond Cedar Works*, 152 N. C. 656, 68 S. E. 200 (1910), overruling *Green v. Insurance Co.*, 139 N. C. 309, 51 S. E. 887 (1905). See also, *Anderson v. United States Fidelity Co.*, 174 N. C. 417, 93 S. E. 948 (1917).

The nonresidence of a foreign corporation will not prevent the running of the statute of limitations in its favor, where constantly from the accrual of the cause

of action it might have been served with summons under the provisions of this section. *Smith v. Finance Co.*, 207 N. C. 367, 177 S. E. 183 (1934).

Merger of Express Companies.—An express company conveyed its property used in transportation, for its appraised value, to the American Railway Express Company, formed at the suggestion of the Director General of Railways, etc., under government control, but retained property of very large value, so that it remained perfectly solvent, and continued to do business under its franchise, having its own officials and shareholders distinct from those of the new corporation. In such a case the American Railway Company Express Company was not affected by the provisions of this section, requiring foreign corporations to keep a process agent in this State. *McAlister v. American Ry. Exp. Co.*, 179 N. C. 556, 103 S. E. 129 (1920).

Service on Insurance Company.—In *Fisher v. Ins. Co.*, 136 N. C. 217, 48 S. E. 667 (1904), it was held that service of process on an insurance company is not restricted to the method prescribed by § 58-153 but that it may be made also in the manner prescribed by this section. *Pardue v. Absher*, 174 N. C. 676, 94 S. E. 414 (1917).

Property in State.—The fact that non-resident defendant corporation had samples, order blanks and stationery in the State was held insufficient to show that defendant had property in the State for the purpose of service of process on it by service on the Secretary of State under the provisions of this section. *Plott v. Machael*, 214 N. C. 665, 200 S. E. 429 (1939).

Franchise to Transport Freight Is Property.—Intrastate franchise for the transportation of freight in North Carolina, owned by a foreign corporation, is "property" within the meaning of this section. *Central Motor Lines v. Brooks Transp. Co.*, 225 N. C. 733, 36 S. E. (2d) 271, 162 A. L. R. 1419 (1945).

Doing Business in State Is Acceptance of Section.—Where foreign corporations come into the State to do business after the enactment of a statute providing a method of personal service on them, reasonably calculated to give them full notice of the pendency of suits against them, the statutory provisions are regarded as conditions on which they are allowed to do business within the State, and their doing business here thereafter is an acceptance by them of the statutory method and a recognition of its validity to confer juris-

diction on our courts by service thereunder. *Anderson v. United States Fidelity Co.*, 174 N. C. 417, 93 S. E. 948 (1917).

What Constitutes Doing Business.—The meaning of the phrase "doing business in this State," as used in this section, is not susceptible of an all embracing definition, and each case must be decided upon the particular facts therein appearing, the general criteria being a foreign corporation is doing business in this State if it transacts in this State the business it was created and authorized to do, through representatives in this State, and thus is present in this State through the person of its representatives. *Parris v. Fischer & Co.*, 219 N. C. 292, 13 S. E. (2d) 540 (1941).

Same—Within the State.—In determining the question whether a foreign corporation is doing business within a state, so as to be subject to its jurisdiction, and, to the end that such jurisdiction may be exercised, subject to service of process from its courts, in accordance with statutory provisions for such service, it has been generally held that the foreign corporation must have entered the state and must have been within the state during the time such business was transacted. *Ivy River Land, etc., Co. v. National Fire, etc., Ins. Co.*, 192 N. C. 115, 133 S. E. 424 (1926).

Same—Question of Fact.—No satisfactory general definition can be made of the phrase "doing business" as found in our statutes, and, generally speaking, each case must be determined on its own facts. The question is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite, and precise rules. *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 225 N. C. 198, 34 S. E. (2d) 78 (1945).

The question as to doing business is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite and precise rules. In the last analysis, the question is one of due process of law under the Constitution of the United States. *Ivy River Land, etc., Co. v. National Fire, etc., Ins. Co.*, 192 N. C. 115, 133 S. E. 424 (1926); *Harrison v. Corley*, 226 N. C. 184, 37 S. E. (2d) 489 (1946).

Same—Question Is One of Due Process under the United States Constitution.—Whether defendant, on the day the alleged liability for damages was incurred, was engaged in business activities within the State, and thus was validly served with process under this section, is a question

of due process of law under the Constitution of the United States, which must be determined in harmony with the decisions of the Supreme Court of the United States. *Harrison v. Corley*, 226 N. C. 184, 37 S. E. (2d) 489 (1946). See *Ivy River Land, etc., Co. v. National Fire, etc., Ins. Co.*, 192 N. C. 115, 133 S. E. 424 (1926).

Same—Continuity of Conduct.—The court has been careful not to bring within the purview of the statute sporadic activities of a foreign corporation which are not directly in performance of its charter functions, or which are not of such a character as to indicate a course of business which might be expected to recur as opportunity offered; but the nature of the activities themselves, their magnitude, the multiplicity of contracts, the possibility that incidents may occur and liabilities be created—especially where the entrance into the State is in the ordinary prosecution of the business which the corporation is chartered to carry on and is carrying on, and which definitely regards the State as a theater for future transactions of a like sort as often as occasion might arise—these are important considerations in determining whether a corporation is, in a given instance, doing business in the State. On a single visitation to the State the matter in hand may explode into a multitude of transactions of far-reaching importance. *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 225 N. C. 198, 34 S. E. (2d) 78 (1945).

While the phrase "doing business in this State" connotes some degree of continuity, and an isolated instance is insufficient to support service of process under this section, evidence that defendant nonresident corporation maintained dealer-representatives in this State, and that in the particular instance in suit the corporation was doing business in this State through its dealer-representative, is sufficient to support service of process under this section, since the fact that defendant employed dealer-representatives for the purpose of selling its products and carrying on its business, presumably in a similar manner, implies a sufficient continuity of conduct within the purview of the statute. *Parris v. Fischer & Co.*, 219 N. C. 292, 13 S. E. (2d) 540 (1941).

Same—Employment of Soliciting Agent.—Where nonresident defendant corporation employed a soliciting agent who took orders and forwarded them to the home office in another state, it was held that the contract in suit was entered into in the state where the home office was situated and that the evidence failed to show that

defendant was doing business in this State for the purpose of service of process on it by service on the Secretary of State under this section. *Plott v. Michael*, 214 N. C. 665, 200 S. E. 429 (1939).

Same—Insurance Business.—A foreign company acquiring membership of persons in North Carolina for life insurance, without soliciting agents to whom policies are issued, upon a mutual benefit plan and kept in force by the payments of dues, is doing a life insurance business here in contemplation of this section, and valid service of summons may be had on such corporation upon compliance with the provisions of this section in respect thereto. *Lunceford v. Commercial Travelers Mutual Accident Ass'n*, 190 N. C. 314, 129 S. E. 805 (1925).

It cannot be held that the issuance of one or more policies of fire insurance, by a corporation created and existing under the laws of another state, and not authorized to do business in this State, insuring citizens of this State against loss or damage by fire to property situate in this State, the contracts for such policies having been made, and the premiums having been paid in the state in which the foreign corporation has its principal office and place of business, not by or through any agent of such corporation or person authorized to act for it in this State, constitutes "doing business" in the State of North Carolina within the meaning of these words in this section. *Ivy River Land, etc., Co. v. National Fire, etc., Co.*, 192 N. C. 115, 133 S. E. 424 (1926).

Same—Foreign Banking Corporation.—A foreign banking corporation which sends its agents here for the purpose of investigating and looking after properties in its capacity as trustee, does business in the State, "doing business in this State" as used in this section meaning engaging in, carrying on or exercising in this State some of the functions for which the corporation was created. *Ruark v. Virginia Trust Co.*, 206 N. C. 564, 174 S. E. 441 (1934).

Same—Lessor of Airports.—Where defendant foreign corporation leased airports to individual defendant and by terms of agreement lessor was to furnish planes, parts, repairs, etc., to provide insurance for airports to be operated in name of corporate defendant, with right to demand that lessee devote full time to business, and to furnish forms for keeping records, it was held that corporation was doing

business in this State so as to subject it to jurisdiction of courts and that process served on it under this section was valid. *Harrison v. Corley*, 226 N. C. 184, 37 S. E. (2d) 489 (1946).

Same—Vessel Discharging Cargo at N. C. Port.—Where a vessel of defendant foreign corporation, a regular carrier of freight in the coastwise trade, entered the port of Wilmington and discharged a substantial part of its valuable cargo in the regular course of business, and was there damaged by striking a bridge and remained some months in said port, undergoing repairs and having considerable business dealings with local residents, the service of process upon the Secretary of State was valid and sufficient to bring defendant into court. *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 225 N. C. 198, 34 S. E. (2d) 78 (1945).

Discontinuance of Business.—The statute authorizes service of process on the Secretary of State, in an action by a resident of this State against a foreign corporation, after the business once carried on by defendant has been discontinued. *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 225 N. C. 198, 34 S. E. (2d) 78 (1945).

The provisions for service of summons under this section are a condition on which a foreign corporation is allowed to do business, and are accepted by it when it enters the State and engages in business without domesticating or appointing a process agent. It cannot, by the simple expedient of closing shop and departing the jurisdiction, withdraw such assent so as to defeat a suit on a cause of action which arose while it was engaged in business. *Harrison v. Corley*, 226 N. C. 184, 37 S. E. (2d) 489 (1946).

Finding by Trial Court Conclusive.—Where there is evidence to show that a foreign corporation was doing business in this State at the time the summons in the action was served on the Secretary of State, a finding by the trial court to the contrary is conclusive and not subject to review of the Supreme Court. *Brown v. Tennessee Coal, etc., R. Co.*, 208 N. C. 50, 178 S. E. 858 (1935).

Cited in *White v. Vaca Land & Lumber Co.*, 199 N. C. 410, 154 S. E. 620 (1930); *Mauney v. Luzier*, 212 N. C. 634, 194 S. E. 323 (1937); *C. T. H. Corporation v. Maxwell*, 212 N. C. 803, 195 S. E. 36 (1938).

§ 55-39. Process agent in county where principal office located; service on inactive corporations.—Every corporation chartered under the

laws of North Carolina shall have an officer or agent in the county where its principal office is located upon whom process can be had, and shall at all times keep on file with the Secretary of State the name and address of such process officer or agent, and upon the return of any sheriff or other officer of such county that such corporation or process officer or agent cannot be found, service may be had upon such corporation by leaving a copy with the Secretary of State, who shall mail the copy so served upon him to the process agent or officer at the address last given and on file with him, or if none, to the corporation at the address given in its charter; and any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State.

For service as above provided to be performed by the Secretary of State he shall receive a fee of one dollar (\$1.00), to be paid by the party at whose instance the service is made.

This section shall not be in derogation of any other act or law pertaining to the service of summons or process, but shall be in addition thereto. (1937, c. 133, ss. 1-3.)

Cross References.—As to service of process upon a corporation, see § 1-97, paragraph 1, and notes. As to service of summons in action for dissolution, or for appointment of a receiver, see § 55-131.

Editor's Note.—See 15 N. C. Law Rev. 340.

Service on Secretary of State.—The provision of this section for service upon the Secretary of State is not in the nature of a penalty upon the corporation for not having an agent upon whom process could be had and not keeping the name of such agent on file with the Secretary of State, which might be condoned because of inability of the corporation to comply with

the statute. It is a device for public convenience, and is sustained upon the theory that it is reasonably adequate notice, either to be employed alternatively or where other forms of notice are unavailable. *Sisk v. Old Hickory Motor Freight*, 222 N. C. 631, 24 S. E. (2d) 488 (1943).

Service after Bankruptcy.—The continuance of corporate existence by § 55-132 makes service of process on a corporation after it has been adjudged a bankrupt and its charter forfeited under § 55-129 reasonable notice and a valid service. *Sisk v. Old Hickory Motor Freight*, 222 N. C. 631, 24 S. E. (2d) 488 (1943).

§ 55-40. Corporate conveyances; when void as to torts.—Any corporation may convey lands, and other property which is transferable by deed, by deed sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and two other members of the corporation, and attested by a witness, or by deed sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and attested by the secretary or assistant secretary of the company. If the corporation is a bank, the deed may be attested by the secretary or an assistant secretary or by the cashier or an assistant cashier of the bank. But any conveyance of its property, whether absolutely or upon condition, executed by a public service corporation, is void as to torts committed by such corporation prior to the execution of said deed, if persons injured, or their representatives, commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said deed as required by law. (Code, s. 685; 1891, c. 118; 1893, c. 95, s. 2; 1899, c. 235, s. 17; 1901, c. 2, s. 2; 1903, c. 660, s. 1; 1905, c. 114; Rev., s. 1130; C. S., s. 1138; 1929, cc. 28, 189, 256; 1931, c. 238; 1943, c. 219, s. 1.)

I. In General.

II. The Seal.

III. Pleading and Practice.

IV. Former Provision as to Creditors.

Cross References.

As to mortgaged property subject to execution for labor, clerical services and torts, see § 55-44 and note. As to probate of corporate conveyances, see § 47-41.

As to validation of corporate probates, see §§ 47-70 to 47-75 and § 55-41. As to probate of corporate deeds when the corporation has ceased to exist, see § 47-16. As to probates before stockholders in building and loan association, see § 47-9.

I. IN GENERAL.

Editor's Note.—The first 1929 amend-

ment inserted the words "public service" in the last sentence of this section. The second 1929 amendment provided that such amendatory act should not affect pending litigation, and the third 1929 amendment provided that it should be construed to apply only to instruments executed after its ratification. The 1931 amendment repealed the third 1929 amendment. Consequently the sentence, limited to public service companies, must be regarded as affecting the standing of corporate mortgages whenever executed. 9 N. C. Law Rev. 363. Some of the cases treated here were decided prior to these amendments.

The 1943 amendment inserted the second sentence.

Section Applies Generally.—By this section the legislature expressed a general intention with regard to a general subject matter, that is, it applies to all conveyances and to all creditors and to all torts. *Boston Safe-Deposit & Trust Co. v. Hudson*, 68 F. 758 (1895).

It is not required that a lessee corporation should sign a lease, this section applying only to conveyances, and the failure of a lessee corporation to affix its seal to a lease to it of lands necessary to the purpose of its business does not of itself render the lease invalid. *Raleigh Banking & Trust Co. v. Safety Transit Lines*, 198 N. C. 675, 153 S. E. 158 (1930).

This section is an enabling act, additional to and not exclusive of the common-law mode of executing deeds. *Bason v. Mining Co.*, 90 N. C. 417 (1884); *Clark v. Hodge*, 116 N. C. 761, 21 S. E. 562 (1895).

Other Methods of Execution Permissible.—A statutory method of alienation by corporations, like that provided by this section, is not exclusive of the common-law mode of conveyance, and does not prohibit other methods of execution by authorized agents. *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

Same—Example.—A deed of a corporation, the concluding clause being, in witness whereof the said corporation "has caused this indenture to be signed by its president and attested by its secretary, and its common seal to be affixed," with the signatures and seal, is properly executed as a common-law deed. *Bason v. Mining Co.*, 90 N. C. 417 (1884).

Power to Convey Belongs Primarily to Stockholders.—The extraordinary powers of a corporation, such as that of selling or leasing the corporate property, where it exists, belong primarily to the stockholders but may be delegated by them, as powers may be delegated by an individual,

to the directors or to an agent designated in the resolution of the body, either by his official title or his name. *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

Deed Is Act of Corporation Alone.—A mortgage deed executed according to the provisions of this section is the act of the corporation alone, and not that of the corporation's officers, by whose agency the deed is executed. *Traders National Bank v. Mfg. Co.*, 100 N. C. 345, 5 S. E. 81 (1888).

Sixty-Day Provision Mandatory.—Under this section a tort claimant must commence his action within sixty days after the registration of a corporate mortgage, or the mortgage deed will not be void as to him. *Joyner v. Reflector Co.*, 176 N. C. 274, 97 S. E. 44 (1918). See § 55-44 and note.

Absolute Sale of Personalty Not Void as against Tort Claimant.—Under this section as construed with §§ 47-18 and 47-20, an absolute sale by a corporation of its personal property, accompanied by delivery to the purchaser, is not void as to a judgment creditor of the corporation on a judgment obtained against the corporation for a tort committed before the transfer. *Carolina Coach Co. v. Begnell*, 203 N. C. 656, 166 S. E. 903 (1932).

Applied in Antietam Paper Co. v. Chronicle Pub. Co., 115 N. C. 143, 20 S. E. 366 (1894).

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 152 S. E. 489 (1930); *Begnell v. Safety Coach Lines*, 198 N. C. 688, 153 S. E. 264 (1930).

II. THE SEAL.

Common Seal Necessary.—When a mortgage by a corporation is signed by the president, secretary and two stockholders and duly witnessed, but there is no common seal attached, and the probate recites that it is "acknowledged by the secretary, who also proves the execution by the president and two stockholders," such probate is insufficient and does not authorize registration, and is ineffectual to pass title as against creditors. *Duke v. Markham*, 105 N. C. 138, 10 S. E. 1003 (1890).

An instrument purporting to be the deed of a corporation, signed by the president and two members of the corporation, but not having the common seal of the corporation attached, is not effective as a deed, under this section, for lack of the common seal. *Caldwell v. Morganton Mfg. Co.*, 121 N. C. 339, 28 S. E. 475 (1897).

Where a corporate act must be executed

by an instrument under seal and the corporation has adopted a common seal, the corporation speaks through and by its seal. *Withrell v. Murphy*, 154 N. C. 82, 69 S. E. 748 (1910).

See § 55-41, validating certain conveyances from which the corporate seal was omitted.

Presumption of Validity.—When a corporation's deed recites that it is sealed with the corporate seal, it will be presumed that what purports to be such seal placed after the name of the officer executing the deed is the seal of the corporation. *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453 (1894).

When Private Seal of Officer Used.—An instrument purporting to be the deed of a corporation and executed in its name by its president, with the word "seal" at the end of the signature, is not effective as the deed of the corporation, either at common law or under this section, but is only the personal act of the president, and is not admissible in evidence to prove a conveyance by the corporation. *Caldwell v. Morganton Mfg. Co.*, 121 N. C. 339, 28 S. E. 475 (1897). See *Clark v. Hodge*, 116 N. C. 761, 21 S. E. 562 (1895).

Same—May Be Adopted by Corporation.—A corporation may adopt and make effectual as its seal the individual seals of its officers affixed to a deed of the corporation, when it has no seal of its own. *Taylor v. Heggie*, 83 N. C. 244 (1880).

III. PLEADING AND PRACTICE.

No Action to Vacate Deed Required.—This section does not require that an action be brought for the purpose of setting aside or vacating a conveyance, but that it becomes void and of no effect immediately upon the bringing of an action by the creditor to "enforce his claim." Hence it is unnecessary for the plaintiffs in their action to make any reference to, or to ask any judgment in respect to, the deed. *Fisher v. Western Carolina Bank*, 132 N. C. 769, 44 S. E. 601 (1903).

Recital in Deed Proof of Authority.—A recital in a deed of a corporation, properly executed, that it was executed in pursuance of an order of the board of directors, dispenses with the necessity of proving such action of the board otherwise than by the deed itself. *Caldwell v. Morganton Mfg. Co.*, 121 N. C. 339, 28 S. E. 475 (1897).

Presumption of Authority Rebutted.—The presumption that a mortgage with the corporate seal affixed was authorized by a corporation is rebutted when it was executed to the company's officers to se-

cure a pre-existing debt. *Edwards v. Hill Supply Co.*, 150 N. C. 171, 63 S. E. 742 (1909).

When Demurrer Insufficient.—In an action against a corporation for specific performance of a contract, the defense that the contract is not in writing with the corporate seal attached or signed by an officer must be taken advantage of by plea and not by demurrer. *Friedenwald Co. v. Asheville Tobacco Works*, 117 N. C. 544, 23 S. E. 490 (1895), decided under former section requiring certain contracts of corporation to be in writing with corporate seal attached, etc.

IV. FORMER PROVISION AS TO CREDITORS.

Editor's Note.—Prior to 1901 this section provided that conveyances should be void as to creditors existing prior to or at the time of the execution of the said deed provided they commenced proceedings within sixty days after registration. See *Fisher v. Bank*, 132 N. C. 769, 44 S. E. 601 (1903), where this former provision is discussed by the court.

The following constructions were given while the provision above referred to was a part of the section.

Purpose of Provision.—The primary purpose of the provision was to impose restraints upon insolvent corporations, and disable them from borrowing money and conveying their property to secure it, whereby present liabilities might go unpaid. *Traders National Bank v. Lawrence Mfg. Co.*, 96 N. C. 298, 3 S. E. 363 (1887).

The provision was designed to prevent a fraudulent conveyance by a corporation contemplating insolvency to the detriment of its existing creditors. It recognized the principle that the property of an insolvent corporation is a trust fund for the benefit of its creditors. Giving to this creature of the law the rights of property of a natural person, the statute in express terms protected its existing creditors from fraud in the disposition of this property. *Finance Co. v. Charleston, C. & C. R. Co.*, 61 F. 369 (1894).

Preference by Insolvent Corporation.—An insolvent corporation may, under the laws of this State, exercise preference in favor of creditors, not incorporators or officers, provided it is not done with a purpose to defeat, delay or hinder other creditors or parties in interest, and subject (in the case of preference by a conveyance by deed) to the right of other creditors to avoid the preference by commencing suit to enforce their claims within sixty days from the date of the registration of the

deed, as provided in this section. *Merchants National Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894), distinguishing *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. 680 (1888); *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107 (1893).

Creditors Must Act within Sixty Days.

—An assignment by an insolvent corporation for the benefit of creditors would be set aside at the suit of creditors within sixty days from the assignment, as (formerly) provided in this section. *Wilson*

Cotton Mills v. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770 (1894). But the right must be asserted within sixty days. *Williams v. R. R.*, 126 N. C. 918, 36 S. E. 189 (1900).

A conveyance by a corporation of its property in trust for creditors was not void as to pre-existing creditors, unless the latter brought suit to enforce their claims within sixty days after the registration of such conveyance. *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99, 14 S. E. 501 (1892).

§ 55-41. Certain corporate conveyances validated.—All deeds and conveyances of land in this State, made by any corporation of this State prior to January first, one thousand nine hundred forty-eight, executed in its corporate name and signed and attested by its proper officers, from which the corporate seal was omitted, shall be good and valid, notwithstanding the failure to attach said corporate seal. (1939, c. 23; 1949, c. 436.)

Editor's Note.—The 1949 amendment changed the date from 1938 to 1948.

Public Laws 1937, c. 360, validated such

conveyances executed prior to January 1, 1935.

§ 55-41.1. Certain deeds executed by banks validated.—All deeds heretofore executed by banks and attested by the cashier, assistant cashier, secretary or assistant secretary thereof, which deeds are otherwise regular and valid, are hereby validated. (1943, c. 219, s. 1½.)

§ 55-41.2. Certain conveyances of corporations now dissolved validated.—All deeds and conveyances of land in this State, made by any corporation of this State prior to January 1, 1939, executed in its corporate name and signed by either its president, vice-president, or secretary, and sealed with the common seal of the corporation, where said corporation has been dissolved for at least seven years, and said deed or conveyance has been on record for at least seven years, shall be good and valid, notwithstanding the failure of one of such officers to sign such instrument. (1949, c. 825.)

§ 55-42. Conveyances by corporations owned by the United States government.—The Home Owners' Loan Corporation and any corporation, the majority of whose stock is owned by the United States government, may convey lands, and/or other property which is transferable by deed which is duly executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution under seal of the board of directors of said corporation authorizing the said officer, manager, or agent to execute, sign, seal and attest deeds, conveyances and/or other instruments.

All deeds, conveyances and/or other instruments which have been executed prior to March 15, 1941 in the manner prescribed above, if otherwise sufficient, shall be valid, and shall have the effect to pass the title to the real and/or personal property described therein.

To the extent as modified in this section the provisions of § 55-40 shall not apply to conveyances executed by the corporations herein referred to. (1941, c. 294.)

§ 55-43. Conditional sale contracts.—Contracts, in writing, for the purchase of personal property by corporations, providing for a lien on the property or the retention of title thereto by the vendor as a security for the purchase price, or any part thereof, or chattel mortgages, chattel deeds of trust and conditional sales of personal property, are sufficiently executed if signed in the name of the

corporation by the president, secretary or treasurer in his official capacity, and may be acknowledged and ordered to registration as is now provided by law for the execution, acknowledgment and registration of deeds by natural persons. (1909, c. 335, s. 1; C. S., s. 1139; 1949, c. 1224, s. 2.)

Editor's Note.—The 1949 amendment rewrote this section and inserted the words "or chattel mortgages, chattel deeds of trust and conditional sales of personal property." For comment on the amend-

ment, see 27 N. C. Law Rev. 440.

Cited in *Pick & Co. v. Morehead Bluffs Hotel Co.*, 197 N. C. 110, 147 S. E. 819 (1929).

§ 55-44. Mortgaged property subject to execution for labor, clerical services, and torts.—Mortgages, deeds of trust or other conveyances upon condition of public service corporations upon their property or earnings cannot exempt said property or earnings from execution for the satisfaction of any judgment obtained in courts of the State against such corporations for labor and clerical services performed, or torts committed whereby any person is killed or any person or property injured. (1879, c. 101; Code, s. 1255; 1897, c. 334; 1901, c. 2, s. 3; Rev., s. 1131; 1915, c. 201, s. 1; C. S., s. 1140; 1929, cc. 29, 256; 1931, c. 238; 1945, c. 635.)

- I. In General.
- II. Relation to Other Sections.
- III. Effect on Mortgages.
- IV. Certain Judgments Preferred.
 - A. Labor Performed.
 - B. Torts Committed.

Cross References.

As to power of corporation to mortgage its property, see § 55-26, paragraph 4. As to when corporate conveyances are void as to torts, see § 55-40. As to wages being a prior lien upon the insolvency of a corporation, see § 55-136. As to execution against a corporation, see § 55-140 et seq.

I. IN GENERAL.

Editor's Note.—The words "clerical services" were added to the section by the 1915 amendment.

The first 1929 amendment inserted the words "public service" before "corporations" near the beginning of this section. The second 1929 amendment provided that such amendatory act should be construed to apply only to instruments executed after its ratification. The 1931 amendment repealed the second 1929 amendment. For discussion of these amendments, see 9 N. C. Law Rev. 363; *Dial v. Chatham*, 70 F. (2d) 21 (1934).

The 1945 amendment inserted the words "deeds of trust or other conveyances upon condition."

It must be noted in studying the cases under this section that there were formerly included the words "for material furnished." These words were stricken out in 1897.

Under the section as formerly constituted it was held that coal is "material furnished." *Pocahontas Coal Co. v. Henderson Elec., etc., Co.*, 118 N. C. 232, 24

S. E. 22 (1896). Steam engine and boiler were not "material furnished" where it did not appear that they were necessary to the conduct of the business. *James v. Lumber Co.*, 122 N. C. 157, 29 S. E. 358 (1898). A mortgage is now not postponed to a judgment for material furnished. *Cheesborough v. Sanatorium*, 134 N. C. 245, 46 S. E. 494 (1904); *Cox v. New Bern Lighting & Fuel Co.*, 152 N. C. 164, 67 S. E. 477 (1910).

Purpose of Section.—This section is exceedingly comprehensive in its terms, and was intended manifestly to prevent corporations within the State of North Carolina, and those doing business with them, from avoiding the payment of obligations due to laborers. *Union Trust Co. v. Southern Sawmills, etc., Co.*, 166 F. 193 (1908).

This section was passed to secure labor and materials, and to give ample protection against the necessary consequences of the use of plant and machinery. *Finance Co. v. Charleston, C. & C. R. Co.*, 61 F. 369 (1894).

The obvious purpose of this section was to make corporate property situated in the State security against torts committed by its owner. *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57, 26 S. Ct. 186, 50 L. Ed. 367 (1906).

How Construed.—This is not a penal statute, to be construed strictly, but is remedial in its nature, and to be construed liberally, to carry into effect the intention of the legislature, and provide the adequate remedy which it intended. *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57, 26 S. Ct. 186, 50 L. Ed. 367 (1906). But see *Fidelity Insurance, Trust, etc., Co. v. Norfolk & W. R. Co.*, 90 F. 175 (1898),

wherein it was said that this section, being in derogation of the common law, must be strictly construed.

Applies Only to Property within State.—This section can only operate on property within the State. *Fidelity Insurance, Trust, etc., Co. v. Norfolk & W. R. Co.*, 114 F. 389 (1902).

Does Not Create a Lien.—This section neither creates nor provides for the creation of a lien. It does not seem to provide against prior judgment liens, whether taken upon a prior or subsequent debt; nor does it provide against an absolute bona fide sale, but only provides that the property mortgaged shall stand, so far as certain debts and liabilities are concerned, just as if there had been no such mortgage made. *Clement v. King*, 152 N. C. 456, 67 S. E. 1023 (1910).

The section confers no lien or priority. It simply wipes out a mortgage as against a judgment for tort, so that the judgment creditor may proceed to collect his judgment as if there were no mortgage, by execution if the property is not in the hands of a receiver, or by prorating with the mortgage creditors if a receiver has taken charge. *Clement v. King*, 152 N. C. 456, 67 S. E. 1023 (1910); *Joyner v. Reflector Co.*, 176 N. C. 274, 97 S. E. 44 (1918).

This section confers no lien on the products of a cotton factory corporation in favor of one furnishing coal used in their manufacture; the section only gives those holding claims against a corporation for labor performed or torts committed the right to enforce their claims by judgment and execution, as against the holders or mortgages upon the corporate property. *Norfleet v. Tarboro Cotton Factory*, 172 N. C. 833, 89 S. E. 785 (1916).

Priorities.—This section creates a priority in favor of those performing labor or rendering clerical services only from the time a judgment has been entered by a court of competent jurisdiction ascertaining the amount and declaring the priority, and when so established it relates back and becomes prior to that of general creditors of the corporation under a prior registered judgment. *Helsabeck v. Vass*, 196 N. C. 603, 146 S. E. 576 (1929).

Same—Purchaser at Foreclosure Sale.—A notice at a foreclosure sale of the property of a corporation under a mortgage that the employees of the corporation claim a priority under the provisions of this section, does not affect the title conveyed to the purchaser at the sale; the claimants after obtaining judgment against the corpo-

ration may maintain the superiority of their claims to those of the purchaser, but the purchaser is entitled to be heard, and may bring suit to restrain the execution. *Helsabeck v. Vass*, 196 N. C. 603, 146 S. E. 576 (1929).

Judgments Not Superior Except as Provided in This Section.—Judgments against a corporation for its obligations arising on a contract are not superior to the lien of a prior registered deed of trust given to secure bondholders, when the judgments were not in actions to recover for labor and clerical services performed or to recover damages for a tort or for injuries to property within the meaning of this section. *Amoskeag Mfg. Co. v. Yadkin Cotton Mills*, 200 N. C. 10, 156 S. E. 101 (1930).

II. RELATION TO OTHER SECTIONS.

Editor's Note.—In *Boston Safe-Deposit & Trust Co. v. Hudson*, 68 F. 758 (1895), the court makes an exhaustive comparison between this section and § 55-40. The decision reached was that a judgment against a railroad company for a tort causing injury to the person is superior to the mortgage executed after the tort was committed, and that the requirement in § 55-40 that the action be brought in sixty days did not apply.

See also *Finance Co. v. Charleston, etc., R. Co.*, 61 F. 369 (1894), where the court discusses the history and purpose of this section and § 55-40.

Gives a Different Remedy.—This section was enacted after §§ 55-40 and 44-1 and could not have been intended to give the same relief they gave. *Pocahontas Coal Co. v. Henderson Elec., etc., Co.*, 118 N. C. 232, 24 S. E. 22 (1896).

Applies to Labor and Torts after Mortgage.—This section must mean such labor performed, and such torts committed after making the mortgage. Liabilities existing prior to making the mortgage have been provided for by § 55-40. *Pocahontas Coal Co. v. Henderson Elec., etc., Co.*, 118 N. C. 232, 24 S. E. 22 (1896).

Mechanic's Lien under § 44-1.—The mechanic's lien, under § 44-1, has no preference over a prior registered mortgage. *Cox v. New Bern Lighting & Fuel Co.*, 152 N. C. 164, 67 S. E. 477 (1910).

III. EFFECT ON MORTGAGES.

Section Refers to Mortgage of Corporation Itself.—This section expressly refers to a mortgage given by the corporation itself, and not to mortgages on the cor-

porate property acquired by a stranger and registered before the formation of the corporation. *Roberts v. Bowen Mfg. Co.*, 169 N. C. 27, 85 S. E. 45 (1915).

Property Acquired Subject to Prior Mortgage.—This section, which gives to judgments against corporations for labor performed and torts committed priority over prior mortgages executed by a corporation, has no application where the corporation acquired the property subject to such prior mortgage. *Walker v. Linden Lumber Co.*, 170 N. C. 460, 87 S. E. 331 (1915); *Humphrey Brothers v. Buell-Crocker Lumber Co.*, 174 N. C. 514, 93 S. E. 971 (1917).

It would materially impair, if not wholly destroy, this section, if a corporation constructing a plant could place a mortgage thereon for its entire value, and then, by sale to a new corporation, enable the purchaser to use the property discharged of all substantial responsibility. *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57, 26 S. Ct. 186, 50 L. Ed. 367 (1906).

Judgment against Lessee.—This section does not make a judgment against the lessee of a railroad a lien on the property superior to a mortgage given by the lessor before the lease. And where the road is in the hands of receivers, appointed in a suit to foreclose the mortgages, the judgment creditor has no right to payment from earnings of the road, as all rights and interests of the lessee were ended by the appointment of the receiver. *Hampton v. Norfolk & W. Ry. Co.*, 127 F. 662 (1904).

Mortgage Conveys Nothing.—A mortgage of a corporation conveys nothing as against a subsequent judgment for a tort by the corporation. *R. R. Co. v. Burnett*, 123 N. C. 210, 31 S. E. 602 (1898); *Howe v. Harper*, 127 N. C. 356, 37 S. E. 505 (1900); *Clement v. King*, 152 N. C. 456, 67 S. E. 1023 (1910).

This section does not directly invalidate the mortgages, but notwithstanding the attempted alienation, exposes the corporate property to execution issued upon a judgment recovered upon the causes of action mentioned. *Traders National Bank v. Lawrence Mfg. Co.*, 96 N. C. 298, 3 S. E. 363 (1887).

Prior Claim.—A mortgagee of the legal title of property of a corporation, to secure a debt, takes to laborers' liens, judgments for torts, and expenses of receivership, and other court proceedings to wind it up, in case of insolvency. *Humphrey Brothers v. Buell-Crocker Lumber Co.*, 174 N. C. 514, 93 S. E. 971 (1917).

IV. CERTAIN JUDGMENTS PREFERRED.

A. Labor Performed.

Meaning of Labor.—The word "labor" in legal parlance and as used in this section has a well-defined, understood, and accepted meaning. It implies continued exertion of the more onerous and inferior kind, usually and chiefly (prior to the addition of the word "clerical" in the section) consisting in the protracted exertion of muscular force. *Moore v. Industrial Co.*, 138 N. C. 304, 50 S. E. 687 (1905).

Section Protects Employees and Not Officers.—This section is for the protection of employees of a corporation and not for its officers. *Helsabeck v. Vass*, 196 N. C. 603, 146 S. E. 576 (1929).

A foreman is a laborer, and he is entitled to any preference for "labor performed" which is given his collaborators whom he supervised and with whom he worked. *Moore v. Industrial Co.*, 138 N. C. 304, 50 S. E. 687 (1905); *Cox v. New Bern Lighting & Fuel Co.*, 152 N. C. 164, 67 S. E. 477 (1910).

Services Need Not Add to Value of Plant.—Debts of a corporation for labor performed to keep it "a going concern," have a priority over a mortgage previously recorded, although the labor done or materials furnished do not add to the plant or enhance its value. *Pocahontas Coal Co. v. Henderson Elec., etc., Co.*, 118 N. C. 232, 24 S. E. 22 (1896).

What Services Excluded.—The words "labor performed," as used in this section, do not embrace such services as superintending the conduct of milling operations, or conducting a commissary store and keeping the books of the corporation. *Moore v. Industrial Co.*, 138 N. C. 304, 50 S. E. 687 (1905). (But note the effect of the addition of the word "clerical" in the section.)

Independent Contractor's Laborers Excluded.—This section gives a preference for "labor performed" only to laborers employed by the corporation in carrying on the ordinary business of the company, including its repairs and upkeep, and does not confer such preference upon contractors who employ labor under a contract to place "betterments" upon the company's property. *Cox v. New Bern Lighting & Fuel Co.*, 152 N. C. 164, 67 S. E. 477 (1910).

Prior Judgment Unnecessary.—Under this section it is not necessary that claims for labor should be reduced to a formal judgment before they can be proved and given priority over a mortgage. The de-

cree, adjudging the amount of the claim, is to all intents and purposes such a judgment as will meet the requirements of the statute. *Union Trust Co. v. Southern Sawmills, etc., Co.*, 166 F. 193 (1908).

B. Torts Committed.

Must Injure Person or Property.—This section expresses a particular intention with regard to a restricted subject matter, and applies only to torts which injure persons or property. *Boston Safe-Deposit & Trust Co. v. Hudson*, 68 F. 758 (1895).

Judgment Pending Foreclosure Proceedings.—A passenger recovered judgment in the courts of this State against a railroad company for personal injury. At the time, a suit to foreclose a mortgage against the railroad was pending in the federal courts. It was held that the judgment in the State court constituted a prior lien on the property of the railroad. *Trust Co. v. Norfolk, etc., R. Co.*, 183 F. 803 (1911).

Deed of Trust Subordinate.—While this

section does not give a tort claimant a lien for his judgment for the tort committed, it does create a priority, and has the effect of rendering a deed of trust subordinate to the judgment. *Dial v. Chatham*, 70 F. (2d) 21 (1934).

Remedy of Injured Person.—While this section does not create a lien, it gives to a tort claimant, who has reduced his claim to judgment, a right to follow and subject to the payment of his claim such property as the corporation has disposed of by mortgage, even where the sale under the mortgage had taken place before the judgment had been rendered. *Clement v. King*, 152 N. C. 456, 67 S. E. 1023 (1910).

Action against Purchaser.—An insolvent railroad company is not a necessary party to a suit against a purchaser at the foreclosure of a mortgage on its road for an injury while it was operating the road. *Howe v. Harper*, 127 N. C. 356, 37 S. E. 505 (1900).

§ 55-45. Gas and electric power companies.—Gas and electric light and power companies have power to lay, extend, construct, erect, maintain, repair and remove all necessary or convenient towers, poles, cable wires, conductors, lamps, fixtures, appliances, and appurtenances upon, through and over any roads, streets, avenues, lanes, alleys and bridges within and near any city, town or village where said company is located; and all such roads, streets, lanes, alleys and bridges shall be left in as good condition as they were in at the time of using them as aforesaid: Provided, that the rights and privileges conferred in this section shall not be exercised unless the authorities of such city, town or village first give their consent, and afterwards the said authorities shall have full power to control the location of all towers, poles, wires, conductors and all other fixtures, appliances and appurtenances belonging to or operated by any of said companies. (1889 (Pr.), c. 35, s. 2; Rev., s. 1133; C. S., s. 1141.)

Cross References.—As to acquisition and condemnation of property by an electric power company, see § 56-1 et seq. As to power of eminent domain in the North

Carolina Rural Electrification Authority, see § 117-2, paragraph g. As to right of eminent domain generally, see § 40-1 et seq.

§ 55-46: Repealed by Session Laws 1943, c. 543.

§ 55-47. Actions by Attorney General to prevent ultra vires acts, etc.—In the following cases the Attorney General may, in the name of the State, upon his own information, or upon the complaint of a private party, bring an action against the offending parties for the purpose of—

1. Restraining by injunction a corporation from assuming or exercising any franchise or transacting any business not allowed by its charter.
2. Restraining any person from exercising corporate franchises not granted.
3. Bringing directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care.
4. Removing such officers or trustees upon proof of gross misconduct.
5. Securing, for the benefit of all interested, the said property or funds.
6. Setting aside and restraining improper alienations of the said property or funds.
7. Generally compelling the faithful performance of duty and preventing all

fraudulent practices, embezzlement, and waste. (Code, ss. 607, 686; 1901, c. 2, s. 107; Rev., s. 1197; C. S., s. 1143.)

Cross Reference.—As to action by the Attorney General to dissolve a corporation, see § 55-126.

Editor's Note.—For article on powers and duties of Attorney General, see 16 N. C. Law Rev. 127.

Application.—This section applies when the purpose of the action is not to dissolve a corporation but to preserve it in order

that its useful functions may be performed and at the same time that it may not be able to abuse its powers or transcend them. *Attorney General v. R. R.*, 28 N. C. 456 (1846). (This case was decided under the old R. S., c. 26, s. 10, the provisions of which are contained in this section.)

Cited in *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48 (1941).

ARTICLE 5.

Directors and Officers.

§ 55-48. **Directors.**—The business of every corporation shall be managed by its directors who must be at least three in number but such directors need not be stockholders in the corporation unless the articles of incorporation or the bylaws so provide. A corporation may, by its certificate of incorporation or bylaws, determine the number of shares a stockholder must own to qualify him as a director. The directors shall be chosen annually by the stockholders at the time and place provided in the bylaws, and shall hold office for one year and until others are chosen and qualified in their stead; but by so providing in its certificate of incorporation, a corporation may classify its directors in respect to the time for which they will severally hold office, the several classes to be elected for different terms, but no class may be elected for a shorter period than one year, or for a longer period than five years, and the term of office of at least one class must expire in each year. A corporation which has more than one kind of stock may, by so providing in its certificate of incorporation, confer the right to choose the directors of any class upon the stockholders of such class, to the exclusion of the others. One director of every corporation of this State shall be, and only one need be, an actual resident of the State, notwithstanding the provisions of the charter or any other act.

Every nonprofit, nonstock corporation which has been or may be organized under the laws of this State may, in its charter or bylaws, provide for the selection of its board of trustees or board of directors by election by the members or subscribers, or by selection by other designated associations, corporations or individuals, or by any combination of such methods of election set forth in the charter or bylaws. (1901, c. 2, ss. 14, 44; Rev., ss. 1147, 1148; C. S., s. 1144; 1937, c. 179; 1945, c. 200; 1949, c. 917.)

Cross References.—As to election of directors, see §§ 55-112 to 55-114. As to cumulative voting for directors, see § 55-110. As to production of books at elections, see § 55-108. As to directors' meetings, see §§ 55-105, 55-106. As to power to declare dividends, see §§ 55-115, 55-116. As to power to make assessments, see § 55-70. As to liability for impairing capital, see § 55-116. As to liability for fraud, see § 55-56. As to directors acting as trustees upon dissolution of the corporation, see § 55-133. As to directors' power to have offices, keep books of the corporation, and hold meetings outside the State, see § 55-105.

Editor's Note.—The 1937 amendment inserted in the first sentence, which formerly required directors to be stockholders, a

provision that a director might be "the guardian of a bona fide stockholder, or the executor or administrator of the estate of a deceased bona fide stockholder, or a director in a corporation which is a bona fide stockholder."

The 1945 amendment added the second paragraph. The 1949 amendment rewrote the first sentence of the first paragraph and eliminated the former requirement that a director be a stockholder, or the guardian of a stockholder, etc.

The 1945 amendatory act provides: "The selection of any board of trustees or board of directors of a nonprofit, nonstock corporation by any of the methods authorized by this act is hereby ratified, validated and confirmed, and the acts of any such board shall be construed to be the acts of the

corporation: Provided, that this section shall not apply to pending litigation."

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 440.

Powers of Directors.—It is well settled that the directors of a corporation, unless they are specially restrained by the charter or by laws, have the power to borrow money with which to conduct its business and to secure payment by mortgage on the corporate property. *Wall v. Rothrock*, 171 N. C. 388, 88 S. E. 633 (1916).

Director Occupies Fiduciary Relation.—A director of a company occupies a fiduciary relation to the company which, by virtue of his office, he represents in the management of its principal functions. *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107 (1893). Directors are to be considered and dealt with as trustees or quasi trustees. *Besseliew v. Brown*, 177 N. C. 65, 97 S. E. 743 (1919).

Care Required of Directors.—Good faith alone will not relieve the directors of a corporation from liability to its creditors for damages caused them by their gross mismanagement and neglect of its affairs. *Anthony v. Jeffress*, 172 N. C. 378, 90 S. E. 414 (1916).

Directors are not, as a rule, responsible for mere errors of judgment (*Fisher v. Fisher*, 170 N. C. 378, 87 S. E. 113 (1915)), nor for slight omissions from which the loss complained of could not have been reasonably expected; but where they accept these positions of trust they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances, and are charged with a like duty, usually the care that a prudent man shows in the conduct of his own affairs of a similar kind. *Besseliew v. Brown*, 177 N. C. 65, 97 S. E. 743 (1919).

Right of Corporation to Sue Negligent Directors.—Where the directors or managing officers of a corporation are liable in damages for their willful or negligent failure to exercise the care and attention to the corporate affairs entrusted to them and which they have assumed, an action will lie against them in favor of the corporation, and in case of its insolvency and receiver-

ship, in favor of its receiver. *Besseliew v. Brown*, 177 N. C. 65, 97 S. E. 743 (1919).

Director May Lend Money to Corporation.—While a director of a company may lend it money when needed for its benefit, and take a lien upon the corporate property as security for its repayment, provided the transaction be open and entirely fair and capable of strict proof as to its bona fides, yet where a corporation is insolvent a director who is a creditor cannot, upon a debt theretofore existing, take advantage of his superior means of information to secure his debt as against other creditors. *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107 (1893).

Director Cannot Prefer Himself as Creditor.—A director who is also a creditor of a corporation cannot prefer himself to the other creditors in the application of its assets to the security or payment of its debts. *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107 (1893); *Bank v. Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894); *McIver v. Young Hardware Co.*, 144 N. C. 478, 57 S. E. 169 (1907).

Right of Directors to Security.—By taking a mortgage on corporate property, when the corporation is in failing circumstances, directors, occupying a fiduciary relation, are not permitted to secure themselves against pre-existing liabilities of the corporation upon which they are already bound. *Wall v. Rothrock*, 171 N. C. 388, 88 S. E. 633 (1916); *Caldwell v. Robinson*, 179 N. C. 518, 103 N. C. 75 (1920).

Judgment Liens of Directors.—Where the directors of a corporation made a bona fide sale of property to it, for value and free from fraud, judgments against the corporation for the purchase price, duly docketed, constitute liens in favor of the directors against the corporate property. *Caldwell v. Robinson*, 179 N. C. 518, 103 S. E. 75 (1920).

Applied in *Thomas v. Baker*, 227 N. C. 226, 41 S. E. (2d) 842 (1947).

Cited in *Lloyd & Co. v. Poythress*, 185 N. C. 180, 116 S. E. 584 (1923); *Tuttle v. Junior Bldg. Corp.*, 228 N. C. 507, 46 S. E. (2d) 313 (1948).

§ 55-49. **Officers, agents, and vacancies.**—Every corporation organized under this chapter shall have a president, secretary, and treasurer, to be chosen either by the directors or stockholders, as the bylaws direct, and they shall hold office until others are chosen and qualified in their stead; the president shall be chosen from among the directors; the secretary shall record all the votes of the corporation and directors in a book to be kept for that purpose, and perform such other duties as are assigned to him; the treasurer may be required to give bond for the faithful discharge of his duty in such sum, and with such surety or sureties, as are required by the bylaws. Any two of these offices may be held by

the same person, if the body electing so determine. The corporation may have such other officers and agents, who shall be chosen in the manner and hold office for the terms, and upon the conditions, prescribed by the bylaws or determined by the board of directors. Any vacancy occurring among the directors, or in the office of president, secretary or treasurer, shall be filled in the manner provided for in the bylaws; in the absence of such provision the vacancy shall be filled by the board of directors. (1901, c. 2, ss. 15, 16, 17; Rev., ss. 1149, 1150, 1151; C. S., s. 1145.)

Cross References.—As to release of mortgage to a corporation by corporate officer, see § 45-42. As to arrest in civil cases, see § 1-410. As to oath of corporation being made by an officer, see § 11-5.

Officers Must Act in Good Faith.—The officers of a company have no right to take advantage of their knowledge of its financial condition to secure a preference for themselves on all its property as to a pre-existing debt. *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107 (1893); *Electric Light Co. v. Electric Light Co.*, 116 N. C. 112, 21 S. E. 951 (1895); *Graham v. Carr*, 130 N. C. 271, 41 S. E. 379 (1902); *Holshouser v. Copper Co.*, 138 N. C. 248, 50 S. E. 650 (1905); *Edwards v. Hill Supply Co.*, 150 N. C. 171, 63 S. E. 742 (1909).

Officer Cannot Appropriate Corporate Business.—A corporate officer cannot for himself take business from the corporation. *Brite v. Penny*, 157 N. C. 110, 72 S. E. 964 (1911).

Power of President.—The president of a corporation is not bound by any secret limitation upon the authority usually vested in the chief officer of a corporation; hence a defense to a note, issued by the president of a corporation, that it was unauthorized because of an unwritten bylaw, is untenable. *Phillips v. Interstate Land Co.*, 176 N. C. 514, 97 S. E. 417 (1918).

The president of a corporation under this section has implied power to sign a note, and secret limitations on his authority will not be binding on the payee, and a plea of *ultra vires* by the corporation, which has placed its president in a position to mislead plaintiff and cause the loss, will be excluded. *White v. Johnson & Sons*, 205 N. C. 773, 172 S. E. 370 (1934).

Implied Authority of Secretary.—The secretary of an incorporated garage and automobile repair company has the implied authority under this section to settle claims made for damages upon the corporation, and one so dealing with him therein will not be bound by a secret limitation of his authority; and upon his own testimony

that he was the proper one to be dealt with in this respect, the question of the corporation's liability for his promise to pay the claim is properly presented. *Beck v. Wilkins-Ricks Co.*, 186 N. C. 210, 119 S. E. 235 (1923).

Implied Authority of General Manager.—The general manager of one of a chain of stores has implied authority to employ clerks by the year, and the corporation is bound by such contract though there exists an undisclosed limitation of the agent's authority to make contracts of employment for more than a month. *Strickland v. Kress & Co.*, 183 N. C. 534, 112 S. E. 30 (1922).

Individual Liability of Officers.—Where officers of a corporation knowingly participate in a wrong which is actionable they are jointly and severally liable therefor. *Cone v. United Fruit Growers' Ass'n*, 171 N. C. 530, 83 S. E. 860 (1916).

Necessity for Contract for Compensation.—An officer of a corporation, for services in the course and scope of his official duties, can only recover when compensation therefor has been authoritatively agreed upon in advance. It is not always required that a definite sum be fixed upon, but there must be a previous agreement for compensation existent or in some way expressed so as to bind the company. There can be no recovery on a quantum meruit. *Chiles v. United States, etc., Mfg. Co.*, 167 N. C. 574, 83 S. E. 812 (1914). See *Caho v. Norfolk, etc., R. Co.*, 147 N. C. 20, 60 S. E. 640 (1908).

Removal.—The officers of a corporation created for private purposes have no franchise in their offices, and are removable during the term for which they are appointed, when found to be incompetent or faithless. *Eliason v. Coleman*, 86 N. C. 236 (1882).

Applied in *Thomas v. Baker*, 227 N. C. 226, 41 S. E. (2d) 842 (1947).

Cited in *Lloyd & Co. v. Poythress*, 185 N. C. 180, 116 S. E. 584 (1923).

§ 55-50. **Books to be audited on request of stockholders.**—Upon request of twenty-five per cent of the stockholders, or of any stockholder or stockholders owning twenty-five per cent of the capital stock, of a private corporation

organized under the laws of North Carolina and doing business in this State, it is the duty of the officers of the corporation to have all of its books audited by a competent accountant, so that its financial status may be ascertained. Upon refusal or failure of the corporation to commence the auditing of its books within thirty days after such request, the requesting stockholder or stockholders, after ten days' notice to the corporation, may apply to the judge of the district, or to the judge holding the courts of the district, in which the corporation has its residence, either at chambers or term time, at any place in the district, and the judge shall appoint an auditor and require the books to be audited at the expense of the corporation. The officers of the corporation shall render to the auditor any assistance or information they can, and give him access to all of the assets, books, papers, etc., relating to the affairs of the corporation, in order that a proper audit may be made. Upon completion of the audit the auditor shall render a statement to the corporation, and to the petitioning stockholder or stockholders. (1911, c. 174, s. 1; 1913, c. 76, s. 1; C. S., s. 1146.)

This section is primarily concerned with the protection of the rights of minority stockholders, and has reference to private corporations as distinguished from municipal, public, or quasi-public corporations. *Cole v. Farmers Bank, etc., Co.*, 221 N. C. 249, 20 S. E. (2d) 54 (1942).

The section applies to banking corporations, since it embraces all domestic corporations organized for profit in which the beneficial interest and pro rata ownership are represented by shares of stock. *Cole v. Farmers Bank, etc., Co.*, 221 N. C. 249, 20 S. E. (2d) 54 (1942).

Sufficient Number of Signatures.—The fact that an interlocutory motion of plaintiff stockholders for an audit of defendant corporation under this section was denied because request therefor was not signed by 25 per cent of its stockholders, does not estop them from thereafter moving for the same relief after the corporation had failed to act within the statutory time on another request for audit signed by more than 25 per cent of its stockholders. *Cole v. Farmers Bank, etc., Co.*, 221 N. C. 249, 20 S. E. (2d) 54 (1942).

Character of Audit Required.—Diction-

ary definitions alone will not determine the character of the audit required under this section upon demand by the stockholder. Some discretion must certainly be vested in the court to see, at least, that it reasonably reflects the information customarily given in audits of that kind, so that the interested stockholder may be able to discover whether the assets of the company are being administered in accordance with sound corporate practice. *Southern Mills v. Summit Yarn Co.*, 223 N. C. 479, 27 S. E. (2d) 289 (1943).

Misjoinder of Causes of Action.—Where plaintiff, in a suit against two corporate defendants, joins a cause of action based upon an alleged breach of contract by one of the defendants only, with a cause of action against the other defendant to compel an audit of its affairs under this section, and also, in the same complaint, asserts another cause of action against the first defendant for fraud and deceit, judgment of the court below, overruling defendants' demurrers, was held properly reversed and the action was dismissed. *Southern Mills v. Summit Yarn Co.*, 223 N. C. 479, 27 S. E. (2d) 289 (1943).

§ 55-51. Loans to stockholders.—No loan of money may be made to a stockholder or officer of a corporation, and if any is made, the officers who made it or assented thereto are jointly and severally liable, to the extent of such loan and interest, for all the debts of the corporation until the repayment of the sum loaned. (1901, c. 2, s. 53; Rev., s. 1160; C. S., s. 1147.)

§ 55-52. Forfeiture of corporate charter and organization of new corporation.—Wherever a corporation created under the laws of the State of North Carolina has, on account of failure to make reports to the different State authorities, for such a length of time as to lose its charter and where thereafter, under the laws of the State of North Carolina, a new charter is issued, in the same name as the original corporation, and on behalf of the same corporation, such new corporation shall succeed to the same properties, to the same rights as the original corporation before losing its charter on account of neglect hereinbefore mentioned.

Whenever such new corporation shall have been created, under the laws of this

State, all the title, rights and emoluments to the property held by the original corporation shall inure to the benefit of the newer corporation and the new corporation shall issue its stock to the stockholders in the defunct corporation, in the same number and with the same par value as held by the stockholders of the defunct corporation.

Such new corporation shall have the rights and privileges of maintaining any action or cause of action which the defunct corporation might maintain, bring or defend and to all intents and purposes the new corporation shall take the place of the defunct corporation to the same intent and purposes as if the defunct corporation had never expired by reason of its failure to make the reports hereinbefore referred to. (1933, c. 124.)

Editor's Note.—See 11 N. C. Law Rev. 211, for criticism and interpretation of this section.

§ 55-53. Secretary of State may call for special reports.—The Secretary of State has power to call for special reports from corporations, of the same character as their regular reports, at such times as he may deem the public interest requires, but no fees shall be charged for filing these special reports. (Rev., s. 1153; C. S., s. 1149.)

§ 55-54. Secretary of State to publish list of corporations created.—The Secretary of State shall annually compile and publish from the records of his office a complete alphabetical list of the original and amended certificates of incorporation filed during the preceding year, together with the location of the principal office of each in this State, the name of the agent in charge thereof, the amount of authorized capital stock, the amount with which business is to be commenced, the amount issued, the date of filing the certificate, and the period for which the corporation is to continue; but the secretary of State and the Commissioner of Banks or the Utilities Commission, as the case may be, shall confer and arrange the statistics so as to prevent the same facts being embodied in the reports of both departments. (1901, c. 2, s. 104; Rev., s. 1244; 1911, c. 211, s. 10; 1913, c. 198, s. 5; C. S., s. 1150; 1931, c. 243, ss. 4, 5; 1933, c. 134, ss. 7, 8; 1941, c. 97, s. 5.)

§ 55-55. Liability of officers failing to make reports or making false reports.—If any of the officers neglect or refuse to make any report required of them by law for thirty days after written request so to do by a creditor or stockholder of the corporation, they are jointly and severally liable to the person demanding such report, for the amount of his debt if he is a creditor, or for the amount of his loss if he is a stockholder. If any report or certificate made, or any public notice given, by the officers in pursuance of the provisions of this chapter, is false in any material representation, all the officers who signed the same, knowing it to be false, are jointly and severally liable for all the debts of the corporation contracted while they were stockholders or officers thereof, as a penalty enforceable in the courts of this State only. (1901, c. 2, ss. 27, 56; Rev., ss. 1154, 1163; C. S., s. 1151.)

§ 55-56. Liability for fraud.—In case of fraud by the officers, directors, managers, or stockholders, in a corporation, the court shall adjudge personally liable to creditors and others injured thereby the officers, directors, managers, and stockholders who were concerned in the fraud. (Code, s. 686; 1901, c. 2, s. 107; Rev., s. 1155; C. S., s. 1152; 1945, c. 635.)

Editor's Note.—The 1945 amendment substituted "officers" for "president" near the beginning of the section, and "officers, directors, managers and stockholders" for

"directors and stockholders" near the end of the section.

While directors of a corporation are not insurers or guarantors and therefore liable

for its debts, yet they are trustees and liable as such for losses attributable to their bad faith, misconduct, or want of care. *Townsend v. Williams*, 117 N. C. 330, 23 S. E. 461 (1895).

Action by Creditor or Stockholder.—It is settled that an action can be brought by a creditor or stockholder against the officers, including directors, of a corporation, for losses resulting from their fraud or negligence, without having first applied to the corporation to bring such action. *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478 (1896); *White v. Kincaid*, 149 N. C. 415, 63 S. E. 109 (1908); *Braswell v. Pamlico*

Ins., etc., Co., 159 N. C. 628, 75 S. E. 813 (1912).

Joinder of Officers in Action against Corporation.—In an action against a corporation charged to be fraudulently in possession of the assets of another corporation which had been merged into it, the officers of the corporation are not necessary parties. *Friedenwald Co. v. Asheville Tobacco Works*, 117 N. C. 544, 23 S. E. 490 (1895). See note to § 55-57.

Evidence held to justify submitting issue of corporate officer's fraud to jury. *Brite v. Penny*, 157 N. C. 110, 72 S. E. 964 (1911).

§ 55-57. Joint and several liability of officers, etc.; contribution.—When the officers, directors or stockholders of a corporation are liable to pay its debts, or any part thereof, any person to whom they are liable has a right of action against any one or more of them. And any such officer, director or stockholder has the right of equitable contribution in any action for that purpose against any other officer, director or stockholder who is liable with him for any amount which he has been compelled to pay as provided in this section. (1901, c. 2, s. 90; Rev., s. 1156; C. S., s. 1153.)

Corporation Need Not Be Joined.—The directors of a corporation are jointly and severally liable for their torts, and the corporation itself can be joined or not, at the election of the plaintiff, in an action to enforce that liability. *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478 (1896).

Neither a corporation nor its trustee in bankruptcy was a necessary party defendant to a suit for the defendants' wrong as officers of the corporation in misappropriating the plaintiff's money and notes. *Virginia-Carolina Chemical Co. v. Floyd*, 158 N. C. 455, 74 S. E. 465 (1912).

§ 55-58. Officers paying may enforce exoneration against corporation.—An officer, director or stockholder who pays a debt of a corporation for which he is made liable by the provisions of this chapter may recover the amount paid, in an action against the corporation for money paid for its use, in which action only the property of the corporation is liable to be taken, and not the property of any stockholder, except as provided in the preceding section. (1901, c. 2, s. 91; Rev., s. 1157; C. S., s. 1154.)

§ 55-59. Assets of corporation first exhausted.—No sale or other satisfaction shall be had of the property of a director or stockholder for a debt of the corporation of which he is director or stockholder until judgment be obtained therefor against the corporation and execution thereon returned unsatisfied, or until it is shown to the court that the corporation has no property available for the satisfaction of the indebtedness. (1901, c. 2, s. 92; Rev., s. 1158; C. S., s. 1155.)

§ 55-60. No personal liability on corporate manager of partnership.—Any corporation created under this chapter which is a member of a partnership may have its interests in such partnership managed, and may be engaged in or have charge of the management and affairs of such partnership, by and through any of its officers, directors, stockholders, agents and servants, and no such person acting as manager of the interests of any corporation in such partnership, or engaged in or having charge of the management and affairs of such partnership, whether as executive, member of an executive committee or board, employee or otherwise, shall be personally subject to any liability for the debts of such partnership or such corporation. (1933, c. 354, s. 2.)

ARTICLE 6.

Capital Stock.

§ 55-61. **Classes of stock.**—Every corporation has power to create two or more kinds of stock of such classes, with such designations, preferences, and voting powers or restrictions or qualifications thereof as are prescribed by those holding a majority of its outstanding capital stock entitled to vote; and the power to increase or decrease the stock as herein elsewhere provided applies to all or any of the classes of stock; and the preferred stock may, if desired, be made subject to redemption in whole or in part on a pro rata basis at not less than par, at a fixed time or times and price, to be expressed in the certificate thereof; and the holders thereof are entitled to receive, and the corporation is bound to pay thereon, a fixed yearly dividend, to be expressed in the certificate, payable quarterly, half-yearly or yearly, before any dividend is set apart or paid on the common stock, and such dividends may be made cumulative. In case of insolvency, its debts or other liabilities shall be paid in preference to the preferred stock. No corporation shall create preferred stock except by authority given to the board of directors by a vote of at least a majority of the stock entitled to vote at a meeting of the stockholders, duly called for that purpose: Provided, that no new class of stock shall hereafter be created entitled to dividends or shares in distribution of assets in priority to any class of preferred stock already outstanding except with the consent of the holders of record of two-thirds (or such greater amount as may be specified in the charter) of the number of shares of such outstanding preferred stock having voting powers. The terms "general stock" and "common stock" are synonymous. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s. 1159; C. S., s. 1156; 1923, c. 155; 1925, c. 118, ss. 2, 2a; 1939, c. 199.)

Cross Reference.—As to capital stock without nominal or par value, see § 55-73 et seq.

Editor's Note.—The 1925 amendment substituted the words "a majority" for the words "two-thirds" in the two places dealing with the vote of stockholders, and added the proviso. The amendatory act provided that it should not apply to banks and building and loan associations. This change is in accordance with the change made in § 55-31 by the same act. See editor's note under § 55-31. See also, 3 N. C. Law Rev. 134, for a discussion of this amendment.

The 1939 amendment inserted in the first sentence the words "in whole or in part on a pro rata basis," also the words "or times."

Capital Stock—As Distinguished from Capital.—The capital stock of a corporation, strictly speaking, is the amount in money or property subscribed and paid in or secured to be paid in by the shareholders, and always remains the same unless changed by proper legal authority, while its capital is a broader term and includes all funds, securities, credits, and property of every kind whatever belonging to the corporation, though the words are often used interchangeably in revenue statutes. *Person v. Board*, 184 N. C. 499, 115 S. E. 336 (1922).

Same—A Trust Fund for Creditors.—The capital stock and property of a cor-

poration, in case of its insolvency, constitute a fund, first, for the satisfaction of its creditors, and next, for its stockholders. *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107 (1893); *Gilmore v. Smathers*, 167 N. C. 440, 83 S. E. 823 (1914).

Meaning of "Trust Fund."—The term "trust fund," as used in various decisions of the courts in reference to the assets of a corporation, does not imply that upon the insolvency of a corporation, its assets will be administered strictly as a trust for the benefits of all creditors pro rata, but that whenever proceedings under the statute are had, and the court takes charge of the assets through its receiver, it will make equitable distribution, among all the creditors, of all the assets not subject to prior liens or rights. *Merchants National Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894).

The preferred stock forms a part of the capital stock of the corporation, under this section, entitling the holders to all rights of the stockholder subject to the terms and conditions on which their stock was issued. *Kistler v. Caldwell Cotton Mills Co.*, 205 N. C. 809, 172 S. E. 373 (1934).

A preferred stockholder is not a creditor of the corporation, and must be confined to his rights as a stockholder. *Weaver Power Co. v. Elk Mountain Mill Co.*, 154 N. C. 76, 69 S. E. 747 (1910).

Lien of Preferred Stockholders—Rights

of Creditors.—This section fixes the authority of the corporation to issue its preferred stock and the priorities thereof are always subject to the rights of creditors. So an attempt of the corporation to give the preferred stockholders a lien upon its realty in the nature of a mortgage or deed

of trust under the provisions of its charter is ineffectual as to the prior rights of creditors. *Ellington v. Supply Co.*, 196 N. C. 784, 147 S. E. 307 (1929).

Cited in *Windsor Redrying Co. v. Gurley*, 197 N. C. 56, 147 S. E. 676 (1929).

§ 55-62. Stock to be paid in money or money's worth; issue for labor or property.—Nothing but money shall be considered as payment for any part of the capital stock of any corporation organized under this chapter, except as herein provided in case of the purchase of property or labor performed. Any corporation may issue stock for labor done or personal property or real estate, or leases thereof, and, in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive. (1901, c. 2, ss. 19, 53; 1903, c. 660, ss. 2, 3; Rev., ss. 1159, 1160; C. S., s. 1157.)

Cross References.—See note to § 55-63. As to nonpar value stock issued for services, see § 55-74.

Purpose Is to Prevent Fraud.—This section was passed in order that stock subscriptions may be protected in their integrity and not become a means of deceiving those who deal with the corporation. *Goodman v. White*, 174 N. C. 399, 93 S. E. 906 (1917).

Effect of Charter Provision.—A provision in the charter of an incorporated company that the capital stock "shall be issued as full-paid stock" does not permit shares of stock to be issued to stockholders without payment for it by them in money, or its equivalent in property at an honest valuation. *Clayton v. Ore Knob Co.*, 109 N. C. 385, 14 S. E. 36 (1891).

Judgment of Directors Arbitrary.—This section makes the judgment of the board of directors, in fixing the value of property to be accepted in lieu of money, arbitrary and of artificial weight, in the absence of fraud; and in a suit to recover on a stock subscription, where there is no evidence of fraud, a judgment as of nonsuit is properly granted. *Gover v. Malever*, 187 N. C. 774, 122 S. E. 841 (1924).

Cash Payment Unnecessary.—It is not essential to a bona fide subscription to stock in a corporation that there be a

present payment in cash by the subscriber or that he be solvent; a subscription is considered bona fide whenever made by one who subscribes in good faith, with reasonable expectation and apparent prospect of being able to pay assessments on his stock as they may thereafter be called for. *Boushall v. Myatt*, 167 N. C. 328, 83 S. E. 352 (1914).

Conditional Subscription.—A subscription to stock of a corporation may be made on condition that there shall be no liability until the corporation has received actual subscriptions to its capital stock to a specified amount. *Alexander v. North Carolina, etc., Trust Co.*, 155 N. C. 124, 71 S. E. 69 (1911). See *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408 (1892); *Kelly v. Oliver*, 113 N. C. 442, 18 S. E. 698 (1893); *Queen City Printing, etc., Co. v. McAden*, 131 N. C. 178, 42 S. E. 575 (1902).

Illegal Payment.—Under this section a transaction whereby the defendant borrowed a certain sum and bought a half interest in a company, and let the company that he was promoting take it over as soon as it was incorporated, and pay his note, and also issue to him stock as the consideration, was illegal. *Goodman v. White*, 174 N. C. 399, 93 S. E. 906 (1917).

Cited in *Windsor Redrying Co. v. Gurley*, 197 N. C. 56, 147 S. E. 676 (1929).

§ 55-63. Stock issued for property; how value ascertained; how stock reported.—Any corporation formed under this chapter may purchase any property necessary for its business, and issue stock to the amount of the value thereof in payment therefor. The stock so issued shall be full-paid stock, and not liable to any further call, nor shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of actual fraud the judgment of the directors as to the value of the property shall be conclusive. In all statements and reports of the corporation to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the facts. (1901, c. 2, s. 54; Rev., s. 1161; C. S., s. 1158.)

Cross References.—See note to § 55-62. As to nonpar value stock issued for property, see § 55-74.

Proceedings Where Property Overvalued.—Although a margin may be allowed for an honest difference of opinion as to value, a valuation grossly excessive, knowingly made, while its acceptance may bind the corporation, is a fraud on creditors, and they may proceed against the stockholders who sell the property individually, as for an unpaid subscription. *Hobgood v. Ehlen*, 141 N. C. 344, 53 S. E. 875 (1906); *Goodman v. White*, 174 N. C. 399, 93 S. E. 906 (1917).

Evidence of Fraud.—In an action by the receivers of an insolvent corporation to compel the payment of a subscription to

stock issued for property acquired by the corporation for the conduct of the business, evidence tending to show a grossly excessive valuation of the property by the directors, knowingly made, is strong evidence of fraud, and may be conclusive thereof. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538 (1912).

Burden of Proof.—The burden of proving that the property was taken in payment at its true value, and, further, that such value was approved by a board of directors acting independently in the interest of the corporation, is upon the person who alleges payment. *Goodman v. White*, 174 N. C. 399, 93 S. E. 906 (1917).

Cited in *Windsor Redrying Co. v. Gurley*, 197 N. C. 56, 147 S. E. 676 (1929).

§ 55-64. Construction companies building railroads, etc., may take stock therein; how issued, valued, and reported.—Corporations having for their object the building or repairing of railroads, water, gas or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any like works of internal improvement or public use, may subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporation formed for the purpose of constructing, maintaining and operating any such public works; and the directors of any such corporation formed for the purpose of constructing, maintaining and operating any public work of the description aforesaid may accept in payment of any such subscription, or purchase, real or personal property, necessary for the purposes of such corporation, or work, labor and services performed, or materials furnished to, or for, such corporation to the amount of the value thereof, and from time to time issue upon any such subscription or purchase, in such installments or proportions as such directors may agree upon, full-paid stock, in full or partial performance of the whole, or any part of such subscription or purchase, and the stock so issued shall be full-paid stock, and not liable to any further call, nor shall the holder thereof be liable for any further payments. And in all statements and reports of the corporation to be published or filed, this stock shall not be stated, or reported, as being issued for cash paid to the corporation, but shall be reported and published in this respect according to the fact. (1901, c. 2, s. 55; Rev., s. 1172; C. S., s. 1159.)

§ 55-65. Liability for unpaid stock.—Where the capital stock of a corporation has not been paid in and the assets are insufficient to satisfy its debts and obligations, each stockholder is bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter, or such proportion of that sum as is required to satisfy such debts and obligations; but no person holding stock in any corporation in this State as executor, administrator, guardian, or trustee, or as collateral security, is personally subject to any liability as a stockholder of the corporation; but the person pledging the stock is considered as holding the same, and is liable as a stockholder accordingly, and the estate and funds in the hands of such executor, administrator, guardian, or trustee, is liable in like manner, and to the same extent, as the testator or intestate, or the ward, or the person interested in such fund, would have been had he been living and competent to act and hold the stock in his own name. (1893, c. 471; 1901, c. 2, s. 22; Rev., s. 1162; C. S., s. 1160.)

In General.—Both under general principles of corporate law appertaining to the subject, and by this section, stockholders of an insolvent corporation are liable pro

rata for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. *McIver v. Hardware Co.*, 144 N. C. 478, 57 S. E. 169 (1907); *Whitlock*

v. Alexander, 160 N. C. 465, 76 S. E. 538 (1912); Claypoole v. McIntosh, 182 N. C. 109, 108 S. E. 433 (1921).

Unpaid Balances to Be Collected.—The capital stock, paid or unpaid, of a corporation being a trust fund for the benefit of creditors, it is the duty of the courts, at the suit of creditors, to require unpaid subscriptions to be collected at least to the extent necessary to pay the unpaid debts of the corporation. *Wilson Cotton Mills v. Randleman Cotton Mills*, 115 N. C. 475, 20 S. E. 770 (1894).

In case of insolvency any unpaid balance may, by proper proceedings, be made available to the extent required for the settlement of outstanding claims. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538 (1912).

Agreement Contrary to Section.—No agreement or arrangement between a corporation and its stockholders, whereby the latter are to be released from indebtedness on their subscriptions, will be valid or of any force as against creditors. *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. 680 (1888); *Heggie v. Building and Loan Ass'n*, 107 N. C. 581, 12 S. E. 275 (1890). See also, *Gilmore v. Smathers*, 167 N. C. 440, 83 S. E. 823 (1914).

Suspension of Corporate Enterprise.—The mere fact that a proposed corporate enterprise has been suspended affords a subscriber to the capital stock no excuse for not paying his subscription according to his agreement. *Raleigh Impr. Co. v. Andrews*, 176 N. C. 280, 96 S. E. 1032 (1918), decree affirmed, 178 N. C. 328, 100 S. E. 514 (1919).

Preliminary Agreement Broken.—Ex-

cept in cases of fraud, and then only in restricted instances (*Chamberlain v. Trogden*, 148 N. C. 139, 61 S. E. 628 (1908)), a subscriber to stock in a corporation, absolute in terms, may not be relieved of his obligation by reason of nonperformance of conditions attached to a preliminary agreement among some of the members prior to incorporation, a position especially insistent where the rights of creditors have supervened. *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. 680 (1888). See *North Carolina R. Co. v. Leach*, 49 N. C. 340 (1857).

Corporation Not Legally Organized.—Where a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership, he cannot, in a suit by the corporation to recover his unpaid subscription, set up as a defense that the corporation was not legally organized. *Navigation Co. v. Neal*, 10 N. C. 520 (1825); *Academy v. Lindsey*, 28 N. C. 476 (1846); *R. R. v. Thompson*, 52 N. C. 387 (1860); *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. 680 (1888); *Wadesboro Cotton Mills Co. v. Burns*, 114 N. C. 353, 19 S. E. 238 (1894).

Set-Offs.—In a receiver's action to collect unpaid stock subscriptions, a subscriber cannot set off a debt due him by the corporation. Nor can he credit himself with amounts he paid on another subscription. *Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co.*, 173 N. C. 502, 92 S. E. 376 (1917).

Cited in *Windsor Redrying Co. v. Gurley*, 197 N. C. 56, 147 S. E. 676 (1929).

§ 55-66. Decrease of capital stock.—The decrease of capital stock may be effected by—

1. Retiring or reducing any class of the stock.
2. Drawing the necessary number of shares by lot for retirement.
3. The surrender by every stockholder of his shares and the issue to him in place thereof of a decreased number of shares.
4. The purchase at not above par of certain shares for retirement.
5. Retiring shares owned by the corporation.
6. Reducing the par value of shares.

No such decrease of capital stock decreases the liability of any stockholder whose shares have not been fully paid, for debts of the corporation theretofore contracted. (1901, c. 2, s. 32; Rev., s. 1164; C. S., s. 1161; 1939, c. 221; 1949, c. 950.)

Cross References.—As to decreasing or increasing the amount of capital stock by amendment to the charter, see § 55-31. As to directors' liability for impairing capital stock, see § 55-116. As to capital stock being a trust fund for creditors, see note to § 55-61. As to purchase by corporation of

its own stock, see note to § 55-71. As to lack of power of corporation to vote its own stock, see § 55-111.

Editor's Note.—The 1939 amendment changed the time within which the certificate decreasing capital stock was required to be published.

The 1949 amendment struck out the provisions of the last paragraph relating to publication of the certificate decreasing capital stock and liability of directors in default of such publication. For brief comment on the amendment, see 27 N. C. Law Rev. 440.

Bona Fide Creditors Protected.—The right to buy in and cancel its own stock may sometimes be exercised by a corporation, but not in derogation of the rights of bona fide creditors. *Heggie v. Peoples Building and Loan Ass'n*, 107 N. C. 581, 12 S. E. 275 (1890).

No Decrease While Debts Unpaid.—No part of capital stock can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. *Weaver Power Co. v. Elk Mountain Mill Co.*, 154 N. C. 76, 69 S. E. 747 (1910).

§ 55-67. Certificates and duplicates.—Every stockholder shall be entitled to have a certificate signed by the president or a vice-president and by the treasurer or an assistant treasurer or the secretary or an assistant secretary of the corporation certifying the number of shares owned by him in such corporation; provided, however, that where such certificate is signed by a transfer agent, or an assistant transfer agent, or by a transfer clerk acting on behalf of the corporation and a registrar, the signature of any such president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary upon such certificate may be facsimile, engraved or printed. In case any officer or officers who shall have signed, or whose facsimile signature or signatures shall have been placed upon any such certificate or certificates, shall cease to be such officer or officers of the corporation, whether because of death, resignation or otherwise, before such certificate or certificates shall have been delivered by the corporation, such certificate or certificates may nevertheless be adopted by the corporation and be issued and delivered with the same effect as if the person or persons who signed such certificate or certificates, or whose facsimile signature or signatures shall have been placed thereon, had not ceased to be such officer or officers of the corporation. A corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost or destroyed, and the directors authorizing such issue of a new certificate may require the owner of the lost or destroyed certificate, or his legal representatives, to give the corporation a bond, in such sum as they may direct, as an indemnity against any claim that may be made against the corporation. A new certificate may be issued without requiring any bond when, in the judgment of the directors, it is proper to do so. (1885, c. 265; 1901, c. 2, s. 94; Rev., ss. 1165, 1166; C. S., s. 1162; 1927, c. 173; 1949, c. 809.)

Cross References.—As to action to compel issuance of duplicate certificate, see § 55-97. As to procedure when corporation in which lost stock is held merges with another, see § 55-166.

Editor's Note.—The first sentence in this section formerly read, "Every stockholder shall have a certificate signed by the president and treasurer, or secretary, certifying the number of shares owned by him." The 1927 amendment substituted therefor the part of the present first sen-

Purpose of Former Provision for Notice.

—The provision as to notice formerly appearing in the last paragraph of this section was only necessary to afford the stockholders of a corporation protection against creditors. As between the stockholders the reduction, if otherwise lawful and valid and pursuant to resolutions properly passed, would bind the members, and could be enforced by corporate action. *Meisenheimer v. Alexander*, 162 N. C. 226, 78 S. E. 161 (1913).

Repurchase of Stock.—This section was held inapplicable to a suit by a receiver against directors for repurchase of stock by a corporation in *Thompson v. Shepherd*, 203 N. C. 310, 165 S. E. 796 (1932).

Quoted in part in *Rex-Hanover Mills Co. v. United States*, 53 F. Supp. 235 (1944).

tence that appears before the proviso.

The 1949 amendment added the proviso to the first sentence and inserted the second sentence. For brief comment on the amendment, see 27 N. C. Law Rev. 441.

Nature of Stock Certificate.—A certificate of stock is simply a written acknowledgment by a corporation of the interest of the holder in its property and franchises. It has no value except that derived from the company issuing it, and its legal status is in the nature of a chose in action. Person

v. Board, 184 N. C. 499, 115 S. E. 336 (1922).

Evidence of Ownership of Stock.—A certificate for shares is not the stock itself, but constitutes only prima facie evidence of the ownership of that number of shares. *Misenheimer v. Alexander*, 162 N. C. 226, 78 S. E. 161 (1913).

Certificate Unnecessary.—Issuance of stock certificates is unnecessary either to the existence of the corporation or to con-

fer title to the stockholder. *Powell Bros. v. McMullan Lumber Co.*, 153 N. C. 52, 68 S. E. 926 (1910).

Reissue—Application of Last Sentence.—The last sentence of this section, relative to the reissue of stock to supply lost certificates, is valid, and applies to all incorporated companies, and interferes with the chartered rights of none. *Hendon v. North Carolina R. Co.*, 125 N. C. 124, 34 S. E. 227 (1899).

§§ 55-68, 55-69: Repealed by Public Laws 1941, s. 353, s. 24; deleted by authority of Session Laws 1943, c. 15, s. 3.

§ 55-70. **Assessments, sale and notice.**—The directors of a corporation may, from time to time, make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof, remaining unpaid; and the sums assessed shall be paid to the treasurer at such times and by such installments as the directors direct, the directors having given thirty days' notice of the assessment and of the time and place of payment, either personally, by mail, or by publication in a newspaper published in the county where the corporation is established. If the owner of any share or shares neglects to pay a sum assessed thereon for thirty days after the time appointed for payment, the treasurer, when ordered by the board of directors, shall sell, at public auction, such share or shares of the delinquent owner as will pay any assessment due from him, with interest, and all necessary incidental charges, and shall transfer the share or shares sold to the purchaser, who is entitled to a certificate therefor. The treasurer shall give notice of the time and place appointed for the sale, and of the sum due on each share, by advertising the same once a week for three successive weeks before the sale in a newspaper published in the county where the principal office of the corporation is located, at the courthouse door, and by mailing a notice thereof to the last known post-office address of the delinquent stockholder. (1901, c. 2, ss. 23, 24, 25; Rev., ss. 1169, 1170, 1171; C. S., s. 1165.)

Assessment as Encumbrance.—Acceptance of an offer of sale of corporation stock cannot be enforced when the proposed purchaser was unaware at the time that there had been an assessment made upon the shares; the usual implied warranty of title applies to such sales. *Martin v. McDonald*, 168 N. C. 232, 84 S. E. 258 (1915).

Remedy for Wrongful Sale.—Where the

plaintiff's stock has been wrongfully sold, after a legal tender, he is entitled to a mandamus for the issue to him of his certificate of stock upon payment of the amount due on the stock with interest to the date of tender and cost of advertisement. *Wilson v. Tel. Co.*, 139 N. C. 395, 52 S. E. 62 (1905).

Cited in *Windsor Redrying Co. v. Gurley*, 197 N. C. 56, 147 S. E. 676 (1929).

§ 55-71. **One corporation may purchase stock, etc., of another.**—A corporation may purchase stock, securities or other evidences of indebtedness created by any other corporation or corporations of this, or any other state, and while owner of such may exercise all the rights, powers and privileges of ownership. (1903, c. 660, s. 3; Rev., s. 1173; C. S., s. 1166.)

Cross References.—As to power of corporation to purchase its own stock for retirement, see § 55-66. As to lack of power to vote its own stock, see § 55-111.

Corporation May Purchase Its Own Stock.—A corporation, unless restrained by some provision of its organic law, may purchase its own stock from holders thereof, and the latter are entitled to all rights

of other creditors of the corporation for the protection and enforcement of their demand for payment. *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99, 14 S. E. 501 (1892).

Cited in *Carolina Coach Co. v. Hartness*, 198 N. C. 524, 152 S. E. 489 (1930); *Citizens Lumber Co. v. Elias*, 199 N. C. 103, 154 S. E. 54 (1930).

§ 55-72. **Mutual corporations may create stock.**—A mutual corporation, upon the consent in writing of all its members, may provide for and create a capital stock and may provide for the payment of the stock, and fix and prescribe the rights and privileges of the stockholders therein not inconsistent with law. (1901, c. 2, s. 105; Rev., s. 1245; C. S., s. 1167.)

Cross Reference.—As to mutual associations in general, see § 54-111 et seq.

ARTICLE 7.

Capital Stock without Nominal or Par Value.

§ 55-73. **Corporations which may create shares without nominal or par value; classes of stock or debentures.**—Any corporation heretofore or hereafter organized under the laws of this State, whether under a special act of legislature or otherwise, except banks, trust companies and insurance companies, may, in its original certificate of incorporation, articles of association, charter or any amendment thereof, create shares of stock with or without nominal or par value, and may create two or more classes of stock or debentures, any class or classes of which may be with or without nominal or par value, with such designations, preferences, voting powers, restrictions and qualifications as shall be fixed in such certificate of incorporation, articles of association, charter or amendment thereof, or by resolution adopted by those holding a majority of the outstanding capital stock entitled to vote. Subject to any provisions so fixed, every share without nominal or par value shall equal every other such share. (1921, c. 116, s. 1; C. S., s. 1167(a); 1925, c. 262, s. 1; 1949, c. 929.)

Editor's Note.—This article as passed in 1921 was the first legislation in this State permitting the issuance of nonpar stock in corporations. It grew out of a pressing demand to overcome the difficulties in financing corporations, whose stock is either above or below par value, resulting from misrepresentations and misunderstandings arising through the difference between the actual value and face value of stock, and from the blue sky laws which prohibit the sale of new stock unless the actual value and par value correspond, and require that new stock be sold at its actual value. See 1 N. C. Law Rev. 26.

The provision that "any class or classes may be with or without par value," the

reference to "special acts of legislature," and the words "charter" and "designations," were inserted in the first sentence by the 1925 amendment. The 1925 amendment also added to the first sentence the provision permitting those holding the outstanding capital stock entitled to vote, to create stock with or without par value and fix its status with respect to voting, preference, etc. The 1949 amendment substituted "a majority" for "two-thirds" in this last provision.

For discussion of the 1925 amendment, see 3 N. C. Law Rev. 136. For comment on the 1949 amendment, see 27 N. C. Law Rev. 440.

§ 55-74. **Stock issues; payment for stock; terms and manner of disposition.**—The provisions of law relating to the issuance of stock with par value shall apply to the issuance of stock without nominal or par value, and such corporation may issue and dispose of its authorized shares without nominal or par value for such consideration and on such terms and in such manner as may be determined or approved from time to time by the board of directors, subject to such conditions or limitations as may be contained in the certificate of incorporation, articles of association, charter, or any amendment thereof or as may be contained in any vote of the holders of a majority of the stock of the corporation, such consideration to be in the form of cash, property, tangible or intangible, services or expenses. Any and all shares without nominal or par value issued for the consideration determined or approved in accordance with the provisions of this section shall be fully paid and not liable to any further call or assessment thereon, nor shall the subscriber or holder be liable for any further payments. (1921, c. 116, s. 2; C. S., s. 1167(b); 1925, c. 262, s. 2.)

Editor's Note.—The 1925 amendment and revised it. While the section is made struck out this section as enacted in 1921 more comprehensive generally, it would

seem the most important change is that the stockholders are now given power to prescribe the consideration, terms and manner of issue and disposal of the stock,

whereas formerly they exercised such power only with respect to an increase in capital stock.

§ 55-75. Statements as to value of shares; reports of amount of stock.—In any case in which the law requires that the par value of the shares of stock of a corporation be stated, it shall be stated, in respect to shares without nominal or par value, that such shares are without nominal or par value, and wherever the amount of stock authorized or issued is required to be stated, if any shares without nominal or par value are authorized, the number of shares authorized or issued of the several classes shall be stated, and it shall also be stated whether such shares are with or without nominal or par value, and what the par value is of such shares as have par value. (1921, c. 116, s. 3; C. S., s. 1167(c).)

§ 55-76. Amendments to existing charters.—Any corporation, whether organized under a special act of legislature or otherwise, having outstanding shares either with or without nominal or par value, may amend its certificate of incorporation, articles of association or charter, as follows:

(a) So as to change its shares with nominal or par value or any class thereof into an equal number of shares without nominal or par value; or

(b) So as to provide for the exchange of its shares with nominal or par value, or any class thereof, for an equal or different number of shares without nominal or par value; but all outstanding shares in any class shall be exchanged on the same basis; or

(c) So as to provide for the exchange of its shares without nominal or par value, or any class thereof, for a different number of shares without nominal or par value; but all outstanding shares in any class shall be exchanged on the same basis:

Provided, however, the preferences on liquidation, redemption price, dividend rate and like preferences or limitations lawfully granted or imposed with respect to any class of outstanding stock so changed or exchanged under the provisions hereof, shall not be impaired, diminished or changed as to any nonassenting holders thereof. Such preferences, rights and limitations, however, may be expressed in dollars, or in cents, per share rather than by reference to par value. Whenever such a corporation has heretofore issued shares without nominal or par value, in exchange for an equal or different number of shares with par value, such exchange and the issue of an equal or different number of shares without nominal or par value in consummation of such exchange are hereby validated, ratified and confirmed. (1921, c. 116, s. 4; C. S., s. 1167(d); 1925, c. 262, s. 3; 1931, c. 59.)

Editor's Note.—Prior to the 1925 amendment this section merely provided that any such corporation "may amend its certificate of incorporation so as to change its certificate of stock from certificates with par value to certificates with nonpar or nominal value, or vice versa." All the other provisions making the section more comprehensive are new. The amendment

also subdivided the section into paragraphs.

The 1931 amendment struck out the words "such" and "heretofore organized" formerly appearing before and after the word "corporation" near the beginning of this section, and inserted after the word "whether" the word "organized."

§ 55-77. Tax on certificate of incorporation or amendments.—The tax upon the certificate of incorporation, or extension or renewal of corporate existence, or increase of capital stock without nominal or par value shall be the same as if each share of stock had a par or face value of one hundred dollars. (1921, c. 116, s. 5; C. S., s. 1167(e); 1945, c. 635.)

Cross References.—As to the taxes required, see § 55-158. As to provision for taxing the nonpar value shares of a foreign corporation, see § 55-118.

Editor's Note.—The 1945 amendment

substituted "of" for "or" in the phrase "renewal of corporate existence."

For a discussion of problems arising in connection with the constitutionality of this section, see 17 N. C. Law Rev. 346.

§ 55-78. Intent or purpose of law.—The intent and purpose of this article is to require a share of stock to be treated and represented, subject to lawful preferences, rights, limitations, privileges, and restrictions as a mere evidence of an aliquot part of divisional interest in the assets and earnings of the corporation issuing the same, whatever the extent or value of such assets or earnings may be, to the end that misrepresentation or misunderstanding arising through the difference between actual value of a share of stock and the value appearing on the face of the certificate therefor may be eliminated. (1921, c. 116, s. 6; C. S., s. 1167(f).)

§ 55-79. Laws applicable to corporations.—Except as otherwise provided by this article, corporations issuing shares without any par or face value under the provisions hereof shall be and remain subject to the laws of the State now or hereafter in force relating to the formation, regulation, or reorganization rights, powers, and privileges of such corporations, and all other laws applicable thereto. (1921, c. 116, s. 7; C. S., s. 1167(g).)

§ 55-80. Provision for future exchange of par value stock for non-par value stock.—Any corporation heretofore or hereafter organized under the laws of this State, whether under a special act of Legislature or otherwise, except banks, trust companies, and insurance companies, may, in its original certificate of incorporation, articles of association, charter, or any amendment thereof, provide for the exchange of its shares to be issued with nominal or par value for an equal or different number of outstanding shares without nominal or par value. (1929, c. 338, s. 1.)

Cross Reference.—As to railroads, see also § 60-11.

ARTICLE 8.

Uniform Stock Transfer Act.

§ 55-81. How title to certificates and shares may be transferred.—Title to a certificate and to the shares represented thereby can be transferred only:

(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or bylaws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent. (1941, c. 353, s. 1.)

Cross Reference.—As to the sale of shares of stock of a foreign corporation held by a life tenant, see § 55-119.

Editor's Note.—For comment on this article, see 19 N. C. Law Rev. 469.

All of the cases in the following note were decided under C. S., s. 1164, which formerly governed transfers of stock.

Transfer of Title under Former Law.—Under C. S., s. 1164, where the holder and owner of stock surrendered the certificates to the corporation and directed the corporation to transfer same on its books, the

transferee acquired title, which was perfected by the surrender or delivery of the new certificate to him. *Jones v. Waldroup*, 217 N. C. 178, 7 S. E. (2d) 366 (1940).

Same—Transfer on Books Not Necessary between Parties.—The requirement of C. S., s. 1164, as to entering transfers of stock upon the books of the corporation was for the protection of the corporation, and the failure to enter such transfer upon the corporate books had no effect upon the legality of the transfer as between the parties themselves. *Grissom v. Stern-*

berger, 10 F. (2d) 764 (1926). See *Castelloe v. Jenkins*, 186 N. C. 166, 119 S. E. 202 (1923).

Certificate as Evidence of Title under C. S., s. 1164.—Under C. S., s. 1164, a certificate indorsed by the person to whom it was issued was at least prima facie evidence of the title of the holder. *Castelloe v. Jenkins*, 186 N. C. 166, 119 S. E. 202 (1923).

Preference of Holder.—Under C. S., s. 1164, the holder of stock either as a purchaser or a pledgee had the preference over an attaching creditor although the transfer of the stock had not been entered on the books of the corporation. *Bleakley v. Candler*, 169 N. C. 16, 84 S. E. 1039 (1915).

Duty of Corporation.—Under C. S., s. 1164, which provided for transfer of stock upon the books of the corporation, it was held that it was the duty of the corpora-

tion to protect persons interested, such as contingent remaindermen or legatees when the corporation had knowledge of the contents of the will, from an unauthorized transfer of stock. *Wooten v. Railroad*, 128 N. C. 119, 38 S. E. 298 (1901); *Baker v. Railroad*, 173 N. C. 365, 92 S. E. 170 (1917).

Under C. S., s. 1164, if an agent made a demand for a transfer, the corporation must look to the power of attorney; if an executor, to the will; if an administrator, to his letters. *Baker v. Railroad*, 173 N. C. 365, 92 S. E. 170 (1917).

Corporation May Trade in Own Stock.—Shares of stock were declared by C. S., s. 1164, to be personal property, and might be sold or purchased by the corporation which had created them. *Byrd v. Tidewater Power Co.*, 205 N. C. 589, 172 S. E. 183 (1934).

§ 55-82. Powers of those lacking full legal capacity and of fiduciaries not enlarged.—Nothing in this article shall be construed as enlarging the powers of an infant or other person lacking full legal capacity, or of a trustee, executor or administrator, or other fiduciary, to make a valid indorsement, assignment or power of attorney. (1941, c. 353, s. 2.)

§ 55-83. Corporation not forbidden to treat registered holder as owner.—Nothing in this article shall be construed as forbidding a corporation:

(a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, or

(b) To hold liable for calls and assessments a person registered on its books as the owner of shares. (1941, c. 353, s. 3.)

§ 55-84. Title derived from certificate extinguishes title derived from a separate document.—The title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person, for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate with the indorsement of the person appearing by the certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document. (1941, c. 353, s. 4.)

§ 55-85. Delivery of certificate by one without authority or right of possession.—The delivery of a certificate to transfer title in accordance with the provisions of § 55-81, is effectual, except as provided in § 55-87, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title. (1941, c. 353, s. 5.)

§ 55-86. Indorsement effectual in spite of fraud, duress, mistake, revocation, death, incapacity or lack of consideration or authority.—The indorsement of a certificate by the person appearing by the certificate to be the owner of the shares represented thereby is effectual, except as provided in § 55-87, though the indorser or transferor:

(a) Was induced by fraud, duress or mistake, to make the indorsement or delivery, or

(b) Has revoked the delivery of the certificate, or the authority given by the indorsement or delivery of the certificate, or

(c) Has died or become legally incapacitated after the indorsement, whether before or after the delivery of the certificate, or

(d) Has received no consideration. (1941, c. 353, s. 6.)

§ 55-87. **Rescission of transfer.**—If the indorsement or delivery of a certificate

(a) Was procured by fraud or duress, or

(b) Was made under such mistake as to make the indorsement or delivery inequitable; or

If the delivery of a certificate was made

(c) Without authority from the owner, or

(d) After the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless,

(1) The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or

(2) The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof and, pending litigation, may enjoin the further transfer of the certificate or impound it. (1941, c. 353, s. 7.)

§ 55-88. **Rescission does not invalidate subsequent transfer by transferee in possession.**—Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby. (1941, c. 353, s. 8.)

§ 55-89. **Delivery of unindorsed certificate imposes obligation to indorse.**—The delivery of a certificate by the person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares, shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering, to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. (1941, c. 353, s. 9.)

§ 55-90. **Ineffectual attempt to transfer amounts to a promise to transfer.**—An attempted transfer of title to a certificate or to shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts. (1941, c. 353, s. 10.)

§ 55-91. **Warranties on sale of certificate.**—A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appear, warrants:

(a) That the certificate is genuine.

(b) That he has a legal right to transfer it, and

(c) That he has no knowledge of any fact which would impair the validity of the certificate.

In the case of an assignment of a claim secured by a certificate, the liability of

the assignor upon such warranty shall not exceed the amount of the claim. (1941, c. 353, s. 11.)

§ 55-92. No warranty implied from accepting payment of a debt.—A mortgagee, pledgee, or other holder for security of a certificate who in good faith demands or receives payment of the debt for which such certificate is security, whether from a party to a draft drawn for such debt, or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such certificate, or the value of the shares represented thereby. (1941, c. 353, s. 12.)

§ 55-93. No attachment or levy upon shares unless certificate surrendered or transfer enjoined.—No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it. (1941, c. 353, s. 13.)

Cross References.—As to attachment of shares of stock, see §§ 1-458 to 1-460. See also §§ 55-142, 55-145, 55-146.

§ 55-94. Creditor's remedies to reach certificate.—A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1941, c. 353, s. 14.)

§ 55-95. No lien or restriction unless indicated on certificate.—There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any bylaws of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate. (1941, c. 353, s. 15.)

§ 55-96. Alteration of certificate does not divest title to shares.—The alteration of a certificate, whether fraudulent or not and by whomsoever made, shall not deprive the owner of his title to the certificate and the shares originally represented thereby, and the transfer of such a certificate shall convey to the transferee a good title to such certificate and to the shares originally represented thereby. (1941, c. 353, s. 16.)

§ 55-97. Lost or destroyed certificate.—Where a certificate has been lost or destroyed, a court of competent jurisdiction may order the issue of a new certificate therefor on service of process upon the corporation and on reasonable notice by publication, and in any other way which the court may direct, to all persons interested, and upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the corporation or any person injured by the issue of the new certificate from any liability or expense, which it or they may incur by reason of the original certificate remaining outstanding. The court may also in its discretion order the payment of the corporation's reasonable costs and counsel fees.

The issuance of a new certificate under an order of the court as provided in this section, shall not relieve the corporation from liability in damages to a person to whom the original certificate has been or shall be transferred for value without notice of the proceedings or of the issuance of the new certificate: Provided, nothing in this section shall prevent the issuance of a new stock certificate in the place

of a lost or destroyed certificate in accordance with the provisions of § 55-67. (1941, c. 353, s. 17.)

Cross References.—As to the issuance of duplicate certificates, see § 55-67. As to procedure when corporation in which stock is held merges with another, see § 55-166.

Loss Question of Fact.—Under C. S., s. 1163, which formerly governed actions to compel issuance of duplicate certificates,

it was held that where a stockholder in an unincorporated company lost his certificate of stock and sued his company for a reissue and the allegation of loss was denied, an issue of fact was raised for trial by jury and it must be submitted to them. *Hendon v. North Carolina R. Co.*, 125 N. C. 124, 34 S. E. 227 (1899).

§ 55-98. Rules for cases not provided for by this article.—In any case not provided for by this article, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. (1941, c. 353, s. 18.)

§ 55-99. Interpretation of article.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1941, c. 353, s. 19.)

§ 55-100. Definition of indorsement.—A certificate is indorsed when an assignment or a power of attorney to sell, assign, or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner of the shares represented thereby, or when the signature of such person is written without more upon the back of the certificate. In any of such cases a certificate is indorsed though it has not been delivered. (1941, c. 353, s. 20.)

§ 55-101. Definition of person appearing to be the owner of certificate.—The person to whom a certificate was originally issued is the person appearing by the certificate to be the owner thereof, and of the shares represented thereby, until and unless he indorses the certificate to another specified person, and thereupon such other specified person is the person appearing by the certificate to be the owner thereof until and unless he also indorses the certificate to another specified person. Subsequent special indorsements may be made with like effect. (1941, c. 353, s. 21.)

§ 55-102. Other definitions.—(1) In this article, unless the context or subject matter otherwise requires—

“Certificate” means a certificate of stock in a corporation organized under the laws of this State or of another state whose laws are consistent with this article.

“Delivery” means voluntary transfer of possession from one person to another.

“Person” includes a corporation or partnership or two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee or as pledgee.

“Purchaser” includes a mortgagee and pledgee.

“Shares” means a share or shares of stock in a corporation organized under the laws of this State or of another state whose laws are consistent with this article.

“State” includes state, territory, district and insular possession of the United States.

“Transfer” means transfer of legal title.

“Title” means legal title and does not include a merely equitable or beneficial ownership or interest.

“Value” is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor.

(2) A thing is done “in good faith” within the meaning of this article, when it is in fact done honestly, whether it be done negligently or not. (1941, c. 353, s. 22.)

§ 55-103. **Article does not apply to existing certificates.**—The provisions of this article apply only to certificates issued after March 15, 1941. (1941, c. 353, s. 23.)

§ 55-104. **Name of article.**—This article may be cited as the Uniform Stock Transfer Act. (1941, c. 353, s. 26.)

ARTICLE 9.

Meetings, Elections and Dividends.

§ 55-105. **Place of stockholders' and directors' meetings.**—The meetings of the stockholders of every corporation of this State shall be held at the principal office in this State. The directors may hold their meetings, and have an office and keep the books of the corporation (except the stock and transfer books) outside the State. Every corporation shall maintain a principal office in this State, and have an agent in charge thereof. (1901, c. 2, s. 49; Rev., s. 1179; C. S., s. 1168.)

Cross References.—As to first meeting of corporation, see § 55-6. As to stock and transfer books, see § 55-107. As to power of court to compel corporation to bring its books into State, see § 55-109. As to changing location of principal office, see § 55-34.

Where Charter Provision Contrary to Section.—Although the act incorporating a company provided that Norfolk, Virginia, should be the place of its principal office, it was held in *Simmons v. Norfolk, etc., Steamboat Co.*, 113 N. C. 147, 18 S. E. 117 (1893), that it is the duty of a corporation to keep its principal place of business, its books and records and its principal officers within the state which incorporates it, to an extent necessary to the fullest jurisdiction and visitatorial power of the state and its courts, and the efficient exercise thereof in all proper cases which concern said corporation. *Roberson v. Johnson Lumber Co.*, 153 N. C. 120, 68 S. E. 1064 (1910).

Stockholders Must Act in Meeting.—It is essential to the validity of the acts of stockholders of a corporation that they should be assembled in their representative capacity, as they are not permitted to discharge any of their duties as stockholders unless so organized. *Hill v. Railroad*, 143 N. C. 539, 55 S. E. 854 (1906), citing *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017 (1890).

Same—Individual Assent Invalid.—The assent of a majority of stockholders, expressed elsewhere than at a meeting of the stockholders, as where the assent of each is given separately and at different times

to a person who goes around to them privately, does not bind the company. *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017 (1890).

Necessity for Notice of Stockholders' Meetings.—In order to protect the rights of minorities the law requires that notice of the meetings of the stockholders of a corporation shall be given to every shareholder, either by the method prescribed in the charter or bylaws or by express notice; but where it appears that every person interested had express notice and participated in a meeting, there is no necessity for proving a compliance with § 55-6 as to such notice. *Benbow v. Cook*, 115 N. C. 325, 20 S. E. 453 (1894).

The scope of a special meeting of stockholders is limited to the purpose stated in the notice thereof; business action beyond this scope is void unless all stockholders are present, consent, or subsequently ratify it. *Asbury v. Mooney*, 173 N. C. 454, 92 S. E. 267 (1917).

Meetings of Directors.—To make the proceedings of a meeting of the directors of a corporation regular, it must be at a stated time provided for in the charter or bylaws or held after notice to all of the directors. *First Nat. Bank v. Asheville, etc., Lumber Co.*, 116 N. C. 827, 21 S. E. 948 (1895).

Same—Necessity for Notice.—The acts of the majority of the directors at a meeting held at an unusual time and place, without notice to the other directors, are not valid. *First Nat. Bank v. Asheville, etc., Lumber Co.*, 116 N. C. 827, 21 S. E. 948 (1895).

§ 55-106. **Meeting called by three stockholders.**—When, for any reason, a legal meeting of the stockholders of any corporation cannot be otherwise called, three stockholders with voting power may call such meeting by publishing in a newspaper published in the county in which the principal office in this State

is located ten days' notice of the time, place and purposes of the meeting, and mailing this notice to all stockholders whose post-office addresses are known or can be ascertained. A meeting so called is a legal meeting of the corporation, and if there are no officers present, the stockholders may elect officers for the meeting; and the secretary of the meeting shall record the proceedings thereof in the minute book of the corporation. (1901, c. 2, s. 51; Rev., s. 1190; C. S., s. 1169.)

§ 55-107. **Transfer and stock books.**—Every corporation shall keep at its principal and registered office in this State the transfer books, in which the transfer of stock shall be registered, and the stock books, which shall contain the names and addresses of the stockholders, and the number of shares held by them respectively, and shall at all times during the usual hours for business be open to the examination of every stockholder. These books shall be the only evidence as to who are the stockholders entitled to examine them, and to vote at elections. In case the right to vote upon any share of stock is questioned, the stock books of the corporation shall be referred to, to ascertain who are the stockholders, and in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote. (1901, c. 2, ss. 38, 45; Rev., ss. 1180, 1181; C. S., s. 1170.)

§ 55-108. **Directors to produce books at election.**—The board of directors shall produce at the time and place of elections the transfer books and the stock books, there to remain during the election, and the neglect or refusal of the directors to produce the same after a demand therefor shall render them ineligible to any office at such election. All elections of directors held under this chapter prior to February 28, 1913, where these books were not produced, and no demand was made therefor, are ratified and confirmed and given full legal force and effect. (1901, c. 2, s. 38; Rev., s. 1180; 1913, c. 14; C. S., s. 1171.)

§ 55-109. **Superior court may require production.**—The superior court may, upon proper cause shown, order any or all of the books of the corporation to be forthwith brought within this State, and kept therein at such place and for such time as is designated in such order. The charter of any corporation failing to comply with such order may be declared forfeited by the court making the order, and all its directors and officers shall be liable to be punished for contempt of court for disobedience of the order. (1901, c. 2, s. 49; Rev., s. 1179; C. S., s. 1172.)

Cross References.—As to jurisdiction of superior court over elections, see § 55-114. As to jurisdiction of superior court upon dissolution of corporation, see § 55-134.

§ 55-110. **Votes stockholders entitled to; cumulative voting.**—Unless otherwise provided in the charter or bylaws of a corporation, at every election each stockholder is entitled to one vote in person, or by proxy duly authorized in writing, for each share of the capital stock held by him, but no proxy may be voted after three years from its date. No share of stock may be voted which has been transferred on the books of the corporation within twenty days of an election. The certificate of incorporation of any corporation authorized to issue shares of capital stock may provide that at all elections of directors, managers or trustees, each stockholder is entitled to as many votes as equal the number of his shares of stock multiplied by the number of directors, managers, or trustees to be elected, and that he may cast all of his votes for a single director, manager, or trustee, or may distribute them among the number to be voted for, or any two or more of them, as he sees fit. This right of cumulative voting may be exercised in the absence of charter provision when at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that more than one-fourth of the capital stock of the corporation is owned or controlled by one person. A stockholder owning or controlling more than twenty-five per cent of the stock has the same right to vote cumulatively as any other stockholder; and no amendment of the charter or bylaws of a corporation can abrogate or abridge any right herein

conferred. The right to vote cumulatively cannot be exercised unless some stockholder announces in open meeting, before the voting for directors, trustees, or managers begins, his purpose to exercise such right, and then every other stockholder may likewise vote cumulatively. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; C. S., s. 1173; 1945, c. 635.)

Editor's Note.—The 1945 amendment inserted the second sentence in lieu of the words "nor may there be voted at any election a share of stock which has been transferred on the books of the corporation within twenty days prior to the election."

When Cumulative Voting Applies.—It is impossible for a person to vote cumulatively upon a single proposition. It is only when several persons are voted for at the same time that the voter can "cumulate" his votes. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892 (1909).

The right to cumulative voting is not given generally, but only in the election of officers. It could not apply to other matters, as the motion to adjourn, for instance, where there is only one proposition and nothing to "cumulate" upon. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892 (1909).

Voting Trust Illegal.—An agreement which deprives the stockholders of the right to vote is contrary to public policy and void. *Harvey v. Improvement Co.*,

118 N. C. 693, 24 S. E. 489 (1896); *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894 (1909).

Same—Not a Proxy.—An agreement pooling stock in a corporation which creates a voting trust, with absolute powers to decide upon matters arising for a period exceeding three years, cannot be considered as a proxy authorized by this section, for a proxy is only good for the period of three years. *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894 (1909).

A proxy cannot be made irrevocable. *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894 (1909).

Assignment Reserving Possession and Right to Dividends.—A written agreement assigning stock in a corporation with authority to vote, reserving to the assignors who retain possession the right to all dividends, amounts only to a proxy and is invalid after three years. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892 (1909).

§ 55-111. Stock held by fiduciary, pledgor, life tenant, or corporation.—Every person holding stock as executor, administrator, guardian or trustee, or in any other representative or fiduciary capacity, may represent it at all meetings of the corporation, and may vote it as a stockholder, with the same effect as if the absolute owner thereof, unless the instrument creating the trust provides to the contrary. Every person who has pledged his stock as collateral security may represent it at all such meetings, and may vote it as a stockholder, unless in the transfer to the pledgee on the books of the corporation he has expressly empowered the pledgee to vote it, in which case only the pledgee or his proxy may represent and vote said stock. Where stock is owned by, or has been transferred on its record books to, one for life and remainder over, the life tenant at all meetings of the corporation may represent and vote the stock in person or by proxy, in the same manner and with the same effect as if he were the absolute owner thereof. Shares of stock of a corporation belonging to the corporation cannot be voted directly or indirectly. (1901, c. 2, ss. 42, 43, c. 474, ss. 1, 2; Rev., ss. 1185, 1186, 1187; C. S., s. 1174.)

Cross Reference.—As to power of a corporation to purchase its own stock, see § 55-66 and note to § 55-71.

When Trustee May Vote.—When the terms and provisions of a will, bequeathing a life interest in certain shares of stock in a corporation, are construed to be that the shares are to be held and controlled by trustees therein named as executors and trustees, the trustees may vote the same

in stockholders' meetings under this section and the provision for voting of the shares by the life tenant has no application. *Haywood v. Wright*, 152 N. C. 421, 67 S. E. 982 (1910).

Assignment Reserving Possession and Right to Dividends.—See note to § 55-110.

Applied in *Wolf v. Citizens Bank, etc.*, Co., 92 F. (2d) 233 (1937).

§ 55-112. Election of directors.—All elections for directors shall be by ballot, unless otherwise provided in the charter or bylaws, and a majority of the

issued and outstanding stock must be present in person or by proxy; the persons receiving the greatest number of votes shall be the directors. (1901, c. 2, s. 39; Rev., s. 1182; C. S., s. 1175; 1927, c. 138.)

Cross Reference.—As to directors in general, see § 55-48 and note.

Editor's Note.—This section formerly contained this additional provision: "The polls must remain open one hour, unless all the stockholders are present in person or by proxy and have sooner voted, or unless all the stockholders waive this provision in writing." This sentence was stricken out by the 1927 amendment.

Effect of Motion of Adjournment. —

§ 55-113. **Failure to hold election.**—If the election for directors of a corporation is not held on the day designated by the charter or bylaws, the directors shall cause the election to be held as soon thereafter as is convenient. No failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation; and if the directors fail or refuse for thirty days after receiving a written request for such election from those owning one-tenth of the outstanding stock, to call a meeting for the election, the judge of the district, or the judge presiding in the courts of the district, in which the principal office of the corporation is located, may, upon the application of any stockholder and on notice to the directors, order an election or make such other order as justice requires. The proceedings governing the issuance and hearing of injunctions shall, as far as applicable, govern such hearing. (1901, c. 2, s. 46; Rev., s. 1188; C. S., s. 1176.)

Cross Reference.—See note to § 55-114.

Necessity for Application to Directors.

—A mandamus sought under the provisions of this and the following section cannot issue to compel the reconvening of the stockholders for the election of directors because of an illegal adjournment by unlawful voting of stock, where there is no application to the directors to call a meeting alleged or shown, nor refusal after thirty days' notice. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892 (1909).

Composition of Meeting.—A meeting of the stockholders of a corporation, ordered, upon application, by the judge in

When a motion to adjourn a stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce the number of those present below a majority of all the stock issued and outstanding, an election of officers cannot be lawfully held thereafter at that meeting, though the adjournment was carried by an illegal vote. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892 (1909).

accordance with the provisions of this section, must be composed of a majority of shares held twenty days before such meeting, as it appears from the stock book, or, in case of a discrepancy, the transfer book of the corporation. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892 (1909).

Notice.—The notice of a meeting called under this section, by custom and by analogy to § 55-106, should be mailed to all stockholders whose addresses are known. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892 (1909).

Stated in *In re Hotel Raleigh*, 207 N. C. 521, 177 S. E. 648 (1935).

§ 55-114. **Jurisdiction of superior court over corporate elections.**—Whenever there shall be any dispute with reference to the election of directors by the stockholders of any corporation in the hands of a receivership, or whenever there shall be any dispute with reference to the election of officers of any corporation by directors or stockholders, if the stockholders elect the officers, the resident or presiding judge of the district may, after ten days' notice to the stockholders, or to the directors as the case may be, hear at chambers, in the county in which the principal office of the corporation is situated, evidence in the form of affidavits as to dispute, and may continue from time to time such hearing for the purpose of establishing facts with reference thereto to his satisfaction; and upon the completion of his hearing may order a new election or may declare the result of the election so held, or may continue the directors or officers, as the case may be, until a new election shall be held: Provided, however, that no order shall be entered temporarily affecting the status of the corporation. With reference to notice, evidence, and the findings by the judge hearing the same, the proceedings

shall be, as far as possible, the same as in injunctions. (1901, c. 2, s. 47; Rev., s. 1189; C. S., s. 1177; 1935, c. 413; 1937, c. 347.)

Cross References.—As to power of superior court to compel production of books, see § 55-109. As to superior court's jurisdiction upon dissolution of corporation, see § 55-134.

Editor's Note.—Prior to the 1937 amendment this section contained a provision for the appointment of receivers, which was inserted by the 1935 amendment.

Section Is Constitutional.—This section, empowering the court to continue corporate officers in their respective offices with the same authority and emoluments enjoyed by them prior to controversy, provides an emergency remedy which does not affect the status of the corporation but merely preserves the status quo pending determination of controversy in order that the corporation may continue to function, not under the supervision of the court, but by virtue of corporate authority theretofore given, and therefore the remedy violates no constitutional right of stockholders or directors, but only imposes upon them the rules of fair play in the exercise of their property rights. *Thomas v. Baker*, 227 N. C. 226, 41 S. E. (2d) 842 (1947).

This section is remedial in character. *Thomas v. Baker*, 227 N. C. 226, 41 S. E. (2d) 842 (1947).

It is the intent of this section that the corporation shall continue to function pending settlement of the dispute, not under the supervision of the court, but by virtue of corporate authority theretofore bestowed. Hence this summary proceeding to avoid temporary corporate paralysis. *Thomas v. Baker*, 227 N. C. 226, 41 S. E. (2d) 842 (1947).

Authority and Emoluments of Officers Continued in Office.—In a proceeding under this section, an order continuing corporate officers in their respective offices necessarily carries with it authorization and direction that such officers should continue to exercise the same functions and receive the same emoluments as before the controversy giving rise to the proceeding. *Thomas v. Baker*, 227 N. C. 226, 41 S. E. (2d) 842 (1947).

Corporation Is Not a Necessary Party.—In a proceeding under this section it is not necessary that the corporation, as

such, be joined as a party, since its inability to take corporate action is the very situation which the section seeks to remedy. *Thomas v. Baker*, 227 N. C. 226, 41 S. E. (2d) 842 (1947). See *In re Hotel Raleigh*, 207 N. C. 521, 177 S. E. 648 (1935).

Rights of Corporation May Not Be Affected.—In a proceeding under this section the corporation is neither a necessary nor a proper party, nor may its rights be affected, and the judge of the superior court has no jurisdiction to appoint a receiver for the corporation in such proceeding. *In re Hotel Raleigh*, 207 N. C. 521, 177 S. E. 648 (1935).

Proceeding Based on Failure to Elect Directors.—A proceeding based upon the failure of stockholders of a corporation to elect directors at the annual meeting held for that purpose was a proceeding under this section, and notice in writing signed by complainant served on the adverse parties by the sheriff ten days before the date designated for the hearing of the complaint conferred jurisdiction upon the judge of the superior court over the parties and subject matter of the proceeding, and the conditions precedent to proceedings under § 55-113, were not applicable. *In re Hotel Raleigh*, 207 N. C. 521, 177 S. E. 648 (1935).

Dispute as to Powers of President.—Where the directors of a corporation are evenly divided in a dispute as to whether its president should exercise managerial powers, and by reason of such division are unable to elect any officers of the corporation or resolve their differences over the management of the corporation, the superior court has jurisdiction in the premises under this section upon petition properly filed. *Thomas v. Baker*, 227 N. C. 226, 41 S. E. (2d) 842 (1947).

Interference with Officers in Performance of Their Duties.—The jurisdiction of the superior court to grant relief against the wrongful interference with the officers in the performance of their duties or the wrongful refusal of an officer to perform the duties of his office cannot be invoked in a proceeding under this section. *Thomas v. Baker*, 227 N. C. 226, 41 S. E. (2d) 842 (1947).

§ 55-115. When dividend declared.—The directors of every corporation created under this chapter shall, in January of each year, unless some specific time for that purpose is fixed in its charter, or bylaws, and in that case at the time so fixed, after reserving, over and above its capital stock paid in, as a working

capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand. The corporation may, in its certificate of incorporation or bylaws, give the directors power to fix the amount to be reserved as a working capital. (1901, c. 2, s. 52; Rev., s. 1191; C. S., s. 1178.)

Dividend Must Not Impair Capital Stock or Working Capital.—Neither the capital stock of the corporation, paid in and outstanding, nor its working capital as fixed pursuant to the provisions of this section, may be impaired by the payment of a dividend, under any circumstances. *Cannon v. Wiscasset Mills Co.*, 195 N. C. 119, 141 S. E. 344 (1928).

Determining Accumulated Profits Available for Dividend.—For the purpose of determining the amount of accumulated profits to be declared and paid as a dividend, it is necessary that the true value of the assets, in cash, and not the mere book value, should be ascertained, in view of the restrictions of § 55-116. There should be deducted from such amount the capital stock, the working capital, and all other liabilities of the corporation. For this purpose the amount reserved for depreciation is a liability. *Cannon v. Wiscasset Mills Co.*, 195 N. C. 119, 141 S. E. 344 (1928).

In a suit to require that dividends be paid to stockholders, it was not error for the court to refuse to order all profits, as shown by the company's statements for the years 1940-41, paid out in cash dividends, such profits being subject to deductions for income taxes, allowance for bad debts, and inventory adjustments; but the court erred in allowing a ten per cent deduction from such profits to cover probable expense, and the order should have directed the payment in dividends of the full net profits, the company showing at the end of 1941 a surplus of \$38,000 on a capital of \$7,800. *Amick v. Coble*, 222 N. C. 484, 23 S. E. (2d) 854 (1943).

Stock Dividends.—Stock dividends may be declared by a solvent corporation from its profits, where the total amount of the stock is kept within the charter limits and the profits have really been earned. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538 (1912).

The issuance of paid-up stock as a dividend cannot be attacked by an existent creditor, nor by one who has notice of the

facts, since it withdraws nothing from the corporation nor in any way depletes its assets. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538 (1912).

Declared Dividend Is Debt.—A dividend declared by and due from a private corporation is a debt due to the shareholder, and is recoverable as such. *Trustees v. North Carolina R. Co.*, 76 N. C. 103 (1877).

Debt Cannot Be Deducted from Dividend.—A bank has no right to retain out of the dividends upon the stock a debt due from the stockholder. *Attorney General v. State Bank*, 21 N. C. 545 (1837).

A sale of corporate stock carries dividends not yet payable. *Burroughs v. North Carolina R. Co.*, 67 N. C. 376 (1872).

Mandamus to Compel Dividends.—Where, under the provisions of this section, the accumulated profit of a private corporation in excess of the working capital has been ascertained, the directors are without authority to carry it to the surplus fund, and upon the demand of the stockholders it must be distributed as dividends in accordance with the requirements of the statute, and mandamus will lie to compel such distribution. *Cannon v. Wiscasset Mills Co.*, 195 N. C. 119, 141 S. E. 344 (1928).

Necessity for Application to Directors.—An action to compel declaration of a dividend cannot be maintained where the stockholder has not applied to the directors, and he must allege that the directors refused to entertain such application. *Winstead v. Hearne Bros. & Co.*, 173 N. C. 606, 92 S. E. 613 (1917).

Service on Nonresident Director.—A mandamus, or mandatory injunction, can only operate in personam; and in an action under this section, to compel the directors of a domestic corporation to pay dividends, so far as substituted service of process on nonresident directors is relied upon, the proceeding is a nullity. *Southern Mills v. Armstrong*, 223 N. C. 495, 27 S. E. (2d) 281, 148 A. L. R. 1248 (1943).

§ 55-116. Dividends from profits only; directors' liability for impairing capital.—No corporation may declare and pay dividends except from the surplus or net profits arising from its business, or when its debts, whether due or not, exceed two-thirds of its assets, nor may it reduce, divide, withdraw, or in any way pay to any stockholder any part of its capital stock except according to

this chapter; provided, a public service corporation may declare and pay such dividends from the surplus or net profits arising from its business except when its debts, whether due or not, exceed three-fourths of its assets; provided, further, that any corporation, other than a public service corporation, which is a member of a partnership may declare and pay dividends from the surplus or net profits arising from its business when the sum of the corporation's separate debts, whether due or not, and that part of the partnership debts which is the same proportion of all the partnership debts, whether due or not, as the corporation's interest in the partnership assets is of all such assets, does not exceed two-thirds of the corporation's assets, and in such calculation the amount of its interest in the partnership assets shall be considered assets of the corporation. In case of a violation of any provision of this section, the directors under whose administration the same occurs are jointly and severally liable, at any time within six years after paying such dividend, to the corporation and its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend paid, or capital stock reduced, divided, withdrawn, or paid out, with interest on the same from the time such liability accrued. Any director who was absent when the violation occurred, or who dissented from the act or resolution by which it was effected, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors at the time the action was taken or immediately after he has had notice of it. (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., s. 1192; C. S., s. 1179; 1927, c. 121; 1933, c. 354, s. 1.)

Cross References.—See note to § 55-115. As to officer's liability for fraud, see § 55-56. As to joint and several liability of directors, see § 55-57.

Editor's Note.—The first proviso in the first sentence was added by the 1927 amendment.

The second proviso, relating to dividends by corporation holding membership in partnership, was added by the 1933 amendment.

See 11 N. C. Law Rev. 212, for criticism of this section.

Surplus or net profits, as used in this section, are what remains after deducting from the present value of all the assets of a corporation the amount of all the liabilities, including the capital stock. *Cannon v. Wiscasset Mills Co.*, 195 N. C. 119, 141 S. E. 344 (1928).

Liability of Director.—A director of a corporation who has not brought himself within the provisions of this section, exonerating him from liability for the payment of dividends to the stockholders when the profits of the business did not justify it, or its debts exceeded two-thirds of its assets, etc., is liable, in the action of the trustee in bankruptcy of such corporation, for the amount of such debts, and the proper court costs and charges, not exceeding the amount of the dividends unlawfully declared. *Claypoole v. McIntosh*, 182 N. C. 109, 108 S. E. 433 (1921).

Where Charter Exempts Stockholder from Liability.—A charter provision, that "no stockholder of the corporation shall be individually liable for debt, liability,

contract, tort, omission, or engagement of the corporation or any other stockholder therein," does not interfere with the just and equitable principle embodied in this section holding stockholders who are directors liable for a joint tort or misfeasance committed by them to the prejudice of creditors. *McIver v. Young Hdw. Co.*, 144 N. C. 478, 57 S. E. 169 (1907).

Repurchase of Stock.—This section was held inapplicable to a suit by a receiver against directors for repurchase of stock by a corporation in *Thompson v. Shepherd*, 203 N. C. 310, 165 S. E. 796 (1932).

Declaration of Dividend as Evidence of Fraud.—The declaration of a dividend and issuance of stock for it, by an excessive overvaluation of property or by an excessive and entirely unwarranted estimate of profits or the unearned increment would be evidence from which fraud could be inferred, and in extreme cases it might be regarded as conclusive. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538 (1912).

Question of Fraud for Jury.—The question as to actual fraud in issuing a stock dividend must be referred to a jury. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538 (1912).

Fraudulent Representation That Dividend Is Earned.—Evidence that the agent for the sale of shares of stock in a corporation had induced the defendant to purchase, by falsely representing that a dividend would be credited upon his notes given for the shares, is in effect evidence of a representation that the corporation

had earned the dividend as required in this section; and it may be received as a circumstance of fraud, together with other evidence tending to establish it. *Seminole Phosphate Co. v. Johnson*, 188

N. C. 419, 124 S. E. 859 (1924).

Quoted in part in *Rex-Hanover Mills Co. v. United States*, 53 F. Supp. 235 (1944).

ARTICLE 10.

Foreign Corporations.

§ 55-117. **Powers existing independently of permission to do business.**—A corporation created by another state of the United States, or by any foreign state, kingdom, or government may acquire by devise or otherwise, and may hold, mortgage, lease, and convey real estate in this State for the purpose of prosecuting its business or objects, or such real estate as it may acquire by way of mortgage or otherwise in the payment of debts due to it, but is not eligible or entitled to qualify in this State as executor, administrator, guardian, or trustee under the will of any person domiciled in this State at the time of his death. The right to acquire, hold and convey real estate exists only where at the time of the acquisition, the foreign state, government, or kingdom under whose laws the corporation was created is not at war with the United States. (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C. S., s. 1180.)

A Matter of Comity Only.—A corporation of one state may do business in another only by comity of the latter state, when not so permitted by a valid federal statute, as in matters of interstate commerce, and may be prohibited from doing business therein entirely, or may be restricted with conditions made a prerequisite by statute. *Lunceford v. Commercial Travelers Mutual Ass'n*, 190 N. C. 314, 129 S. E. 805 (1925). See *Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352 (1896); *Blackwells Tobacco Co. v. American Tobacco Co.*, 145 N. C. 367, 59 S. E. 123 (1907).

Regulation of Contracts, etc.—A former statute relating to the requisites of certain corporate contracts was held not to apply to contracts of foreign corporations. *Rumbough v. Southern Improvement Co.*, 106 N. C. 461, 11 S. E. 528 (1890), wherein the court stated that the legislature had not undertaken to regulate the powers and methods of business of foreign corporations, nor to prescribe how their contracts should be executed, but that the general principles of law relating to corporations were applicable.

Internal Management of Corporation.—The courts of North Carolina have not the power to and will not interfere with the

internal management of the business matters of foreign corporations. *Howard v. Mutual Reserve Fund Life Ass'n*, 125 N. C. 49, 34 S. E. 199 (1899); *Reid v. Norfolk, etc.*, R. Co., 162 N. C. 355, 78 S. E. 306 (1913).

Power to Acquire and Sell Land.—Foreign corporations, having a right under their charters to acquire and sell land, can exercise such rights in this State to the same extent that corporations of this State can do so. *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

Capacity to Sue and Be Sued.—A foreign corporation can sue in the courts of another state by comity only, and the legislature may deny to a foreign corporation that right, or may impose conditions on its exercise. *Exchange Bank v. Tiddy*, 67 N. C. 169 (1872).

Corporation Not Restricted to Authority Conferred in Home State.—A corporation incorporated in another state with authority to conduct business in North Carolina, which has complied with the statutes of this State, can maintain an action in the courts of this State although its charter may not authorize it to do business in the state of its incorporation. *Troy, etc., Co. v. Snow Lumber Co.*, 173 N. C. 593, 92 S. E. 494 (1917).

§ 55-118. **Requisites for permission to do business.**—Every foreign corporation before being permitted to do business in this State, insurance companies excepted, shall file in the office of the Secretary of State a copy of its charter or articles of agreement, attested by its president and secretary, under its corporate seal, and a statement attested in like manner of the amount of its capital stock authorized, the amount actually issued, the principal office in this State, the name of the agent in charge of such office, the character of the business which it trans-

acts, and the names and post-office addresses of its officers and directors. And such corporation shall pay to the Secretary of State, for the use of the State, forty cents for every one thousand dollars of the total amount of the capital stock authorized to be issued by such corporation, but in no case less than forty dollars nor more than five hundred dollars; and also a filing fee of five dollars. Provided that the tax upon shares of stock without nominal or par value shall be the same as if each share of stock had a par or face value of one hundred dollars. Such corporation may withdraw from the State upon filing in the office of the Secretary of State a statement signed by its president and secretary and attested by its corporate seal, setting forth the fact that such corporation desires to withdraw, and upon payment to the Secretary of State of a fee of five dollars. Every corporation failing to comply with the provisions of this section shall forfeit to the State five hundred dollars, to be recovered, with costs, in an action to be prosecuted by the Attorney General, who shall prosecute such actions whenever it appears that this section has been violated. This section does not apply to railroad, banking, express or telegraph companies which, prior to March 9, 1915, had been licensed to do business in this State, or were engaged in business in this State, having a regularly appointed agent upon whom service of process could be made, located in this State.

All acts of the Secretary of State domesticating foreign corporations without nominal or par value shares of stock and taxing the same as provided in the proviso are hereby validated. (1901, c. 2, s. 57; 1903, c. 76; Rev., s. 1194; 1915, c. 263; C. S., s. 1181; 1935, c. 44; 1939, c. 57.)

Cross References.—As to service of process and appointment of agent, see §§ 1-97, paragraph 1, 1-98, 55-38, 7-143. As to venue, see § 1-80. As to foreign insurance companies, see § 58-149 et seq. As to foreign building and loan associations, see § 54-34 et seq. As to taxation, see §§ 105-122, 105-250.

Editor's Note.—The 1935 amendment increased the amount payable on every one thousand dollars of capital stock from twenty to forty cents and placed the minimum at forty instead of twenty-five dollars and the maximum at five hundred instead of two hundred and fifty dollars. The changes occur in the second sentence of the section.

The 1939 amendment inserted the proviso after the second sentence and added the last sentence.

For comment on 1939 amendment, see 17 N. C. Law Rev. 346.

Constitutionality of Section.—There is nothing in the U. S. or State Constitution which prohibits the State, in the exercise of its police power, from making the transaction of business by a foreign corporation prior to procuring a license an indictable offense. *State v. Agency*, 171 N. C. 831, 88 S. E. 726 (1916).

The only restriction of the Constitution is that the license tax must not interfere with interstate commerce or be otherwise invalid. *Pittsburg Life, etc., Co. v. Young*, 172 N. C. 470, 90 S. E. 568 (1916).

Insurance Companies Excluded.—Although this section excludes insurance

companies from its operation, the statutes will be construed in relation to their subject matter. The exception in this section is because insurance companies are exclusively dealt with elsewhere. *Occidental Life Ins. Co. v. Lawrence*, 204 N. C. 707, 169 S. E. 636 (1933).

Contracts Not Avoided by Noncompliance.—From the character of this section and its evident purpose the contracts of a foreign corporation doing business in the State without compliance are not avoided, but the penalty alone is enforceable, and by action as the statute prescribes. *Miller v. Howell*, 184 N. C. 119, 113 S. E. 621 (1922). See *Ober & Sons Co. v. Katzenstein*, 160 N. C. 439, 76 S. E. 476 (1912).

The State sues for the penalty. *Blackwell's Tobacco Co. v. American Tobacco Co.*, 144 N. C. 352, 57 S. E. 5 (1907); *Ober & Sons Co. v. Katzenstein*, 160 N. C. 439, 76 S. E. 476 (1912).

Effect of Compliance.—When a foreign corporation complies with the provisions of this section, it subjects itself to the laws of this State and acquires in return certain compensating rights and privileges. Among these is the right to sue and be sued in the State courts under the rules and regulations which apply to domestic corporations. *Hill v. Atlantic Greyhound Corp.*, 229 N. C. 728, 51 S. E. (2d) 183 (1949).

Property Not Removed to State.—This section requiring "domestication" enables a plaintiff to get personal service upon a foreign corporation, but does not remove

its property to the State nor the situs of its debts created elsewhere. *Strause Bros. v. Aetna Fire Ins. Co.*, 126 N. C. 223, 35 S. E. 471 (1900).

Right to Sue and Be Sued.—Where a foreign corporation has submitted to domestication in this State by filing its certificate of incorporation with the Secretary of State and by otherwise complying with the provisions of this section, it thereby acquires the right to sue and be sued in the courts of this State as a domestic corporation, and where it brings action on a note in the county of its designated residence the defendants are not entitled to removal to the county of their residence as a matter of right. *Smith-Douglass Co. v. Honeycutt*, 204 N. C. 219, 167 S. E. 810 (1933).

Right to Remove to Federal Courts.—A foreign corporation by compliance with this section does not lose its right to remove to the federal courts on the ground of diverse citizenship. *Southern Ry. Co. v. Allison*, 190 U. S. 326, 23 S. Ct. 713, 47 L. Ed. 1078 (1903). This decision reverses *Allison v. Southern Ry. Co.*, 129 N. C. 336, 40 S. E. 91 (1901), and overrules *Debnam v. Southern Bell Tel., etc., Co.*, 126 N. C. 831, 36 S. E. 269, 65 L. R. A. 915 (1900), and *Beach v. Southern Ry. Co.*, 131 N. C. 399, 42 S. E. 856 (1902).

For purposes of venue domesticated foreign corporations are residents of the State. *Hill v. Atlantic Greyhound Corp.*, 229 N. C. 728, 51 S. E. (2d) 183 (1949).

Section 1-80 Does Not Apply.—A foreign corporation domesticated under this section may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have

an action against it, instituted by a non-resident, removed to the county of its main place of business in this State. In such case § 1-80 does not apply. *Hill v. Atlantic Greyhound Corp.*, 229 N. C. 728, 51 S. E. (2d) 183 (1949).

This section must be read in connection with § 55-38, and the implication of consent with respect to the foreign corporation rendering itself liable to process is no stronger in the one than in the other. In *Southern Ry. Co. v. Allison*, 190 U. S. 326, 23 S. Ct. 713, 47 L. Ed. 1078 (1903) (reversing the decision of the North Carolina Supreme Court in *Allison v. Southern Ry. Co.*, 129 N. C. 336, 40 S. E. 91 (1901), and incidentally overruling *Debnam v. Southern Bell Tel., etc., Co.*, 126 N. C. 831, 36 S. E. 269, 65 L. R. A. 915 (1900), and *Beach v. Southern Ry. Co.*, 131 N. C. 399, 42 S. E. 856 (1902)), the United States Supreme Court interpreted the North Carolina domestication law as a licensing statute rather than one creating a new corporation. Under this section or § 55-58, or both taken together, the controlling distinction lies in the extent to which the presumption of implied consent may be indulged in without infraction of the federal right. *Central Motor Lines v. Brooks Transp. Co.*, 225 N. C. 733, 36 S. E. (2d) 271, 162 A. L. R. 1419 (1945).

How Charter Proven.—The charter of a foreign corporation may be proven in this State by exhibiting a copy duly certified by the secretary of state of the state in which the corporation was created. *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

Cited in *Ward v. Southern Sand & Gravel Co.*, 33 F. (2d) 773 (1929).

§ 55-119. Sale of shares of stock held by life tenant.—The shares of the capital stock of a foreign corporation, in which any person owns a life estate, may be sold by an order in a special proceeding, unless prohibited by the instrument under which such title was acquired. All persons in esse who are interested in the property aforesaid shall be made parties to the proceedings. Whenever it appears from the petition, or otherwise, that among those interested are persons not in being, or who, because of some contingency, cannot be presently ascertained, such persons shall be made parties defendant by publication of notice of the proceeding, according to the usual practice, and a guardian ad litem shall be appointed for them, and he shall file answer, as provided by §§ 1-66 and 1-67. The clerk of the Superior Court shall have power to make, from time to time, appropriate orders for the sale of said shares of stock, and for handling, securing and investing the net proceeds of sale. In lieu of the payment to the life tenant of the income and profits on the net proceeds of sale, the clerk may order the present cash value of the life tenant's share, ascertained as by law provided, to be paid to the life tenant absolutely, out of said proceeds, and order the balance thereof to be invested and kept invested for the remaindermen, or paid over to a trustee appointed for the purpose, after the trustee shall have qualified by filing with the clerk an undertaking, to be approved by him, payable to the State of North

Carolina, for the benefit of the remaindermen, in a sum double the amount of the balance of the net proceeds aforesaid, and conditioned for the prompt forthcoming and payment of the principal and interest or income thereof, and the faithful performance of duty and compliance with the orders of court relating thereto. The orders aforesaid shall be approved by the judge of the superior court residing in or holding the courts of the district, where such approval is now required by law. (1925, c. 59.)

§ 55-120. Secretary of State directed to require domestication of all foreign corporations doing business in State.—The Secretary of State is hereby directed to require that every foreign corporation doing business in North Carolina, as permitted under the provisions of § 55-117, shall file in the office of the Secretary of State a copy of its charter or articles of agreement, in the manner required by § 55-118, and all amendments thereto, and otherwise fully comply with the provisions of said law, including the payment to the Secretary of State of fees fixed by said law for the privilege of doing business in this State and domestication therein. The Secretary of State is authorized and empowered to employ such assistants as shall be deemed necessary in his office for the purpose of carrying out and enforcing the provisions of this section, and for making such investigations as shall be necessary to ascertain foreign corporations now doing business in North Carolina which may have failed or hereafter fail to domesticate as required by law. (1937, c. 343.)

ARTICLE 11.

Dissolution.

§ 55-121. Voluntary, generally.—When in the judgment of the board of directors it is deemed advisable and for the benefit of a corporation that it be dissolved, the board, within ten days after the adoption of a resolution to that effect by a majority of the whole board, at a meeting called for that purpose, of which meeting every director shall have received three days' notice, shall cause notice of adoption of such resolution to be mailed to each stockholder residing in the United States, to his last known post-office address, and also, beginning within said ten days, cause a like notice to be published in a newspaper published in the county wherein the corporation has its principal office, at least once a week for four successive weeks, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolution. The stockholders' meeting thus called may, on the day appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at one time, of which adjourned meeting notice by advertisement in said newspaper shall be given. If at such meeting two-thirds in interest of all the stockholders consent in writing that a dissolution take place, their consent, together with the list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the Secretary of State, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that the consent has been filed, and the board of directors shall cause this certificate to be recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located, and published once a week for four successive weeks in a newspaper published in said county. Upon the filing in the office of the Secretary of State of an affidavit of the manager or publisher of such newspaper that the certificate has been so published, the corporation is dissolved, and the board shall proceed to settle up and adjust its business and affairs.

Whenever all the stockholders consent in writing to a dissolution, no meeting or notice thereof is necessary, but on filing the consent in the office of the Secretary of State, he shall issue a certificate showing that such consent in writing has been

filed in his office, and said certificate shall be published as above provided in cases without unanimous consent, and recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located. Upon the filing in the office of the Secretary of State of an affidavit of the manager or publisher of the newspaper in which publication is made, showing that said certificate has been so published, the Secretary of State shall forthwith issue a certificate of dissolution of the said corporation.

The Secretary of State shall withhold issuance of final certificate of dissolution of or withdrawal of any corporation, domestic or foreign, until the receipt by him of a notice from the commissioner of revenue to the effect that such corporation has met the requirements with respect to reports and taxes required by the revenue laws of the State of North Carolina. (1901, c. 2, s. 34; Rev. s. 1195; C. S., s. 1182; 1941, c. 195.)

Cross References.—As to status of debts due and actions pending at time of dissolution, see § 55-138. As to fees, see § 55-158. As to voluntary dissolution of a bank, see § 53-18. As to voluntary dissolution of a credit union, see § 54-92.

Editor's Note.—The 1941 amendment substituted the second and third paragraphs in lieu of the former last sentence of the section, which read as follows: "Whenever all the stockholders consent in writing to a dissolution, no meeting or notice thereof is necessary, but on filing the consent in the office of the Secretary of State he shall forthwith issue a certificate of dissolution, which shall be published as above provided, and recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located."

Section Settles Mooted Questions.—As far as North Carolina is concerned, this statute settles the question formerly much mooted in the courts as to whether, and under what circumstances, a corporation could be dissolved by the stockholders, when no time was fixed for its duration, upholding and extending this power of voluntary dissolution as established by the better considered decisions on the subject. *White v. Kincaid*, 149 N. C. 415, 63 S. E. 109 (1908).

A Part of Every Charter.—The provision of this section enters into every charter, and unless otherwise enacted by the legislature, every stockholder takes and holds his stock subject to this power of voluntary dissolution, by resolution of the directors concurred in by two-thirds in interest of the stockholders. *White v. Kincaid*, 149 N. C. 415, 63 S. E. 109 (1908).

§ 55-122. Liability of stockholders.—The stockholders of a corporation chartered under the laws of this State are individually liable for all taxes, costs and fees for the dissolution of the corporation, and the Attorney General is authorized to enforce the provisions of this section by suit before a justice of the peace or in

Motive for Dissolution Generally Immaterial.—When a corporation lawfully proceeds to wind up its affairs in accordance with this section the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; and the courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem in a given instance. *White v. Kincaid*, 149 N. C. 415, 63 S. E. 109 (1908).

Directors Are Trustees.—The directors of a corporation in proceedings for dissolution under this section are trustees in the sense that they must act faithfully in their judgment for the benefit of the corporation and in furtherance of its interest, and not for the purpose of unjustly oppressing the holders of the minority stock, or to attain their own personal ends. *White v. Kincaid*, 149 N. C. 415, 63 S. E. 109 (1908).

Liquidation to Escape Judgment.—An attempted liquidation by a corporation, to escape judgment for the refund of money wrongfully distributed, is in fraud of creditors. *Chatham v. Realty Co.*, 180 N. C. 500, 105 S. E. 329 (1920).

Suits Pending Dissolution.—Where it appears in an action that the indebtedness sought to be recovered was claimed to be due a corporation, and that the suit was instituted by the individual stockholders, a judgment as of nonsuit is properly entered, though proceedings in dissolution of the corporation were being had under this section, the proper party plaintiff being the corporation or a receiver appointed therefor. *Worthington v. Gilmers*, 190 N. C. 128, 129 S. E. 153 (1925).

the superior court in the county where such corporation had its principal place of business, whenever it appears upon report from the Secretary of State that the corporation has ceased to transact business and fails to pay the taxes due the State or to file annual statements or to dissolve itself as provided by law. If a nonresident stockholder of the corporation refuses to sign the certificate of dissolution, the resident stockholders shall make affidavit to that effect, and the written assent of such resident stockholders, accompanied by such affidavit, is sufficient to dissolve the corporation. If no stockholder of such corporation is found within the State, the Secretary of State has authority to declare the charter of the corporation forfeited, and shall publish annually in his corporation report a list of the corporations whose charters have been so forfeited. (1909, c. 730, s. 1; C. S., s. 1183.)

Cross Reference.—As to liability for unpaid stock, see § 55-65.

Cited in *Life Ins. Co. v. Edgerton*, 206 N. C. 402, 174 S. E. 96 (1934).

§ 55-123. Voluntary, before payment of stock.—The incorporators named in a certificate of incorporation, before the payment of any part of the capital stock, and before beginning the business for which the corporation was created, may surrender all their corporate rights and franchises, by filing in the office of the Secretary of State a certificate, verified by oath, that no part of the capital stock has been paid and such business has not been begun, and surrendering all rights and franchises. Thereupon the corporation is dissolved. (1901, c. 2, s. 35; Rev., s. 1177; C. S., s. 1184.)

§ 55-124. Involuntary, at instance of private persons.—Corporations may be dissolved by civil action, instituted by the corporation, a stockholder, or creditor, or by authority of the Attorney General in the name of the State, in the following cases:

1. For any abuse of its powers to the injury of the public or of its stockholders, creditors, or debtors.
2. For nonuser of its powers for two or more consecutive years.
3. When it is insolvent, or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights.
4. Upon any conviction of the company of a persistent criminal offense. (Code, s. 694; 1901, c. 2, s. 73; Rev., s. 1196; C. S., s. 1185.)

Cross Reference.—As to involuntary dissolution of a bank, see § 53-19.

Provision of § 55-125 Inapplicable.—The provision in the next section, that the stockholder instituting the dissolution proceeding must own one-fifth or more of the stock, does not apply to proceedings under this section. *Lasley v. Mercantile Co.*, 179 N. C. 575, 103 S. E. 213 (1920).

Amount of Stock Held by Plaintiff Immaterial.—In a suit to dissolve a corporation for nonuser of its powers the right to proceed is conferred on the individual stockholder by express provision of the statute, and without regard to the amount of his holdings. *Lasley v. Mercantile Co.*, 179 N. C. 575, 103 S. E. 213 (1920).

Application to Directors or Management Unnecessary.—Nor is it necessary that the stockholder allege or prove that he first made application to the directors or management to take action in the matter, for this relates to suits concerning corporate management. *Lasley v. Mercantile Co.*, 179 N. C. 575, 103 S. E. 213 (1920).

Direct Proceeding Required.—A cause of forfeiture cannot be taken advantage of collaterally or otherwise than by a direct proceeding for that purpose so that the corporation may be heard in answer. *Asheville Division v. Aston*, 92 N. C. 579 (1885).

Appointment of Receiver in Equity.—While it is more orderly to proceed under this section to appoint a receiver for a corporation, this could be done in a court of equity, where all parties were before the court or could be brought in, and the same relief awarded as if the provision of the statute had been complied with. *Greenleaf v. Land & Lumber Co.*, 146 N. C. 505, 60 S. E. 424 (1908).

Where Creditors Estopped.—Where a provision in a deed of trust is to the effect that upon default in the payment of the interest, etc., the trustee shall have the power to foreclose upon request of the holders of a certain part of the par value of the bonds, those who hold such a proportionate part are bound by the valid

provision of their contract, and without complying therewith a permanent receiver may not be appointed by the court under the provisions of this section in their suit for the purpose, though the corporation itself may be insolvent. *Jones v. A. & W. Ry. Co.*, 193 N. C. 590, 137 S. E. 707 (1927).

Bankruptcy Proceedings Not Authorized.—The fact that minority stockholders have instituted a suit in the State court under this section, and that a receiver has been appointed under § 55-147, does not entitle creditors to avail themselves of the relief provided for them in the federal bankruptcy statute until the corporation

has become insolvent and committed an act of bankruptcy. *Bank v. Gudger*, 212 F. 49 (1914).

Failure to Maintain Principal Place of Business in State.—The persistent failure of a corporation chartered in this State to maintain its principal place of business within the State as required by its charter, and the withdrawing of all its agencies from the State, will authorize the courts to decree a dissolution of such corporation upon the suit of a stockholder, under this section. *Simmons v. Norfolk, etc., Steamboat Co.*, 113 N. C. 147, 18 S. E. 117 (1893).

§ 55-125. Involuntary, by stockholders.—When stockholders owning one-fifth or more in amount of the paid-up stock of any corporation organized under the laws of and doing business in this State, except corporations organized for religious, charitable, fraternal, and educational purposes, and except banking and public service corporations, apply in term or vacation to the judge of the superior court holding the courts for the county in which the principal place of business of the corporation is situated, by petition containing a statement that for three years next preceding the filing of the petition, which time shall begin to run from three years after it has begun business, the net earnings of the corporation have not been sufficient to pay in good faith an annual dividend of four per cent upon the paid stock of the corporation, over and above the salaries and expenses authorized by its bylaws and regulations, or that the corporation has paid no dividend for six years preceding said application; or whenever stockholders owning one-tenth or more in amount of the paid-up common stock of any such corporation apply to the judge of the superior court as aforesaid by petition containing a statement that the corporation has paid no dividend on the common stock for ten years preceding said application, and that they desire a dissolution of the corporation, the judge shall make an order requiring the officers of the corporation to file in court, within a reasonable time, inventories showing all the real and personal estate of the corporation, a true account of its capital stock, the names of the stockholders, their residences, the number of shares belonging to each, the amount paid in upon said shares and the amount still due thereon, and a statement of all the encumbrances on the property of the corporation and all its contracts which have not been fully satisfied and canceled, specifying the place and residence of each creditor, the sum owing to each, the nature of the debt or demand, and the consideration therefor, and the books and papers of the corporation. Upon the filing of the inventories, accounts and statements, the court shall enter an order requiring all persons interested in the corporation to appear before a referee to be appointed by the court, at a time and place named in the order, service of which may be made by publication for such time as may be deemed proper by the court, and show cause why the corporation should not be dissolved. If it appears to the court that the statements contained in the petition are true, the court may adjudge a dissolution of the corporation and shall appoint one or more receivers, who shall have all powers of receivers conferred by this chapter for the winding up the affairs and distribution of the assets of the corporation. If it appears to the court that the corporation is insolvent or in imminent danger of insolvency, the court may appoint a temporary receiver of the corporation pending dissolution. No suit shall be brought for the dissolution of a corporation under the provisions of this section until each and all of the petitioners have owned their stock for the term of two years prior to the

institution of the action; nor shall any such suit be brought for the period of three years after a final judgment upon a prior petition as herein provided. (1913, c. 147; 1915, c. 137, s. 1; C. S., s. 1186.)

Editor's Note.—The provision for dissolution, upon the application of stockholders owning one-tenth or more of the paid up common stock, when the corporation has paid no dividends for ten years preceding, was added by the 1915 amendment. In regard to this amendment the court said in *Winstead v. Hearne Bros.*, 173 N. C. 606, 610, 92 S. E. 613 (1917): "This amendment would appear to be inconsistent with the six-year clause of the original act, and to require ten years complete suspension of dividends on the common stock of a corporation before application can be made for a receiver on that ground."

The constitutionality of this section providing for the dissolution of corporations in certain instances, cannot be successfully assailed in an action thereunder to dissolve a corporation organized subsequent to its enactment. *Kistler v. Caldwell Cotton Mills Co.*, 205 N. C. 809, 172 S. E. 373 (1934).

This section is a remedial statute, and intended to remedy an abuse of power by the majority shareholders by a suspension of dividends, a method at times resorted to for the purpose of freezing out minority holders or depressing the market value of the shares. *Winstead v. Hearne Bros.*, 173 N. C. 606, 92 S. E. 613 (1917).

Applies to "A Going Concern."—This section is intended to control and regulate suits for the dissolution of a corporation doing business as "a going concern," by reason of the fact that it has not earned for three years next preceding the filing of the petition a net dividend of four per cent, or has not paid a dividend for six years, and the section clearly has no application to an action under the preceding section to dissolve a corporation for nonuse of its powers. *Lasley v. Mercantile Co.*, 179 N. C. 575, 103 S. E. 213 (1920).

Construed with Article 15 on Reorganization.—Standing alone, this section might be considered as confining the court, in a proceeding thereunder, to a decree strictly of dissolution, involving a destruction of the corporate franchise, but when the section is construed, as it should be, in connection with other provisions of our statute law on the subject, namely article 15 of this chapter, the court has ample power to enter a decree for a sale of the franchise with the corporate property, transferring the same to the purchasers and conferring upon them the right to re-

organize and carry on the business as a new corporation. *Coal and Ice Co. v. R. R.*, 144 N. C. 732, 57 S. E. 444 (1907); *Wood v. Staton*, 174 N. C. 245, 93 S. E. 794 (1917).

"Paid-Up Stock" Refers to Common and Preferred.—It is not required that stockholders suing for dissolution of a corporation under this section should own one-fifth of its common stock in order to maintain the action, it being sufficient if they own common and preferred stock constituting one-fifth or more of the total paid-in capital stock of the corporation, and their right to maintain the action is not affected by the fact that holders of preferred stock are given no vote in the management of the corporation. *Kistler v. Caldwell Cotton Mills Co.*, 205 N. C. 809, 172 S. E. 373 (1934).

Dividends Must Equal 4%.—The fact that a corporation has earned net income sufficient to pay in good faith dividends on its preferred stock within three years prior to the institution of an action for its dissolution under this section is not sufficient to resist the action for dissolution if the earned dividends do not amount to four per cent on its total capital stock, preferred and common. *Kistler v. Caldwell Cotton Mills Co.*, 205 N. C. 809, 172 S. E. 373 (1934).

When Stockholders Estopped.—Where a stockholder in a corporation has actively participated in its management and consented to the increase in its capital stock from the earnings of a profitable concern, which has proven decidedly advantageous, he is thereafter estopped to assert the right given a holder of a certain amount of the stock to throw the corporation into a receiver's hands for nonpayment of dividends within a certain period. *Winstead v. Hearne Bros.*, 173 N. C. 606, 92 S. E. 613 (1917).

When Order for Inventories Proper.—Where a petition in an action for dissolution of a corporation meets all requirements of this section, it is not error for the court to require the defendant corporation to file inventories as provided herein. *Kistler v. Caldwell Cotton Mills Co.*, 205 N. C. 809, 172 S. E. 373 (1934).

Dissolution in Discretion of Court.—Whether the court will order dissolution upon the final hearing is to be determined in its discretion according to whether, from all facts shown, the failure of the corporation to earn the required dividends

was due to temporary conditions or to its management. *Kistler v. Caldwell Cotton Mills Co.*, 205 N. C. 809, 172 S. E. 373 (1934).

§ 55-126. Involuntary, by Attorney General.—An action may be brought by the Attorney General in the name of the State against a corporation for the purpose of annulling its charter upon the ground that it was procured upon a fraudulent suggestion, or concealment of a material fact, by the persons incorporated or by some of them, or with their knowledge or consent; or for the purpose of annulling the existence of a corporation, other than municipal, when such corporation—

1. Offends against the act creating, altering, or renewing it.
2. Violates any law by which it has forfeited its charter by abuse of its power.
3. Has forfeited its privileges or franchises by failure to exercise its power.
4. Has done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises.
5. Has exercised a franchise or privilege not conferred upon it by law.
6. Has failed to use its powers for two or more consecutive years.
7. Has become insolvent as manifested by the return of an execution unsatisfied upon a judgment against the corporation docketed in the superior court of the county where it has its principal place of business.

It is the duty of the Attorney General, whenever he has reason to believe that any of these acts or omissions can be established by proof, to bring an action in every case of public interest, and also in every other case in which satisfactory security is given to indemnify the State against the costs and expenses to be incurred thereby. (Code, ss. 604, 605; 1889, c. 533; Rev., s. 1198; C. S., s. 1187.)

Cross Reference.—As to action in the nature of quo warranto by the Attorney General against corporations, see § 1-515.

Editor's Note.—Formerly this section provided that an action might be brought against a corporation by the Attorney General, "whenever the legislature shall so direct." Under this wording it was held that the Attorney General could not bring an action to vacate the charter of a corporation of his own motion, but that the authority of the legislature was necessary. *Attorney General v. R. Co.*, 134 N. C. 481, 46 S. E. 959 (1904).

When Proceedings to Declare Forfeiture Necessary.—A corporation cannot endure longer than the time prescribed by its charter, and no judicial proceedings are necessary to declare a forfeiture for such a cause but for any other cause of forfeiture a direct proceeding must be instituted by the sovereign to enforce the forfeiture. *Asheville Division v. Aston*, 92 N. C. 579 (1885).

An information in the nature of a writ of quo warranto against a corporation, to have its privileges declared forfeited because of neglect and abuse in the exercise of them, must be filed in the name of the Attorney General of the State, and cannot be instituted in the name of a solicitor of a judicial circuit. *Houston v. Neuse River Nav. Co.*, 53 N. C. 476 (1862).

What Information Must Set Out.—An information, filed by the Attorney General, for the purpose of having the charter of an incorporation declared to be forfeited, though it need not be expressed in technical language, must set out the substance of a good cause of forfeiture in its essential circumstances of time, place and overt acts. *Attorney General v. Petersburg, etc., R. Co.*, 28 N. C. 456 (1846).

Area of Rural Community Misrepresented.—The right of action is given the Attorney General, on the relation of the State, to annul a certificate of incorporation of a rural community when the petition upon which the Secretary of State has issued the certificate misrepresents that the area of the community to be incorporated extended only to that of "one school district," under the provisions of this section authorizing the Attorney General to bring action when a certificate of incorporation has been procured upon "a fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge or consent," etc. *State v. Rural Community*, 182 N. C. 861, 109 S. E. 576 (1921).

§ 55-127. Forfeiture or dissolution for failure to organize or act.—When a charter has been granted creating a corporation, and the incorporators for two years neglect to organize and carry into effect the intent of the charter,

or when organized, if they for two consecutive years cease to act, then this disuse of their corporate privileges and powers is a forfeiture of the charter. If, after thirty days' notice by the Secretary of State, the corporation fails to surrender its corporate rights or to dissolve, in the manner provided in this chapter, the Secretary of State shall report it to the Attorney General, who shall institute an appropriate action for its dissolution. (Code, s. 688; 1901, c. 2, s. 106; Rev., s. 1246; C. S., s. 1188.)

State Must Bring Action.—The fact that a bank failed to organize within two years after it was chartered cannot affect the validity of whatever lien the bank may, by its charter, have on the shares of stock of a stockholder indebted to it. Such de-

fect in the organization of the bank can be taken advantage of only by a direct proceeding by the State for that purpose. *Boyd v. Redd*, 120 N. C. 335, 27 S. E. 35 (1897).

§ 55-128. Forfeiture for nonuser by hydro-electric companies.—All water power, hydro-electric power, and water companies or corporations organized in this State shall be required to begin active work in making their proposed development within two years after their organization and diligently to prosecute their work on the same until it has been completed; and a failure to begin the work or development within the time, and to diligently prosecute work on the same until its completion, as herein provided, shall be legal grounds for declaring their charter rights, privileges and franchises forfeited, by the State, acting through its Attorney General, upon the recommendation of the Utilities Commission of this State: Provided, this section shall not apply to any company which is supplying the public and is meeting the demands of the public for its services. (1913, c. 133, s. 2; C. S., s. 1189; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

§ 55-129. Involuntary, by bankruptcy.—When a corporation chartered under the laws of this State is adjudged bankrupt under the laws of the United States or when it shall be made to appear to a judge of the superior court that all of the assets of the corporation of whatever kind or character have been lost to the stockholders by reason of foreclosure, assignment, or execution under judgment, and that the corporation is therefore unable to conduct the business for which it was organized, the charter of the corporation is forfeited without further action, unless the stockholders determine by appropriate resolutions to continue the corporate existence of the corporation after the adjudication in bankruptcy, foreclosure, assignment, or sale under execution, and furnish the Secretary of State with a duly certified copy of the resolutions, all within six months after the adjudication, foreclosure, assignment or final sale under execution. The stockholders of a bankrupt corporation whose existence is continued by the foregoing procedure must pay all privilege taxes which have accrued against the corporation since the adjudication, together with a fee of one dollar allowed the Secretary of State for recording and filing the certificate provided for in this section. (1915, c. 134, ss. 2, 3; C. S., s. 1190; 1931, c. 310.)

Editor's Note.—Under this section prior to the 1931 amendment, corporate charters were automatically forfeited by an adjudication of bankruptcy unless the stockholders took certain specified action within six months. The amendment extends a like forfeiture to a corporation which is shown in the superior court to have lost its entire assets either through foreclosure, assignment or execution. 9 N. C. Law Rev. 363.

This section must be read in *pari materia* with § 55-132, the application of which also is necessary to determine the

status of a corporation suffering a forfeiture of its charter by reason of bankruptcy. *Sisk v. Old Hickory Motor Freight*, 222 N. C. 631, 24 S. E. (2d) 488 (1943).

Evidence Showing Continuance of Corporate Entity.—Evidence that upon destruction of an incorporated boys' school by fire, the remainder of its property and its student body were removed to the site of a girls' school but that it maintained the same activities as far as possible, and that the trustees of the boys' school continued to be elected separately, was held

sufficient to support finding that the school had kept its entity and had not lost its right to sue or to take property because of asserted merger with the girls' college.

Wachovia Bank, etc., Co. v. Plumptree School for Boys, 229 N. C. 738, 51 S. E. (2d) 477 (1949).

§ 55-130. When franchises forfeited by neglect, etc., corporation dissolved; costs.—If it is adjudged that a corporation against which an action has been brought has forfeited by neglect, abuse, or surrender, its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such rights, privileges and franchises, and that it be dissolved. If judgment is rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs to be collected by execution against the persons making the claim, or by attachment or process against the directors or other officers of the corporation. (Code, ss. 617, 618; Rev., ss. 1209, 1210; C. S., s. 1191.)

§ 55-131. Service of summons in action for dissolution.—In an action for the dissolution of a corporation, or for the appointment of a receiver thereof, the summons must be served on the corporation by service on an officer or agent upon whom other process can be served, and shall be served on the stockholders, creditors, dealers and any others interested in the affairs of the company by publishing a copy at least weekly for two successive weeks in some newspaper printed in the county in which the corporation has its principal place of business, or if there is no such newspaper published, by posting a copy of the summons at the door of the courthouse of such county, and publishing a copy for the time and in the manner aforesaid in a newspaper published nearest the county seat of the county in which the corporation has its principal place of business or in a newspaper published in the city of Raleigh. This publication is sufficient service on all the stockholders, creditors of, or dealers with, the corporation, and upon the corporation, if no officer can after due diligence be found in the State and it has no process agent in the State; and all such stockholders, creditors or dealers or other parties interested may intervene in said proceedings and become parties thereto for themselves, or for others in like interest, under such rules as the court for the purpose of justice prescribes. (Code, s. 695; Rev., s. 1199; 1911, c. 173, s. 1; C. S., s. 1192.)

Cross References.—As to service of summons generally, see §§ 1-97, paragraph 1, 55-38 and 55-39. As to appointment of receiver, see § 55-147.

§ 55-132. Corporate existence continued three years.—All corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall continue to be bodies corporate for three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of their property, and to divide their assets; but not for the purpose of continuing the business for which the corporation was established. The superior court of the county in which the principal office of the corporation is located may, upon petition of said corporation, continue the corporate existence for the purposes of winding up the affairs, for such time as the court may deem proper. The provisions hereof shall also apply to corporations whose affairs have not on March 30, 1939, been wound up.

Where a corporation is dissolved in any manner and six months shall have elapsed after the expiration of its corporate existence as continued by or pursuant to the foregoing provisions of this section for the purposes therein expressed, and any share of any stockholder of any money or other property in any division of money or other property among the stockholders of such corporation shall then remain in the hands of the directors of such corporation, such share shall escheat to the University of North Carolina to be held without liability for profit or interest until a just claim therefor shall be preferred by the party or parties

entitled thereto. The provisions hereof shall apply to any corporation heretofore dissolved as well as to corporations hereafter dissolved. (Code, s. 667; 1901, c. 2, s. 58; Rev., s. 1200; C. S., s. 1193; 1939, c. 250, s. 1; 1947, c. 613.)

Cross Reference.—As to status of corporation which has been merged with another, see § 55-166.

Editor's Note.—The 1939 amendment substituted the last two sentences of the first paragraph for the former last sentence of the first paragraph.

The 1947 amendment added the second paragraph.

For brief discussion of the 1947 amendment and other provisions relating to escheats, see 25 N. C. Law Rev. 421.

This section expressly extends the life of the corporation for three years after dissolution, for the purpose of winding up its affairs. *Smathers v. Bank*, 135 N. C. 410, 47 S. E. 893 (1904).

Purpose of Section.—The provisions of this section are free from any ambiguity. The mischief to be remedied was the confusion possibly resulting from the abrupt dissolution of the corporation from any cause. The plan adopted was the continuation of the corporate character solely for the purpose of winding up its affairs. *General Electric Co. v. West Asheville Imp. Co.*, 73 F. 386 (1896).

It was not the intention of this section and § 55-129 to bring about a situation in which a corporation could be alive to its assets, but dead to its obligations, or enjoy the security of an indefeasible non est inventus during the time corporate existence is continued by statute for the purpose of suing and being sued. *Sisk v. Old Hickory Motor Freight*, 222 N. C. 631, 24 S. E. (2d) 488 (1943).

Covers Forfeitures Other than Bankruptcy.—This section covers cases of forfeiture not nearly so horrendous as bankruptcy. *Sisk v. Old Hickory Motor Freight*, 222 N. C. 631, 24 S. E. (2d) 488 (1943).

Section Applicable to Any Corporation.—Under this section, a corporation continues for three years to be a body corporate for the purpose of disposing of its property and dividing its assets, and the section is applicable to any corporation. *Burnet v. Lexington Ice, etc., Co.*, 62 F. (2d) 906 (1933).

Effect of Repeal of Corporate Charter.—This section is not a provision of the charter of a particular corporation but a general provision of law applying to all corporations, and the repeal of a particular charter does not repeal this section pro tanto. Indeed, the repeal of the charter makes the section applicable actively to

the particular corporation, as a sort of statutory letters of administration; whereas before the repeal it was a passive provision. *General Electric Co. v. West Asheville Imp. Co.*, 73 F. 386 (1896).

Section Does Not Apply to Merger.—Where an old corporation is, by a transfer of all its property, franchises and privileges, merged into a new corporation, with the same stockholders and directors as the old, and assumes all the liabilities of the old corporation, this section does not apply so as to make the old corporation a necessary party to the action against the new. *Friedenwald Co. v. Asheville Tobacco, etc., Co.*, 117 N. C. 544, 23 S. E. 490 (1895).

Equity Jurisdiction Ousted.—This section and the two following sections, which continue the existence of defunct corporations for three years after the expiration of their charters for the purpose of bringing and defending suits and closing their general business, oust the former equity jurisdiction for the appointment of a receiver, at the instance of creditors, to wind up the corporate affairs. *VonGlahn v. DeRosset*, 81 N. C. 468 (1879).

Remedies Must Be Pursued within Three Years.—The statutory remedy, by appointment of a receiver, is exclusive of all others, and must be pursued within the three years, and a failure to proceed within that period will be a complete defense, not only to the corporation, but to the stockholders, who by its charter are made individually responsible in the event of its insolvency. *VonGlahn v. DeRosset*, 81 N. C. 468 (1879).

Where a corporation is actually dissolved, the lapse of more than three years from dissolution will serve as a complete defense to actions against it. *Standard Trust Co. v. Commercial Nat. Bank*, 240 F. 303 (1917).

Same—Applies Only Where Charter Expired or Annulled.—This section has no application where a corporation has ceased to do business but its charter has not expired or been annulled. Hence in such a case the action of a judgment creditor is not barred in three years after the cessation of business. *Heggie v. Building & Loan Ass'n*, 107 N. C. 581, 12 S. E. 275 (1890).

Deed from Dissolved Corporation.—Where the certificate of the probate of a deed from a corporation, dissolved upon certificate of the Secretary of State, made

within the time allowed by this section, recites as a fact judicially found that the deed was made in the name of the corporation by the order of the directors, the trustee's objection that it was not executed in the method required by § 55-133 is untenable; and the signature of the agent in charge, if made upon the mistake that he was in law the assignee of the mort-

gage, is only surplusage, and harmless. *Lowdermilk v. Butler*, 182 N. C. 502, 109 S. E. 571 (1921).

Liquidation by National Bank.—See *Standard Trust Co. v. Commercial Nat. Bank*, 240 F. 303 (1917).

Cited in *Smith v. Dicks*, 197 N. C. 355, 148 S. E. 464 (1929).

§ 55-133. **Directors to be trustees; powers and duties.**—On the dissolution in any manner of a corporation, unless otherwise directed by an order of the court, the directors are trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, and, after paying its debts, divide any surplus money and other property among the stockholders. The trustees have power to meet and act under the bylaws of the corporation, and, under regulations to be made by a majority, to prescribe the terms and conditions of the sale of such property, and they may sell all or any part for cash or partly on credit, or take mortgages or bonds for part of the purchase price for all or any part of the property. They have power to sue for and recover the said debts and property in the name of the corporation, and are suable in the same name for the debts owing by it, and are jointly and severally responsible for such debts only to the amount of property of the corporation which comes into their possession as trustees. Vacancies in the board of directors may be filled in accordance with the provisions of the bylaws of the corporation or the stockholders may fill such vacancies at a regular or duly called meeting. (Code, s. 687; 1901, c. 2, ss. 59, 60; Rev., ss. 1201, 1202; C. S., s. 1194; 1939, c. 250, s. 2.)

Cross Reference.—As to directors in general, see § 55-48.

Editor's Note.—The 1939 amendment added the last sentence of this section.

Trustees Sell in Corporate Name.—The certificate of the Secretary of State for the dissolution of a corporation continues the corporation for three years, and the provisions of this section, that the directors as trustees may sell and convey the corporate property, does not exclude the idea that they may do so in the name of the corporation in whom the original legal title was originally vested. *Lowdermilk v. Butler*, 182 N. C. 502, 109 S. E.

571 (1921).

Deed from Dissolved Corporation.—See note to § 55-132.

Confession of Judgment in Director's Favor.—A confession of judgment by an insolvent corporation in favor of a director who is a creditor, and upon a debt theretofore existing, is void as against other creditors. *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107 (1893).

Cited in *Smith v. Dicks*, 197 N. C. 355, 148 S. E. 464 (1929); *Life Ins. Co. v. Edgerton*, 206 N. C. 402, 174 S. E. 96 (1934).

§ 55-134. **Jurisdiction of superior court.**—When a corporation is dissolved, in any manner whatsoever, the superior court, on application of a creditor or stockholder, may either continue the directors as trustees or appoint one or more persons receivers of the corporation. The court has jurisdiction of the application, and of all questions arising in the proceedings thereon, and may make, at any place in the district, any orders, injunctions, or decrees therein as justice and equity require. The powers of such trustees or receivers are as elsewhere given in this chapter, and may be continued as long as the court thinks necessary. (Code, ss. 619, 668, 669; 1901, c. 2, ss. 61, 62; Rev., ss. 1203, 1204; C. S., s. 1195.)

Cross References.—As to appointment of receiver, see § 55-147. As to powers and duties of receiver, see § 55-148.

Court May Take Charge of Winding Up Corporate Business.—Although by § 55-133 the directors, unless otherwise determined by order of some court having

jurisdiction, are made trustees with power to settle or wind up the corporate business, under this section the entire matter of winding up the corporate business after dissolution may be taken charge of by the court, and must be at the instance of either the creditors or the stockholders, or any

one of them. *White v. Kincaid*, 149 N. C. 415, 63 S. E. 109 (1908).

Who Is a "Creditor."—Anyone who has a debt or demand against an insolvent corporation upon a contract, express or implied, comes within the meaning of the word "creditor" used in this section, and may apply to the courts and obtain, in proper instances, the appointment of a receiver for the corporation. *Summit Silk Co. v. Kinston Spinning Co.*, 154 N. C. 421, 70 S. E. 820 (1911).

When Receiver Appointed.—When a corporation is insolvent or in imminent danger of insolvency, and especially when its business operations have practically been suspended owing to its financial condition, the court may, upon proper application of a creditor or stockholder, appoint a receiver of its assets to administer them for the benefit of all of its creditors. *Summit Silk Co. v. Kinston Spinning Co.*, 154 N. C. 421, 70 S. E. 820 (1911).

Property In Custodia Legis.—The property of an insolvent corporation in a receiver's hands is in custodia legis, and the court has jurisdiction by virtue of its general equitable powers, and by express provision of this section. *Lasley v. Scales*,

179 N. C. 578, 103 S. E. 214 (1920).

Authority to Adjust Claims.—While in the statute relating to the winding up of the affairs of an insolvent corporation no specific directions are given as to mutual debts and credits, yet under this section, which provides that the court shall make such orders as justice and equity shall require and direct how claims shall be approved, the claims may be adjusted. *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, 19 S. E. 371 (1894).

Jurisdiction over Foreign Corporation.—An insolvent corporation, with its property or plant located in this State, is subject to the appointment by our courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though it is incorporated under the laws of another state. *Summit Silk Co. v. Kinston Spinning Co.*, 154 N. C. 421, 70 S. E. 820 (1911), approving *Holshouser v. Copper Co.*, 138 N. C. 248, 50 S. E. 650 (1905).

Judgment against Corporation.—Judgments against a corporation rendered upon process issued after it ceased to exist are of no validity. *Dobson v. Simonton*, 86 N. C. 492 (1882).

§ 55-135. Injunction; notice and undertaking.—An injunction to suspend the general and ordinary business of a corporation or to appoint a receiver shall not be granted without due notice of the application therefor to the corporation, except where the State is a party to the proceeding, unless the plaintiff gives a written undertaking, executed by two sufficient sureties to be approved by the judge, to the effect that the plaintiff will pay all damages, not exceeding the sum mentioned in the undertaking, which the corporation may sustain by reason of the injunction, or the appointment of the receiver, if the court finally decides that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court directs. (C. C. P., s. 194; Code, s. 343; Rev., s. 1205; C. S., s. 1196.)

Cross References.—As to injunctions generally, see § 1-485 et seq. As to receivers, see §§ 55-134, 55-147 to 55-157.

§ 55-136. Wages for two months' lien on assets.—In case of the insolvency of a corporation, partnership or individual, all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, partnership or individual, which lien is prior to all other liens that can be acquired against such assets: Provided, that the lien created by this section shall not apply to multiple unit dwellings, apartment houses, or other buildings for family occupancy except as to labor performed on the premises upon which the lien is claimed. This section shall not apply to any single unit family dwelling. (1901, c. 2, s. 87; Rev., s. 1206; C. S., s. 1197; 1937, c. 223; 1943, c. 501.)

Cross Reference.—As to mortgaged property subject to execution for labor, see § 55-44.

Editor's Note.—The 1937 amendment

inserted the words "partnership or individual" twice in this section. Before this amendment it had been held that the section did not apply to the employee of an insolvent individual but only to the employee of an insolvent corporation. See *In re Reade*, 206 N. C. 331, 173 S. E. 342 (1934).

The 1943 amendment inserted the proviso.

Section Gives an Ancillary Remedy.—This section, giving to laborers of insolvent corporations a specific lien upon the assets of the company for two months' wages at least, was not intended to militate against rights that they might otherwise have under the existing law for debts due them, but gives them a special lien for certain wages. *Union Trust Co. v. Southern Sawmills, etc., Co.*, 166 F. 193 (1908).

What Creditors Favored.—The creditors favored by this section are laborers and workmen and all persons doing labor or service of whatever character in the regular employment of certain corporations. *Phoenix Iron Co. v. Roanoke Bridge Co.*, 169 N. C. 512, 86 S. E. 184 (1915).

Contractor Not Included.—A contractor, furnishing his own teams, labor, etc., in hauling materials for the building of a bridge by a corporation, within the two months next preceding the date of the institution of proceedings in insolvency, is not engaged in doing labor or performing "service of whatever character" within the meaning of this section. *Phoenix Iron Co. v. Roanoke Bridge Co.*, 169 N. C. 512, 86 S. E. 184 (1915).

Agent Having Authority to Deduct Salary from Collections.—Under this section an agent with authority to make collections and to deduct his salary and ex-

penses from the sums collected, has no lien for claims for salary earned and expenses incurred before his appointment to the position and more than two months before the appointment of a receiver. *Cummer Lumber Co. v. Seminole Phosphate Co.*, 189 N. C. 206, 126 S. E. 511 (1925).

Service after Receivership.—This section is not intended to destroy the lien for such wages and services performed after the company goes into the hands of a receiver. The word "within" means "subsequent," that is, that after 60 days prior to the insolvency the laborers and workmen shall have a first lien for their wages. *Walker v. Lumber Co.*, 170 N. C. 460, 87 S. E. 331 (1915).

Prior Lien Holders Protected.—Property acquired by a private corporation subject to a valid and registered mortgage does not become an asset of the corporation except as subject to the prior lien; and the lien given to laborers on the assets of an insolvent corporation for work done under the conditions stated in this section cannot affect the vested rights obtained by the prior lien holders. *Roberts v. Bowen Mfg. Co.*, 169 N. C. 27, 85 S. E. 45 (1915).

When Mortgage Takes Subject to Laborer's Lien.—One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts does so with the knowledge that the lien of his mortgage is subject to be displaced in favor of laborers' liens in case of insolvency. *Humphrey Bros. v. Buell-Crocker Lbr. Co.*, 174 N. C. 514, 91 S. E. 971 (1917).

Notice Need Not Be Filed.—Under this section the laborer is not required to file a notice of his claim. *Walker v. Lumber Co.*, 170 N. C. 460, 87 S. E. 331 (1915).

§ 55-137. Distribution of funds.—After payment of all allowances, expenses and costs, and the satisfaction of all general and special liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, and shall be entitled to distribution on debts not due, making in such case a rebate of interest when interest is not accruing on the same. Any surplus funds, after payment of the creditors and costs, expenses and allowances, shall be paid to the preferred stockholders according to their respective shares, and if there still be a surplus, it shall be divided and paid to the general stockholders proportionately, according to their respective shares. Upon the distribution of the assets of an insolvent corporation, judgment of dissolution shall be entered and a certified copy of the judgment filed in the office of the Secretary of State, and also in the office of the clerk of the superior court of the county in which the principal office of the corporation is located, and the same shall be recorded in the Corporation Book and in the Record of Incorporations in these offices respectively. Thereupon the cor-

poration is dissolved without being required to comply with § 55-121. (Code, s. 670; 1901, c. 2, ss. 63, 89; Rev., s. 1207; 1909, c. 15, s. 1; C. S., s. 1198.)

Section Does Not Conflict with Constitution.—The enactment of statutes regulating the manner in which corporations shall equitably discharge the claims of their creditors, or subjecting all or a portion of their property to sale at the instance and for the benefit of creditors, is not in conflict with the constitutional provisions in respect to vested rights or the obligation of contracts. *Bass v. Roanoke Navigation Co.*, 111 N. C. 439, 16 S. E. 402 (1892).

How Assets Distributed.—When the receiver has collected the assets he is required to pay all the debts, if the funds are sufficient, and, if the funds are not sufficient, to distribute the same ratably, among all the creditors who prove their claims. When once the court of equity, through its receiver, takes charge of the assets, they are to be distributed pro rata among the creditors, subject to such priorities as have already accrued. *Merchants National Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894).

Property Does Not Revert or Escheat.—Upon the dissolution or extinction of a corporation for any cause, the real property conveyed to it in fee does not re-

vert to the original grantors or their heirs, and its personal property does not escheat to the State; and this is so whether or not the duration of the corporation was limited by its charter or general statute. *Wilson v. Leary*, 120 N. C. 90, 26 S. E. 630 (1897), overruling *Fox v. Horah*, 36 N. C. 358 (1841).

Creditors Come before Stockholders.—A corporation cannot settle with its members, by the application of assets to the retirement or redemption of the stock of the shareholders, until it has first settled and discharged all its liabilities, and any agreement among the shareholders looking to such arrangement will be void as to creditors. *Heggie v. Building & Loan Ass'n*, 107 N. C. 581, 12 S. E. 275 (1890).

Costs.—It is error to tax the costs against first-mortgage creditors, who have established the priority of their lien over the rights of general creditors, in statutory proceedings to wind up the affairs of an insolvent corporation and to distribute its assets. *Hickston Lumber Co. v. Gay Lumber Co.*, 150 N. C. 281, 63 S. E. 1048 (1909).

Cited in *Smith v. Dicks*, 197 N. C. 355, 148 S. E. 464 (1929).

§ 55-138. Debts not extinguished nor actions abated.—In case of the dissolution of a corporation, the debts due to and from it are not thereby extinguished, nor do actions against a corporation which is dissolved before final judgment abate by reason thereof, but no judgment shall be entered therein without notice to the trustees or receivers of the corporation. (Code, s. 687; 1901, c. 2, ss. 59, 64; Rev., ss. 1201, 1208; C. S., s. 1199.)

Cross Reference.—As to directors becoming trustees upon dissolution, see § 55-133.

Where a corporation has been served with summons and has filed answer, the

action against it does not abate upon its subsequent dissolution, and its directors are made trustees of its property by §§ 55-132 and 55-133. *Lertz v. Hughes Bros.*, 208 N. C. 490, 181 S. E. 342 (1935).

§ 55-139. Copy of judgment to be filed with Secretary of State; costs.—A copy of every judgment dissolving a corporation or forfeiting its charter shall be forthwith filed by the clerk of the court in the office of the Secretary of State, and a note thereof shall be made by the Secretary of State on the charter or certificate of incorporation and in the index thereof, and be published by him in the annual report hereinafter provided for, the cost of which shall be taxed by the clerk of the superior court in the action wherein the corporation is dissolved. (1901, c. 2, s. 65; Rev., s. 1211; C. S., s. 1200.)

ARTICLE 12.

Execution.

§ 55-140. How issued; property subject to execution.—If a judgment is rendered against a corporation, the plaintiff may sue out such executions against its property as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money

as on the goods, chattels, lands and tenements of such corporation. (1901, c. 2, s. 66; Rev., s. 1212; C. S., s. 1201.)

Cross References.—As to execution in general, see § 1-302 et seq. As to incorporation by purchaser at execution sale of railroad, see §§ 55-161, 60-62. As to incorporation by purchaser generally, see § 55-161.

Levy on Franchise and Property of Public Service Corporation.—See § 55-161 and note.

Prior to the enactment of the Revised Code (1854), the franchise of a corporation, such as that of a railroad or navigation company, could not be levied upon and sold under a writ of fieri facias, or any other writ of execution known either to our common or statute law. *Taylor v. Jenkins*, 51 N. C. 316 (1859). See *State v. Rives*, 27 N. C. 297 (1844).

The franchise and corporate property must go together. They cannot be separated. There cannot be a corporation without a franchise. *James v. Western N. C. R. Co.*, 121 N. C. 523, 28 S. E. 537 (1897).

So the real estate acquired by a public corporation in exercise of a delegated

right of eminent domain, and necessary for uses in which the public is concerned, cannot be sold under execution apart from the franchise and its incidents, so as to give the purchaser a title to the property divested of all the duties and obligations assumed by the company. *Gooch v. McGee*, 83 N. C. 60 (1880).

The franchise of a water company is inseparable from its plant and property. The public necessity requires that they should be sold together, for, in this case, the purchaser will take cum onere and the public will be protected. *Pipe Co. v. Howland*, 111 N. C. 615, 16 S. E. 857 (1892).

Proceedings supplemental to execution lie against a private corporation created by a special act of the legislature and organized for purposes of private gain for its shareholders. *LaFountain v. Southern Underwriters' Ass'n*, 79 N. C. 514 (1878).

Cited in *Carolina Coach Co. v. Hartness*, 198 N. C. 524, 152 S. E. 489 (1930).

§ 55-141. Agent must furnish information as to property to officer.—Every agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same. (1901, c. 2, s. 67; Rev., s. 1213; C. S., s. 1202.)

Cross Reference.—As to penalty for failure to furnish information, see § 55-144.

§ 55-142. Shares subject to execution; agent must furnish information.—Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this State, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier, or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a certificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he willfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs. (1901, c. 2, ss. 69, 70; Rev., ss. 1214, 1215; C. S., s. 1203.)

Cross Reference.—See §§ 1-458 to 1-460, 55-93, 55-94, 55-145, 55-146.

Editor's Note.—Before this section was passed it was held that shares of stock,

not being goods or chattels, lands or tenements within the sense of the writ, could not be sold under a fi. fa. See *Pool v. Glover*, 24 N. C. 129 (1841).

§ 55-143. Debts due corporation subject to execution; duty, etc., of agent.—If an officer holding an execution is unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may

elect to satisfy such execution in whole or in part out of any debts due the corporation; and it is the duty of any agent or person having custody of any evidence of such debt to deliver it to the officer, for the use of the creditor, and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor, shall be a valid assignment thereof; and the creditor may sue for and collect the same in the name of the corporation, subject to such equitable set-offs on the part of the debtor as in other assignments. Every agent or person who neglects or refuses to comply with the provisions of this section and § 55-141 is liable to pay to the execution creditor the amount due on the execution, with costs. (1901, c. 2, s. 68; Rev., s. 1216; C. S., s. 1204.)

§ 55-144. Violations of three preceding sections misdemeanor.—If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, willfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or shall willfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall willfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a misdemeanor. (1901, c. 2, ss. 67, 68, 70; Rev., s. 3690; C. S., s. 1205.)

§ 55-145. Proceedings when custodian of corporate books is a non-resident.—When the clerk, cashier, or other officer of any corporation incorporated under the laws of this State, who has the custody of the stock-registry books, is a nonresident of the State, it is the duty of the sheriff receiving a writ of execution issued out of any court of this State against the goods and chattels of a defendant in execution holding stock in such company to send by mail a notice in writing, directed to the nonresident clerk, cashier, or other officer at the post office nearest his reputed place of residence, stating in the notice that he, the sheriff, holds the writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels the writ has been issued, and that by virtue of such writ he seizes and levies upon all the shares of stock of the company held by the defendant in execution on the day of the date of such written notice. It is also the duty of the sheriff on the day of mailing the notice to affix and set upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of the company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode. The sending, setting up, and serving of such notices in the manner aforesaid constitute a valid levy of the writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of the notice by the clerk, cashier, or other officer, who has custody of the stock-registry books, been actually transferred by the defendant; and thereafter any transfer or sale of such shares by the defendant in execution is void as against the plaintiff in the execution, or any purchaser of such stock at any sale thereunder. (1901, c. 2, s. 71; Rev., s. 1217; C. S., s. 1206.)

Cross Reference.—See § 55-93.

§ 55-146. Duty and liability of nonresident custodian.—The nonresident clerk, cashier, or other officer in such corporation, to whom notice in writing is sent as prescribed in § 55-145, shall send forthwith to the officer having the writ, a statement of the time when he received the notice and a certificate of the number of shares held by the defendant in the corporation at the time of the receipt, not actually transferred on the books of the corporation; and the

sheriff, or other officer, on receipt by him of this certificate, shall insert the number of shares in the inventory attached to the writ. If the clerk, cashier, or other officer in such corporation neglects to send the certificate as aforesaid or willfully sends a false one, he is liable to the plaintiff for double the amount of damages occasioned by his neglect, or false certificate, to be recovered in an action against him; but the neglect to send, or miscarriage of the certificate, does not impair the validity of the levy upon the stock. (1901, c. 2, s. 72; Rev., s. 1218; C. S., s. 1207.)

ARTICLE 13.

Receivers.

§ 55-147. **Appointment and removal.**—When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights, or its corporate existence has expired by limitation, a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them. (Code, s. 668; 1901, c. 2, ss. 73, 79; Rev., ss. 1219, 1223; C. S., s. 1208.)

Cross References.—As to receivers in general, see §§ 1-501 to 1-507. As to powers and bonds of corporate receiver, see § 55-148. As to statute making this section applicable to banks, see § 53-22. As to service of summons in action for appointment of receiver, see § 55-131. As to jurisdiction of superior court over the appointment of receivers, see § 55-134. As to abatement of actions upon death of receiver, see § 1-74.

Broad Powers Conferred.—This article is so broad and comprehensive in its provisions regarding the appointment of receivers that it is not necessary to refer to the general power of a court of equity in such cases. *Summit Silk Co. v. Kinston Spinning Co.*, 154 N. C. 421, 70 S. E. 820 (1911).

Section Does Not Limit Power of Court.—The power of the court to appoint a receiver in proper cases is not limited by this section or § 1-502. *Sinclair v. Moore Cent. R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

Nature of Receivership.—Upon the insolvency of a corporation and the appointment of a receiver under the provisions of this section, the receiver represents the creditors as well as the owners, excluding the general creditors from taking any separate or effective steps on their account in furtherance of their claims; and the proceeding for the receivership is in the nature of a judicial process by which the rights of the general creditors are fastened upon the property. *Observer Co. v. Little*, 175 N. C. 42, 94 S. E. 526 (1917).

Discretion of Court.—The selection of

a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge, and will not generally be reviewed unless this discretionary power has been greatly abused; and though the practice of appointing the plaintiff's attorney as receiver is not commended, he will not be removed, as a matter of law, on appeal, though, like any other receiver, he may be removed upon application to the proper judge of the superior court. *Mitchell v. Aulander Realty Co.*, 169 N. C. 516, 86 S. E. 358 (1915). See *Fisher v. Trust Co.*, 138 N. C. 90, 50 S. E. 592 (1905).

Effect of Appointment.—The appointment of a receiver, who is directed to take control of all the property of a company, and to assume entire management of its affairs, has the effect of suspending all the officers of the company; and they cannot interfere with the business of the company, and are entitled to no salaries during the continuance of the receivership. *Lenoir v. Linville Improvement Co.*, 126 N. C. 922, 36 S. E. 185 (1900).

Title of Receiver Relates Back.—The title of the receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be performed and the receiver remains out of possession pending such performance. *Worth v. Bank*, 122 N. C. 397, 29 S. E. 775 (1898); *Pelletier v. Lumber Co.*, 123 N. C. 596, 31 S. E. 855 (1898); *Battery Park Bank v. Western Carolina Bank*, 127 N. C. 432, 37 S. E. 461 (1900); *Fisher v. Western Carolina Bank*, 132 N. C. 769, 44 S. E. 601 (1903).

Continuance of Receivership.—A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. *Young v. Rollings*, 90 N. C. 125 (1884).

Officers' Duty When Receiver Appointed.—An order appointing a receiver of a defunct corporation with power to receive into possession all the effects of the company, and with the usual rights and powers of receivers, involves the correlative duty of delivering the funds to him by the late officers of the company in whose hands the funds are, although this is not expressly required in the decretal order. *Young v. Rollings*, 90 N. C. 125 (1884).

Valid Liens Not Divested.—The title of a receiver relates only to the time of his appointment, and valid liens existing at that time are not divested. *Battery Park Bank v. Western Carolina Bank*, 127 N. C. 432, 37 S. E. 461 (1900); *Roberts v. Bowen Mfg. Co.*, 169 N. C. 27, 85 S. E. 45 (1915).

Where Assignee Appointed Receiver.—One to whom an insolvent bank made an assignment of its assets, and who on the same day, and at the suit of creditors, was appointed receiver, held the assets after such adjudication, not by virtue of the deed of assignment, but as an officer of the court appointed to settle and wind up the affairs of such insolvent bank. *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, 19 S. E. 371 (1894).

Receiver Appointed after Reorganization.—The organization of a new corporation at once dissolves the old one, and if there are creditors of the dissolved corporation they may cause the property of the defunct corporation to be applied to their debts by means of a receiver. *Marshall v. Western, N. C. R. Co.*, 92 N. C. 322 (1885).

Dissolution of De Facto Corporation.—Assuming that a bank which had never been duly incorporated had a corporate existence as to those who bona fide dealt

with it is as corporation, a receiver should be appointed to take charge of and preserve its effects, where it has voluntarily dissolved, and no one claims to own its stock, and all its supposed officers disclaim their offices. *Dobson v. Simonton*, 78 N. C. 63 (1878).

Fraudulent Disposal of Property.—If, during the existence of a corporation, its officers fraudulently or unlawfully disposed of any of its property, the creditors are entitled to have a receiver appointed to sue for and recover it. *Latta v. Catawba Elec. Co.*, 146 N. C. 285, 59 S. E. 1028 (1907).

Cessation of Business.—Where a corporation had ceased operation, a stockholder had the right to maintain an action for the appointment of a receiver, although the corporation had not been dissolved in accordance with the provisions of the statute. *Greenleaf v. Land, etc., Co.*, 146 N. C. 505, 60 S. E. 424 (1908).

When Receiver Unnecessary.—It is unnecessary to have a receiver appointed in order for the assignee of a judgment creditor, and those beneficially interested, to maintain an action against officers and stockholders for misapplication of funds in distribution among the shareholders as dividends. *Chatham v. Mecklenburg Realty Co.*, 180 N. C. 500, 105 S. E. 329 (1920).

Remedy Not Available in Federal Courts.—This section does not confer upon a stockholder or a creditor a substantive right, but merely gives a new remedy, and such remedy is not available in the federal courts. See *& Depew v. Fisheries Products Co.*, 9 F. (2d) 235 (1925).

Adjudication of Bankruptcy during Insolvency Proceedings.—Proceedings against an insolvent corporation under this section do not preclude creditors from petitioning to have the corporation adjudged a bankrupt, notwithstanding the action of the State courts. *In re McKinnon Co.*, 237 F. 869 (1916).

Cited in *Harris v. Hilliard*, 221 N. C. 329, 20 S. E. (2d) 278 (1942).

§ 55-148. **Powers and bond.**—The receiver has power and authority to—

1. Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.

2. Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

3. Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment.

4. Sell, convey, and assign all of the said estate, rights, and interest.
5. Appoint agents under him.
6. Examine persons and papers, and pass on claims as elsewhere provided in this article.
7. Do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business.

The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes. (Code, s. 668; 1901, c. 2, ss. 74, 84; Rev., ss. 1222, 1231; C. S., s. 1209.)

Cross Reference.—As to foreclosure by receiver, see § 55-150.

Directors Superseded.—Appointment of receivers of a corporation on a creditors' bill supersedes the power of the directors to carry on the business of the corporation, and the receivers take possession of the corporation until further order of the court. See & Depew v. Fisheries Products Co., 9 F. (2d) 235 (1925).

Power of Receiver to Bring All Actions.—The receiver represents and, in a certain sense, succeeds to the rights of the corporation. There is no valid reason why he may not, representing the corporation and its creditors, bring any and all actions in respect to its assets, or rights of action, which it or its creditors could have brought. Smathers v. Bank, 135 N. C. 410, 47 S. E. 893 (1904).

The receiver may sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets. Gray v. Lewis, 94 N. C. 392 (1886); Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322 (1894); Smathers v. Bank, 135 N. C. 410, 47 S. E. 893 (1904).

Receiver May Plead Usury.—The plea of usury may be made by the receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Riley v. Sears, 154 N. C. 509, 70 S. E. 997 (1911).

All Rights May Be Adjusted.—In a suit by the receivers of a bank may be adjudicated all the rights of the bank, its creditors, and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings, and such judgment may be entered as will enforce the rights of the general creditors and also protect any equities that the defendant may be entitled to. Smathers v. Bank, 135 N. C. 410, 47 S. E. 893 (1904). See Gray v. Lewis, 94 N. C. 392 (1886); Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322 (1894).

Valid Existing Liens Protected.—The title of a receiver of a private corporation to the corporate property relates back only to the time of his appointment, and it cannot divest the property of valid liens existing at that time. Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45 (1915).

Receiver Has No Extraterritorial Power.—A receiver, appointed in a stockholder's action to sequester assets of the corporation against mismanagement of its officers and directors, has no extraterritorial power. See & Depew v. Fisheries Products Co., 9 F. (2d) 235 (1925).

Priority between Receivers.—One receiver has no priority over another receiver previously appointed in another district on a creditors' bill. See & Depew v. Fisheries Products Co., 9 F. (2d) 235 (1925).

Power after Charter Has Expired.—A receiver, appointed under the preceding section to wind up the affairs of a corporation, can proceed to collect the assets and to prosecute and defend suits, after the corporation has ceased to exist by the expiration of its charter. Asheville Division v. Aston, 92 N. C. 579 (1885).

Effect of Judgment against Corporation.—Judgments against a corporation rendered upon process issued after it ceased to exist are of no validity; and the same may be impeached by a party interested in the administration of its assets. Dobson v. Simonton, 86 N. C. 492 (1882).

Conveyances.—While paragraph 4 empowers receivers to convey the estate, the receiver of a corporation may not ordinarily dispose of a substantial part of the assets entrusted to him without authority of court, and sales are subject to confirmation unless authority to convey on specified terms is expressly given. Harrison v. Brown, 222 N. C. 610, 24 S. E. (2d) 470 (1943).

Deed Held Sufficient to Pass Title.—Where, under a court order, the receiver of an insolvent bank had conveyed lands according to the terms of a deed of trust by which the bank held the land, applying this and the following section the deed was

sufficient in law to pass title. *Wachovia Bank, etc., Co. v. Hudson*, 200 N. C. 688, 158 S. E. 244 (1931). **Cited in** *Harris v. Hilliard*, 221 N. C. 329, 20 S. E. (2d) 278 (1942).

§ 55-149. Title and inventory.—All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto. Within thirty days after his appointment he shall lay before the court a full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and shall make a report of his proceedings to the superior court at such times as the court may direct during the continuance of the trust. (1901, c. 2, ss. 75, 80; Rev. ss. 1224, 1225; C. S., s. 1210; 1945, c. 635.)

Cross Reference.—As to liability of property in receiver's hands for taxes, see § 55-160.

Editor's Note.—The 1945 amendment substituted near the end of the section the word "such times as the court may direct" for the words "every civil term."

Prior Liens Not Divested.—The appointment of a receiver does not divest the property of prior existing liens, but the court, through its receiver, receives such property impressed with all existing rights and equities, and the relative ranks of claims and standing of liens remain unaffected by the receivership. *Pelletier v. Lumber Co.*, 123 N. C. 596, 31 S. E. 855 (1898); *Battery Park Bank v. Western Carolina Bank*, 127 N. C. 432, 37 S. E. 461 (1900); *Fisher v. Western Carolina Bank*, 132 N. C. 769, 44 S. E. 601 (1903); *Garrison v. Vermont Mills*, 154 N. C. 1, 69 S. E. 743 (1910); *Witherell v. Murphy*, 154 N. C. 82, 69 S. E. 748 (1910).

Insurance Policies Not Forfeited.—The vesting of the property of a corporation in the receiver under this section does not constitute such a change in the "interest, title or possession" of the property as to forfeit insurance policies on the property. *Southern Pants Co. v. Insurance Co.*, 159 N. C. 78, 74 S. E. 812 (1912).

Effect of Subsequent Judgment against Corporation.—The title to the property of a corporation vests in the receiver at the time he was duly appointed by the court, from which time the corporation is divested thereof, and a judgment against the

corporation entered thereafter, but before the docketing of the order or the qualifying of the receiver thereunder, can acquire no lien in favor of the judgment creditor. *Odell Hdw. Co. v. Holt-Morgan Mills*, 173 N. C. 308, 92 S. E. 8 (1917).

Same—Does Not Relate Back.—A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver who had in the meanwhile been appointed. *Odell Hdw. Co. v. Holt-Morgan Mills*, 173 N. C. 308, 92 S. E. 8 (1917).

Effect of Unrecorded Conditional Sale Contract.—A receiver has the power of creditors armed with process to disregard or avoid the unrecorded condition in a contract of conditional sale. *Observer Co. v. Little*, 175 N. C. 42, 94 S. E. 526 (1917).

Where Receiver Refuses to Bring Action.—In an action brought by creditors, depositors or stockholders to recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action the receiver may properly be made a defendant, to the end that the recovery may be subject to orders and decrees by the court, in the judgment as to its application to the claims of creditors and depositors, or to its distribution among stockholders. *Douglass v. Dawson*, 190 N. C. 458, 130 S. E. 195 (1925).

Applied in *Teague v. Teague Furniture Co.*, 201 N. C. 803, 161 S. E. 530 (1931).

§ 55-150. Foreclosure by receivers and trustees of corporate mortgages or grantees.—Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation in this State authorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the

decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court.

All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein.

All sales of real property made prior to April 10, 1931 by such receiver or trustee of and pursuant to the orders of the courts of competent jurisdiction in such cases, are hereby validated. (1931, c. 265.)

Editor's Note.—The need for this section is not apparent, in view of §§ 55-148 and 55-149, as construed in *Wachovia Bank and Trust Co. v. Hudson*, 200 N. C. 688, 158 S. E. 244 (1931), decided shortly after the section was ratified, except that those statutes are limited to receiverships and are not applicable, as the new statute is, to trusteeships as well. 9 N. C. Law Rev. 401.

§ 55-151. May send for persons and papers; penalty for refusing to answer.—The receiver has power to send for persons and papers, to examine any persons, including the creditors, claimants, president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts, and liabilities, and the claims against it; and if any person refuses to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuses to declare the whole truth touching the subject matter of the examination, the court may, on report of the receiver, commit such person as for contempt. (1901, c. 2, s. 78; Rev., s. 1227; C. S., s. 1211.)

§ 55-152. Proof of claims; time limit.—All claims against an insolvent corporation must be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver directs, and shall produce such books and papers relating to the claim as shall be required. The receiver has power to examine under oath or affirmation all witnesses produced before him touching the claim, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. The court may limit the time within which creditors may present and prove to the receiver their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time. (1901, c. 2, ss. 81, 82; Rev., ss. 1228, 1229; C. S., s. 1212.)

Court May Extend Time for Filing.—The court has the discretion to permit the filing of claims subsequent to the time fixed after the appointment of the receiver. *Odell Hdw. Co. v. Holt-Morgan Mills*, 173 N. C. 308, 92 S. E. 8 (1917).

Creditor May Assign Claim—Set-Offs.—After the appointment of a receiver for a bank a creditor may assign his claim, but

such assignment is subject to the receiver's right to set off claims the bank may have against the creditor, and if the assignee of a claim is himself a debtor of the bank he cannot use the assigned claim as a set-off. *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, 19 S. E. 371 (1894).

Cited in *Kenny Co. v. Hinton Hotel Co.*, 208 N. C. 295, 180 S. E. 696 (1935).

§ 55-153. Report on claims to court; exceptions and jury trial.—It is the duty of the receiver to report to the term of the superior court subsequent

to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within ten days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. Provided, that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least twenty days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge. (1901, c. 2, s. 83; Rev., s. 1230; C. S., s. 1213; 1945, c. 219.)

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

The power to extend time for filing exceptions to receiver's report is expressly given by this section. *Benson v. Roberson*, 226 N. C. 103, 36 S. E. (2d) 729 (1946).

Exceptions Not Filed within Time Prescribed.—Exceptions filed and made a part of the record are not void as a matter of law because not filed within the first three days of the term of court commencing next after the filing of the receiver's report, in the absence of motion to strike or order to that effect, and a judgment entered on the ground that such exceptions were not before the court for consideration will be remanded. *Benson v. Roberson*, 226 N. C.

103, 36 S. E. (2d) 729 (1946).

Where objections were filed by a creditor of a corporation in the hands of a receiver to an order allowing a claim against such corporation, which order adjudicated material and controverted issues of fact without consent, evidence or findings, it was held error to deny a motion to set aside the allowance of such claim and refuse to grant a hearing on such objections alleging facts which if true would constitute a valid defense to such claim. *Peoples Bank, etc., Co. v. Tar River Lbr. Co.*, 224 N. C. 432, 31 S. E. (2d) 353 (1944). See also, *Peoples Bank, etc., Co. v. Tar River Lbr. Co.*, 224 N. C. 153, 29 S. E. (2d) 348 (1944).

§ 55-154. Property sold pending litigation.—When the property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of encumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least ten days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular term of the superior court of the county in which

the property is situated. (1901, c. 2, s. 86; Rev., s. 1232; C. S., s. 1214; Ex. Sess. 1924, c. 13.)

Editor's Note.—Prior to the 1924 amendment this section consisted of the first sentence only of the present section.

The 1924 amendment to this section is applicable to suits pending at the time it took effect. *Martin v. Vanlaningham*, 189 N. C. 656, 127 S. E. 695 (1925).

Section Applicable to Pending Litigation.—The statute is a remedial one and relates only to the method of procedure in dealing with certain assets of an in-

solvent corporation. Such statutes, unless otherwise limited, are usually held to be applicable to pending litigation, where the language used clearly indicates that such construction was intended by the legislature, and especially where no hardship or injustice results, and the rights of the parties are thereby better secured and protected. *Martin v. Vanlaningham*, 189 N. C. 656, 127 S. E. 695 (1925).

§ 55-155. Compensation and expenses.—Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five per cent upon receipts and disbursements, and the costs and expenses of administration of his trust and of the proceedings in said court, to be first paid out of said assets. (1901, c. 2, s. 88; Rev., s. 1226; C. S., s. 1215.)

The effect of this section is to take from the funds of the insolvent corporation a sufficient sum to pay all the costs, allowances and legitimate expenses, and then to distribute what is left according to priority. *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N. C. 281, 63 S. E. 1048 (1909).

Commissions Limited.—A rate not exceeding 5 per cent on receipts and 5 per cent on disbursements is the statutory limit of a receiver's commissions. *Battery Park Bank v. Western Carolina Bank*, 126 N. C. 531, 36 S. E. 39 (1900).

Commissions Part of Costs.—Commissions payable to a receiver are part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable pro rata with other debts. *Wilson Cotton Mills v. Randleman Cotton Mills*, 115 N. C. 475, 20 S. E. 770 (1894).

Same—Discretion of Court.—An allowance to a receiver is a part of the costs of the action and usually taxable against the losing party, but the court below may, in its discretion, divide it between the parties, as in case of referees' fees. *Simmons v. Allison*, 119 N. C. 556, 26 S. E. 171 (1896).

First Assets Applied to Costs.—Under this section the first assets that are the property of the corporation must be applied to the costs of the proceedings in court, including the fees of the receiver and referee, and, except as to private corporations, receivers' certificates issued in operation of the plant, under the orders of the court, and liabilities incurred for labor, and torts. *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N. C. 281, 63 S. E. 1048 (1909); *Humphrey Bros. v. Buell-*

Crocker Lumber Co., 174 N. C. 514, 93 S. E. 971 (1917).

When Costs Prior to Mortgage.—One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts, past or prospective, does so with the knowledge that, under this section, the lien of his mortgage is subject to be displaced in favor of the expenses of receivership; but when the corporation has acquired the property subject to a valid registered mortgage, then the costs of receivership are not prior to that mortgage. *Humphrey Bros. v. Buell-Crocker Lumber Co.*, 174 N. C. 514, 93 S. E. 971 (1917).

Allowance of Commissions Held Premature.—The allowance of commissions to receivers appointed by the court, by consent, to finish partially constructed waterworks, was premature before the work was finished, as it could not be determined whether such allowance was excessive or too little. *Delafield v. Mercer Const. Co.*, 118 N. C. 105, 24 S. E. 10 (1896).

Appeal.—When the order of the court below allowing commissions to a receiver for services as such is appealed from, and there is no suggestion that the amount was excessive or based upon a wrong principle, the order will not be disturbed. *Talbot v. Tyson*, 147 N. C. 273, 60 S. E. 1125 (1908).

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the Supreme Court will alter the same only when it is clearly inadequate or excessive. *Graham v. Carr*, 133 N. C. 449, 45 S. E. 847 (1903).

§ 55-156. Debts provided for, receiver discharged.—When a receiver has been appointed, and it afterwards appears that the debts of the corporation have been paid, or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that the property, rights, and franchises of the corporation revert to it, and thereafter the corporation may resume control of the same, as fully as if the receiver had never been appointed. (1901, c. 2, s. 76; Rev., s. 1220; C. S., s. 1216.)

Discharged Receiver Not Proper Party.—Where the receiver of an insolvent railroad company has been discharged, he is not a proper party to an action against a

foreclosure purchaser to recover for personal injuries suffered after the receiver's discharge. *Howe v. Harper*, 127 N. C. 356, 37 S. E. 505 (1900).

§ 55-157. Reorganization.—When a majority in interest of the stockholders of the corporation have agreed upon a plan for its reorganization and a resumption by it of the management and control of its property and business, the corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for an amount necessary for the purposes of the reorganization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization. (1901, c. 2, s. 77; Rev., s. 1221; C. S., s. 1217.)

Cross Reference.—As to reorganization in general, see § 55-161 et seq.

Power of Superior Court.—This section gives the superior court, in a receivership, power to approve a plan for the reorganization of a corporation, which provides for the readjustment of the company's capital structure, when approved by a majority in interest of the stockholders; but it cannot affect either the rights of dissenting stockholders not parties to the receivership, or the vested rights of parties to the proceedings unless they fail to appear. *Commercial Nat. Bank v. Mooresville Cotton Mills*, 222 N. C. 305, 22 S. E. (2d) 913 (1942).

Consent of Creditors Unnecessary.—Where a corporation engaged in business transfers its entire property rights and franchise to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the contracts of its predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company

are concerned and to substitute the new one as debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change. *Friedenwald Co. v. Asheville Tobacco, etc., Co.*, 117 N. C. 544, 23 S. E. 490 (1895).

New Corporation Assumes Contracts of Old.—Where, by merger of an old into a new corporation, a novation of the debts of the old is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name. *Friedenwald Co. v. Asheville Tobacco, etc., Co.*, 117 N. C. 544, 23 S. E. 490 (1895).

Duty of Fiduciaries.—In the reorganization of a corporation under this section, executors, trustees, and other fiduciaries, holding stock in the corporation, not only have the right, but it is their duty, to assert whatever legal rights they may have which in their opinion will be for the best interest of the estates involved. *Commercial Nat. Bank v. Mooresville Cotton Mills*, 222 N. C. 305, 22 S. E. (2d) 913 (1942).

ARTICLE 14.

Taxes and Fees.

§ 55-158. Taxes for filing; Secretary of State not to file corporate papers until prescribed fees, etc., paid.—On filing any certificate or paper relative to corporations in the office of the Secretary of State, the following tax shall be paid to the State Treasurer for the use of the State:

1. For certificates of incorporation, forty cents for each thousand dollars of

the total amount of capital stock authorized but in no case less than forty dollars.

2. Increase of capital stock, forty cents for each thousand dollars of the total increase authorized, but in no case less than forty dollars.

3. Extension or renewal of corporate existence of any corporation, forty dollars.

4. Change of name, change of nature of business, amended certificate of incorporation (other than those authorizing increase of capital stock and those extending or renewing corporate existence), decrease of capital stock, increase or decrease of par value of, or number of shares, forty dollars.

5. For filing of officers and directors, two dollars.

6. Dissolution of corporation, change of principal place of business, five dollars.

7. For certificates of incorporation for any benevolent, religious, educational, charitable or social society or association having no capital stock, fifteen dollars.

Provided, no tax shall be required by corporations created by virtue of § 55-11 relating to public parks and drives; and these taxes shall not be cumulative, but when two or more taxes have been incurred at the same time the tax for all shall be the largest single tax.

The Secretary of State shall not file any articles, certificates, applications, amendments, reports, or other papers relating to any corporation, domestic or foreign, organized under or subject to the provisions of this chapter until all fees, taxes, and charges provided to be paid in connection therewith shall have been paid to him. (1901, c. 2, s. 96; Rev., s. 1233; 1911, c. 155, s. 5; C. S., s. 1218; 1929, c. 36; 1935, c. 10; 1937, c. 171; 1945, c. 635; 1947, c. 1042.)

Cross References.—As to the requirements of the certificate of incorporation, see § 55-3. As to errors or omissions in the certificate, see § 55-8. As to amending the certificate before payment of stock, see § 55-30. As to tax upon certificate of incorporation or amendments when capital stock is without nominal or par value, see § 55-77. As to fees to be collected from merging corporations, see § 55-170. As to franchise or privilege tax on domestic and foreign corporations, see § 105-122.

Editor's Note.—The 1929 amendment made this section conform to Public Laws, Ex. Sess. 1920, c. 1, which amended Rev., s. 1233, so as to increase the taxes provided for in the original section.

Prior to the 1935 amendment no taxes were required of benevolent, religious,

educational or charitable societies or associations having no capital stock, the same being exempted by the proviso. The amendment omitted this exemption, and added subsection 7.

The 1937 amendment added the last paragraph.

The 1945 amendment inserted in subsection 4 the words "and those extending or renewing corporate existence."

The 1947 amendment rewrote subsection 3.

For article dealing with taxation of North Carolina corporations, see 1 N. C. Law Rev. 203.

Cited in *Carolina Coach Co. v. Hartness*, 198 N. C. 524, 152 S. E. 489 (1930); *Atlantic Refin. Co. v. Virginia*, 302 U. S. 22, 58 S. Ct. 75, 82 L. Ed. 52 (1937).

§ 55-159. Fees to Secretary of State and clerk of superior court.

—The Secretary of State shall collect and retain the following fees: For recording the certificate of incorporation, one dollar for the first three copy sheets and ten cents for each copy sheet in excess thereof, and for official seal one dollar; for copying, the same fees as for recording. There shall be paid the clerk of the superior court for recording the certificate of incorporation a fee of three dollars. (Code, s. 680; 1893, c. 318, s. 4; 1901, c. 2, s. 96; Rev., s. 1234; 1917, c. 231, s. 84; C. S., s. 1219.)

§ 55-160. Property in receiver's hands liable for taxes.—When listed or unlisted taxes are duly assessed and charged against and are due and unpaid by a corporation with chartered rights, doing business or with property in this State, or against a person residing in, doing business, or having property in this State, it is competent for an officer or tax collector who has the tax list to levy upon, seize, and take possession of that part of the property belonging to the corporation or person necessary to pay such taxes, even though the

property is in the hands of a receiver duly appointed; and the officer or collector need not apply to the court appointing the receiver, or with jurisdiction of the property or the receiver, for an order for the payment of said taxes. This section applies to all taxes, whether State, county, town or municipal, and shall be liberally construed in favor of and in furtherance of the collection of such taxes. (Code, ss. 699, 670; Rev., ss. 1236, 1237; C. S., s. 1220.)

Cross References.—As to duty of State Board of Assessment to prepare and keep record of the assessed valuation of the property of corporations, see § 105-349. As to liability of foreign corporations, see § 105-396.

State and County as Creditors of Corporation.—The State and a county having, through the boards of commissioners sitting with the justices of the peace, assessed the property of a corporation for taxation and placed the tax list in the hands of the sheriff, who cannot find any property of the corporation upon which to levy, are creditors holding a debt against such corporation and are entitled to bring a proceeding in the nature of a creditor's bill against such corporation, with or without proceedings for its dissolution. *State v. Georgia Co.*, 112 N. C. 34, 17 S. E. 10 (1893).

Attachment and Continuance of Lien on Real Property.—The lien for taxes attaches to the real property taxed from the date provided in the statute, and the lien continues thereon until the taxes are paid, regardless of whose hands the property has passed into, unless barred by

some statute of limitations. *Reichland Shale Products Co. v. Southern Steel, etc., Co.*, 200 N. C. 226, 156 S. E. 777 (1931). See § 105-340.

When City and County Have No Lien on Proceeds of Sale of Personalty.—

Where the receiver of a corporation sold personal property of the corporation, its sole assets, under orders of the court, and deposited the proceeds of sale to his credit as receiver, and the city and county in which the corporation was located levied executions on the funds on deposit, claiming that they were entitled to preferred claims against the funds for personal property taxes for several years prior to the appointment of the receiver, it was held that since under C. S., s. 7986 a lien for personal property taxes did not attach until levy thereon, and no lien for taxes was created prior to the sale of the property free from tax liens by the receiver, the city and county had no lien on the proceeds of sale of the property and were not entitled to a preferred claim against the funds. *Currie v. Southern Manufacturers Club*, 210 N. C. 150, 185 S. E. 666 (1936). See § 105-340.

ARTICLE 15.

Reorganization.

§ 55-161. **Corporations whose property and franchises sold under order of court or execution.**—When the property and franchises of a public service corporation are sold under a judgment or decree of a court of this State, or of the district court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon, such sale vests in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was made, to said property and franchise, subject to all the conditions, limitations and restrictions of the corporation; and the purchaser and his associates, not less than three in number, thereupon become a new corporation, by such name as they select, and they are the stockholders in the ratio of the purchase money by them contributed; and are entitled to all the rights and franchises and subject to all the conditions, limitations and penalties of the corporation whose property and franchises have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of the sale succeeds to all the franchises, rights and privileges of the original corporation only when the sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when the railroad is sold as an entirety. If a purchaser at any such sale is a corporation, such purchasing corporation shall succeed to all the properties, franchises, powers, rights, and privileges of the original corporation: Provided, that this shall not affect vested rights and shall not be construed to al-

ter in any manner the public policy of the State now or hereafter established with reference to trusts and contracts in restraint of trade. (Code, ss. 697, 698; 1897, c. 305; 1901, c. 2, s. 99; Rev., s. 1238; 1913, c. 25, s. 1; 1919, c. 75; C. S., s. 1221.)

Cross References.—As to levy on franchise and property of public service corporation, see note to § 55-140. As to reorganization, see § 55-157. As to purchaser of railroad property, see §§ 60-62, 60-63.

Meaning of "Encumbrance."—In this section the word "encumbrance" is not restricted, as in cases of real estate alone, to claims having specific liens on the property, but is extended to include any and all claims importing a liability to sale as a whole under a judicial decree. *Wood v. Staton*, 174 N. C. 245, 93 S. E. 794 (1917).

Railroad Property and Franchise Must Be Kept Together.—The property of railroads must be kept in association with their franchises to preserve their value, to give credit to such corporations, to secure creditors and to keep railroads in operation for the benefit of the public, which was the primary object of the legislature in bestowing such corporate franchises. Such legislative purpose is clearly manifested in this section. *Bradley v. Ohio River, etc., Co.*, 119 N. C. 918, 26 S. E. 169 (1896). See *Gooch v. McGee*, 83 N. C. 60 (1880).

Effect of Sale of Railroad.—The sale of a railroad under a second mortgage and a conveyance thereunder subject to the first mortgage upon its franchise and corporate property did not extinguish the corporate existence of the company, nor release it from liability to the public for the manner in which it is operated. *James v. Western N. C. R. Co.*, 121 N. C. 523, 28 S. E. 537 (1897).

New Corporation Must Be Provided.—In order that the sale of the franchise and property of a corporation under the mortgage shall have the effect of a dissolution of such corporation as provided in this section, another corporation must be provided, as contemplated in § 60-62, to take its place, and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist, and when it is done the new corporation will be a domestic corporation. *James v. Western N. C. R. Co.*, 121 N. C.

523, 28 S. E. 537 (1897).

Rights of Purchaser.—On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right of way under its charter. *Barker v. Railroad*, 137 N. C. 214, 49 S. E. 115 (1904).

The purchaser of a railroad under this section takes the rights acquired by the former company under its charter, and also becomes liable for damages and assessments on account of the appropriation of lands for the right of way. *Hendrick v. R. R.*, 101 N. C. 617, 8 S. E. 236 (1888).

Debts and Liabilities.—The principle that a corporation taking over another by reorganization, consolidation, amalgamation, or union is subject to the debts and liabilities of the other corporation, rests either upon the ground that the corporation so taken over has not been paid a consideration, or that the transaction was in fraud of creditors, or upon the presumption of a trust for creditors; consequently, the principle does not apply to the bona fide sale of only a part of the assets of a corporation which continues to exist and exercise its functions under its franchise. *McAlister v. Express Co.*, 179 N. C. 556, 103 S. E. 129 (1920).

Rights of Old Stockholders.—When the property, including the franchise, of a corporation is sold under judicial sale, conferring on the purchaser the right to reorganize, etc., the old stockholders have a right to share in the assets if there is a surplus; but the decree itself shuts off all their rights as such stockholders in the new corporation. *Wood v. Staton*, 174 N. C. 245, 93 S. E. 794 (1917).

Use of Former Name.—Where a corporation has been practically reorganized under a different name, the fact that persons in negotiating for the sale of shares of stock in the reorganized corporation used the former name is immaterial, it appearing that the purchaser received the certificates he had contracted to purchase, and held them without objection, and must have known of the fact. *Pritchard v. Daily*, 168 N. C. 330, 84 S. E. 392 (1915).

§ 55-162. New owners to meet and organize.—The persons for whom the property and franchises have been purchased shall meet within thirty days after the delivery of the conveyance made by virtue of said process or decree, and organize the new corporation, ten days' written notice of the time and place of

the meeting having been given to each of the said persons. At this meeting they shall adopt a corporate name and seal, determine the amount of the capital stock of the corporation, and shall have power and authority to make and issue certificates of stock in shares of such amounts as they see fit. The corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary. (1901, c. 2, ss. 100, 101, 102; Rev., ss. 1239, 1240; C. S., s. 1222.)

Change of Seal and Amount of Capitalization Not Required.—Where the purchasers of the entire property of a defunct corporation under the decree of a court have in other respects complied with the requirements of the statute as to reorganization, the fact that they have assumed to continue operations without changing the seal, or determining upon a

different amount of capitalization, does not necessarily affect the fact of proper reorganization, there being no statutory requirement that the seal and capitalization be changed. *Wood v. Staton*, 174 N. C. 245, 93 S. E. 794 (1917).

Cited in *Carolina Coach Co. v. Hartness*, 198 N. C. 524, 152 S. E. 489 (1930).

§ 55-163. Certificate to be filed with Secretary of State.—It is the duty of the new corporation, within one month after its organization to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of the organization, the name adopted, the amount of capital stock, and the names of its president and directors, and transmit the certificate to the Secretary of State, to be filed and recorded in his office, and there remain of record. A certified copy of this certificate so filed shall be recorded in the office of the clerk of the superior court of the county in which is located the principal office of the corporation, and is the charter and evidence of the corporate existence of the new corporation. (1901, c. 2, s. 103; Rev., s. 1241; C. S., s. 1223.)

Failure to File with Secretary of State.—Where purchasers reorganized within the requirements of this article, except that they failed to file the certificate with the Secretary of State within one month from the reorganization as required by this section, the purchasers having acted in good faith, the corporation became at

least a corporation de facto, and the individuals could not be held to personal liability for debts contracted in the name of the corporation, except to the extent provided by the charter or act of incorporation. *Wood v. Staton*, 174 N. C. 245, 93 S. E. 794 (1917).

§ 55-164. Effect on liens and other rights.—Nothing contained in this article in any manner impairs the lien of a prior mortgage, or other encumbrance, upon the property or franchises conveyed under the sale, when by the terms of the process or decree under which the sale was made, or by operation of law, the sale was made subject to the lien of any such prior mortgage or other encumbrance. No such sale and conveyance or organization of such new corporation in any way affects the rights of any person, body politic, or corporate, not a party to the action in which the decree was made, nor of the said party except as determined by the decree. When a trustee has been made a party to such action and his cestui que trust, for reason satisfactory to the court, has not been made a party thereto, the rights and interest of the cestui que trust are concluded by the decree. (1901, c. 2, s. 103; Rev., s. 1241; C. S., s. 1224.)

ARTICLE 15A.

Amendments Extending Corporate Existence Validated.

§ 55-164.1. Validation of amendments to corporate charters extending corporate existence.—In every case where a private corporation, chartered under the general laws of the State of North Carolina, has continued to act and do business as a corporation after the expiration of its period of existence as theretofore fixed in its charter, and has thereafter filed in the office of the Secretary of State an amendment to its charter to extend or renew its corporate existence, such amendment is hereby validated and made effective for all intents

and purposes to the same extent and with the same effect as if such amendment had been made within the period of such corporation's existence as theretofore fixed in its charter. (1947, c. 504, s. 1.)

§ 55-164.2. Limitation of actions attacking validity of corporate action on grounds amendment not filed during corporate existence.—No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after the ratification of this article in which either the continued existence of such corporation or the validity of any of the contracts, acts, deeds, rights, privileges, powers, franchises and titles of such corporation is attacked or otherwise questioned on the grounds that such amendment was not filed within the period of such corporation's existence as theretofore fixed in its charter. (1947, c. 504, s. 2.)

Editor's Note.—The act from which this 25, 1947, and provides that it shall not article was codified was ratified on March affect pending litigation.

§ 55-164.3. Clarification of intent of preceding section.—In no event shall the limitation provided in § 55-164.2 bar any action, proceeding, defense or counterclaim based upon grounds other than those mentioned in § 55-164.2, unless the grounds set out in § 55-164.2 are an essential part thereof. (1947, c. 504, s. 3.)

ARTICLE 16.

Consolidation or Merger.

§ 55-165. Consolidation or merger; proceedings for.—Any two or more corporations organized under the provisions of this chapter or existing under the laws of this State, for the purpose of carrying on any kind of business, may, as shall be specified in the agreement hereinafter required, be merged into one of such constituent corporations, herein designated as the surviving corporation, or may be consolidated into a new corporation to be formed by means of such consolidation of the constituent corporations, which new corporation is herein designated as the resulting or consolidated corporation; and the directors, or a majority of them, of such corporations as desire to consolidate or merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation or merger, the mode of carrying the same into effect, and stating such other facts required or permitted by the provisions of this chapter to be set out in certificates of incorporation, as can be stated in the case of a consolidation or merger, stated in such altered form as the circumstances of the case require, as well as the manner of converting the shares of each of the constituent corporations into shares of the surviving or consolidated corporation, with such other details and provisions as are deemed necessary. The agreement of merger or consolidation may also provide for the distribution of cash, property, or securities, in whole or in part, in lieu of shares of the surviving or consolidated corporation, to stockholders of the constituent corporations or any class of them.

Said agreement shall be submitted to the stockholders of each constituent corporation, at a separate meeting thereof, called for the purpose of taking the same into consideration; of the time, place and object of which meeting due notice shall be given by publication at least once a week for four successive weeks in one or more newspapers published in the county wherein each such corporation either has its principal office or conducts its business (and if there be no newspaper published in such county then in a newspaper published in an adjoining county), and a copy of such notice shall be mailed to the last known post-office address of each stockholder of each such corporation, at least twenty days prior to the date of such meeting, and at said meeting said agreement shall be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the same; and if the votes of stockholders of each such corporation representing a majority of the outstanding shares of stock entitled to vote shall be for the adoption of the said

agreement, then that fact shall be certified on said agreement by the secretary of each such corporation, under the seal thereof; and the agreement so adopted and certified shall be signed by the president or vice-president and secretary or assistant secretary of each of such corporations under the corporate seals thereof and acknowledged by the president or vice-president of each such corporation before any officer authorized by the laws of this State to take acknowledgments of deeds to be the respective act, deed and agreement of each of said corporations, and the agreement so certified and acknowledged shall be filed in the office of the Secretary of State, and shall thence be taken and deemed to be the agreement and act of consolidation or merger of the said corporations; and a copy of said agreement and act of consolidation or merger, duly certified by the Secretary of State under the seal of his office, shall also be recorded in the office of the clerk of the superior court of the county of this State in which the principal office of the surviving or consolidated corporation is, or is to be established, and in the offices of the clerks of the superior court of the counties of this State in which the respective corporations so merging or consolidating shall have their original certificates of incorporation recorded, or if any of the corporations shall have been specially created by a public act of the legislature, then said agreement shall be recorded in the county where such corporation shall have had its principal office, and also in the office of the register of deeds in each county in which either or any of the corporations entering into the merger or consolidation owns any real estate, and such record, or a certified copy thereof, shall be evidence of the agreement and act of consolidation or merger of said corporations, and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation or merger.

Any one or more corporations organized under the provisions of this chapter, or existing under the laws of this State, may consolidate or merge with one or more other corporations organized under the laws of any other state or states of the United States of America, if the laws under which said other corporation or corporations are formed shall permit such consolidation or merger. The constituent corporations may merge into a single corporation, which may be any one of said constituent corporations, or they may consolidate to form a new corporation, which may be a corporation of the state of incorporation of any one of said constituent corporations as shall be specified in the agreement hereinafter required. All the constituent corporations shall enter into an agreement in writing which shall prescribe the terms and conditions of the consolidation or merger, the mode of carrying the same into effect, the manner of converting the shares of each of said constituent corporations into shares or other securities or obligations of the corporation resulting from or surviving such consolidation or merger and such other details and provisions as shall be deemed necessary or proper. There shall also be set forth in said agreement such other facts as shall then be required to be set forth in certificates of incorporation, or other similar document, by the laws of the State, under which the resulting corporation is to be formed or the surviving corporation is to continue to exist, as provided by said agreement, stated in such form as may be required or permitted by the laws of such state. Said agreement shall be authorized, adopted, approved, signed and acknowledged by each of said constituent corporations in accordance with the laws under which it was formed and, in the case of a North Carolina corporation, in the manner hereinbefore provided. The agreement so authorized, adopted, approved, signed and acknowledged shall be filed in the office of the Secretary of State and said agreement shall thenceforth be taken and deemed to be the agreement and act of consolidation or merger of said constituent corporations for all purposes of the laws of this State. A copy of said agreement, duly certified by the Secretary of State under the seal of his office, shall also be recorded as provided in this section with respect to the consolidation or merger of corporations of this State.

If the corporation resulting or surviving such consolidation or merger is to be governed by the laws of any state other than the laws of this State, it shall agree

that it may be served with process or notice in this State in any proceeding for enforcement of any obligation of any constituent corporation of this State, including any amount to be paid dissatisfied stockholders of any corporation of this State as such amount may be determined pursuant to the provisions of § 55-167, and shall irrevocably appoint the Secretary of State as its agent to accept service of process or notice in an action or proceeding for the enforcement of payment of any such obligation or any amount to be paid such dissatisfied stockholders and shall specify the address to which a copy of such process or notice shall be mailed by the Secretary of State. Service of such process or notice shall be made by delivering to and leaving with the Secretary of State duplicate copies thereof. The Secretary of State shall forthwith send by registered mail one of such copies to such address so specified, unless such resulting or surviving corporation shall thereafter have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270.)

Cross References.—As to illegal trusts and monopolies under the State law, see § 75-1 et seq. As to merger of railroads, see §§ 60-59, 60-60. As to consolidation of banks, see § 53-12. As to consolidation of State bank or trust company with national banking association, see § 53-16.

Editor's Note.—The 1939 amendment changed the first paragraph of this section. For comment on the 1939 amendment, see 17 N. C. Law Rev. 346.

The 1943 amendment rewrote this section. For comment on the 1943 amendments to this and the following five sections, see 21 N. C. Law Rev. 333.

The statutes in this article prior to the 1943 amendment did not observe the distinction between "consolidation" and "merger," the terms being loosely applied. For a discussion of the distinction, see *Carolina Coach Co. v. Hartness*, 198 N. C. 524, 152 S. E. 489 (1930). See also 17 N. C. Law Rev. 346.

This enactment furnishes definite machinery for merger and consolidation, which heretofore has been lacking in our statutes. While the language in the first section, permitting any corporations, engaging in any kind of business, to merge, will have to be interpreted in its relation to competing and noncompeting companies, and its relation to statutes covering trusts, monopolies, and combinations in restraint of trade under the Sherman

Law, etc., the court will, perhaps, have an easier task of interpretation under the present language of the act than would have been the case if the legislature had attempted to define and restrict specifically. 3 N. C. Law Rev. 133.

Statute Controls as to Merger or Consolidation.—Where two corporations enter into an agreement for their union and the continuation of business under the name of one with the combined assets of both, the statute controls as to whether there is a merger or a consolidation; and since this section, prior to the 1943 amendment, expressed the primary purpose of creating a new corporation, it authorized a consolidation and not a merger. *Carolina Coach Co. v. Hartness*, 198 N. C. 524, 152 S. E. 489 (1930).

Rights and Properties of Constituent Bodies.—Where an agreement of merger consolidating two corporations was executed and filed in the office of the Secretary of State in proceedings conforming to the pertinent provisions of this and the following section, the result was that the merged corporations ceased to exist and the consolidated corporation came into being possessed of all the rights and vested with all the property of the constituent bodies. *Morgan Mfg. Co. v. Commissioner of Internal Revenue*, 124 F. (2d) 602 (1941), decided prior to the 1943 amendment.

§ 55-166. Consolidation or merger; status of old and new corporations.—When an agreement shall have been signed, acknowledged, filed and recorded, as in the preceding section is required, for all purposes of the laws of this State, the separate existence of all the constituent corporations, parties to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, of each of said constituent cor-

porations, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations, shall be vested in the corporation resulting from or surviving such consolidation or merger; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate, whether vested by deed or otherwise, under the laws of this State, vested in any of such constituent corporations, shall not revert or be in any way impaired by reason of such consolidation or merger: Provided, however, that all rights of creditors and all liens upon the property of either or any of said constituent corporations shall be preserved unimpaired, limited in lien to the property affected by such lien at the time of the merger or consolidation, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

If the surviving or resulting corporation be a corporation of this State, then upon the agreement of merger or consolidation being signed, acknowledged, filed and recorded, as is provided in the preceding section, the certificate of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its certificate of incorporation are stated in the agreement of merger; and, in cases of consolidation, the statements set forth in the agreement of consolidation, and which are required or permitted to be set forth in certificates of incorporation of corporations organized under the laws of this State, shall be deemed to be the certificate of incorporation of the consolidated or resulting corporation: Provided, that such resulting or surviving corporation, if it be a corporation of this State, shall not, by reason of any merger or consolidation with any corporation formed under the laws of any other state, acquire authority to engage in any business or exercise any right or privilege which may not be engaged in or exercised by a corporation organized under the laws of this State.

The shares of stock of any of the constituent corporations, which are to be converted into shares or other securities or obligations of the surviving or resulting corporation, or for which cash is to be distributed, must be surrendered by the holders thereof to the surviving or resulting corporation before receiving the shares or other securities or obligations of such surviving or resulting corporation, or such cash distributions, and the shares so surrendered shall be canceled by the surviving or resulting corporation, unless the agreement of merger or consolidation otherwise provides. If any certificate of stock in any of the constituent corporations shall have been lost, destroyed or misplaced, the owner thereof shall have the right to receive from the surviving or resulting corporation shares or other securities or obligations of the surviving or resulting corporation, or such cash distribution, as may be provided in said agreement of merger or consolidation, upon indemnifying such surviving or resulting corporation against loss, in the manner provided by law for the reissue of lost stock. If the person owning such lost, destroyed or misplaced certificate in one of the constituent corporations shall be dissatisfied with the terms of the merger and shall object thereto, he shall have the same right to have the value of his stock appraised and paid for, and to appeal to the courts, as is provided herein for other dissatisfied stockholders, upon giving security and indemnifying the surviving or resulting corporation against loss on account of the payment for such lost, destroyed or misplaced certificate of stock. (1925, c. 77, s. 1; 1943, c. 270.)

Cross References.—See note to § 55-165.
As to reissue of lost stock, see §§ 55-67,
55-97.

wrote this section.

Cited in *Carolina Coach Co. v. Hartness*,
198 N. C. 524, 152 S. E. 489 (1930).

Editor's Note.—The 1943 amendment re-

§ 55-167. Consolidation or merger; payment for stock of dissatisfied stockholder.—If any stockholder, entitled to vote, in any corporation of this State consolidating or merging as aforesaid shall vote against the same, or if any stockholder in any such corporation, not entitled to vote, shall, at or prior to the taking of the vote, object in writing to such merger or consolidation, and if any such stockholder shall, within twenty days after the agreement of consolidation or merger has been filed and recorded in the office of the Secretary of State, as hereinbefore provided, demand in writing from the surviving or resulting corporation payment of his stock, such surviving or resulting corporation shall, within thirty days thereafter, pay to him the fair value of his stock without regard to any depreciation or appreciation thereof in consequence of the merger or consolidation. In case the fair value of said stock is not paid within said thirty-day period, or such stockholder and the surviving or resulting corporation do not within said period enter into a written agreement for the payment of said stock, then such stockholder, within thirty days after the expiration of the aforesaid thirty-day period, shall apply by petition to the superior court of the county wherein the principal office of the constituent corporation, in which he is or was a stockholder, is or was located for the appointment of three appraisers to appraise the fair value of such stock. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on the surviving or resulting corporation at least ten days prior to the hearing of the petition by the court. The award of the appraisers (or a majority of them), if no exceptions be filed thereto within ten days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive. If either party file exceptions to said award within said ten days, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in chapter forty for the trial of cases under the eminent domain law of this State, and with the same right of appeal to the Supreme Court as is permitted in said chapter. The court shall assess the cost of said proceedings as it shall deem equitable.

On the making of said demand in writing, as aforesaid, any such stockholder shall cease to be a stockholder in said constituent corporation and shall have no rights with respect to such stock, except the right to receive payment therefor, as aforesaid, and upon payment of the agreed value of said stock, or the value thereof as fixed by final judgment of the court, such stockholder shall surrender the certificate or certificates representing his shares of stock to the surviving or resulting corporation. In the event the surviving or resulting corporation shall fail to pay the amount of said judgment within ten days after the same becomes final, said judgment may be collected and enforced in the manner prescribed by law for the enforcement of judgments.

Any stockholder in either or any of the constituent corporations, entitled to vote, who does not vote against the merger or consolidation, and any stockholder, not entitled to vote, who does not object thereto in writing as aforesaid, shall cease to be a stockholder in such constituent corporation and shall be deemed to have assented to the merger or consolidation, as the case may be, together with stockholders voting in favor of the merger or consolidation, in the manner and on the terms specified in the agreement of merger or consolidation; and any stockholder in either or any of said constituent corporations voting against said merger or consolidation, or objecting thereto in writing as hereinbefore provided, but who does not demand payment for his stock within the twenty-day period, as hereinbefore provided, or who does not apply to the court to have the value thereof determined as hereinbefore provided, shall likewise cease to be a stockholder in such constituent corporation and shall likewise be deemed to have consented to said merger or consolidation. (1925, c. 77, s. 1; 1943, c. 270.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 55-168. Consolidation or merger; pending actions saved.—Any ac-

tion or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted to judgment, as if such consolidation or merger had not taken place or the corporation resulting from or surviving such consolidation or merger may be substituted in its place. (1925, c. 77, s. 1; 1943, c. 270.)

Editor's Note.—The 1943 amendment re-wrote this section.

§ 55-169. Liability of corporations and rights of others unimpaired by consolidation or merger.—The liability of corporations created under this chapter, or existing under the laws of this State, or the stockholders or officers thereof, or the rights or remedies of the creditors thereof, or of persons doing or transacting business with such corporations, shall not, in any way, be lessened or impaired by the consolidation or merger of two or more of such corporations under the provisions of this article. (1925, c. 77, s. 1; 1943, c. 270.)

Editor's Note.—The 1943 amendment inserted the words "or merger."

§ 55-170. Powers of corporation resulting from or surviving consolidation or merger.—When two or more corporations are consolidated or merged, the corporation resulting from or surviving such consolidation or merger shall have power and authority to issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payments it will be required to make, or obligations it will be required to assume, in order to effect such consolidation or merger; to secure the payment of which bonds and obligations it shall be lawful to mortgage its corporate franchise, rights, privileges and property, real, personal, and mixed; and may issue its capital stock, with or without par value, or in classes, any class of which may be with or without par value, to the stockholders of such constituent corporations in exchange or payment for the original shares, in such amount as shall be necessary in accordance with the terms of the agreement of consolidation or merger in order to effect such consolidation or merger in the manner and on the terms specified in such agreement; provided, that the only fees that shall be collected from said surviving or resulting corporation shall be office or filing fees and charter fees upon any increase in the authorized capital stock of the surviving or resulting corporation in excess of that provided for in the charters of the constituent corporations when the authorized capital stock of said constituent corporations shall be added together. (1925, c. 77, s. 1; 1931, c. 209; 1943, c. 270.)

Cross Reference.—As to fiduciary powers and liabilities of merged banks or trust companies, see § 53-17.

Editor's Note.—Prior to the 1943 amend-

ment this section related only to powers of consolidated corporations.

Cited in *Carolina Coach Co. v. Hartness*, 198 N. C. 524, 152 S. E. 489 (1930).

§ 55-171. Merger of charitable and other corporations not under control of State.—Any two or more charitable, educational, social, ancestral, historical, penal or reformatory corporations not under the patronage and control of the State, and any two or more corporations without capital stock organized for the purpose of aiding in the work of any church, religious society or organization, or fraternal order, whether organized under special act or general laws, may consolidate into a single corporation, which shall be deemed the successor of each and all corporations joining in such consolidation, in the following manner:

(a) When authorized to do so by the conference, synod, convention or other body owning and/or controlling such corporation, the trustees or directors of such corporation by resolution adopted by majority vote at a meeting duly called and convened in accordance with the present charter, bylaws or other regulations for the conduct of such meetings of such corporation, and in the absence of such charter provision, bylaws or other regulations upon ten days' notice to each trustee or director of the time, place and object of the meeting, may authorize such corporation to make, enter into and execute a consolidation agreement with one

or more other such corporations; that such consolidation agreement shall prescribe the terms and conditions of consolidation, the mode of carrying same into effect, and shall set forth in full the certificate of incorporation of the consolidated corporation; and the consolidation agreement so authorized shall be executed in the name and behalf of each such corporation entering into the consolidation by its president or vice-president, attested by its secretary or assistant secretary and its corporate seal thereto affixed, and the due execution thereof shall be acknowledged in the manner and before a notary public or other officer required by the general laws of North Carolina for the acknowledgment of corporate deeds; and there shall be attached to such agreement of consolidation the written consent of a majority of the trustees or directors of each corporation entering into the consolidation.

(b) The agreement of consolidation, when authorized and executed as provided above and having attached thereto the aforesaid written consent, shall be filed in the office of the Secretary of State. When so filed, the separate legal existence of each of the corporations joining in the consolidation thereupon shall be merged into the consolidated corporation, and thereafter there shall be only one corporation having as its charter the certificate of incorporation fully set forth in the agreement of consolidation.

(c) A copy of said agreement of consolidation, duly certified by the Secretary of State under the seal of his office, shall be recorded in the office of the clerk of the superior court of the county in which the principal office of the consolidated corporation as fixed by its certificate of incorporation is located, and a like certified copy of the agreement of consolidation shall be recorded in the office of the clerk of the superior court of each county where any one or more of the corporations joining in the consolidation theretofore has had its principal office or place of business; and such certified copy shall be evidence of the existence of the consolidated corporation created by such agreement of consolidation and of the observance and performance of all antecedent acts and conditions necessary to the execution thereof. (1933, c. 408, s. 1.)

§ 55-172. Rights and powers of consolidated charitable, etc., corporations.—The consolidated corporation shall succeed to and be vested with all rights, privileges and powers, and all property, real, personal and mixed, tangible and intangible, and the title thereto, of each and all of the corporations joining in the consolidation as fully and effectually as the same were theretofore owned and held by each of the separate corporations, and the consolidated corporation shall be liable for the payment of all debts and liabilities of each and all of the separate corporations: Provided, such consolidation shall not affect liens or the priority of liens established against the separate property of any corporation prior to the consolidation. (1933, c. 408, s. 2.)

§ 55-173. Trust properties vested in new charitable, etc., corporation.—The consolidated corporation shall succeed to and be vested with all money, securities, property, real, personal and mixed, tangible and intangible, and the title thereto, theretofore owned, held and/or administered by each separate corporation upon the uses and trusts declared in any will, deed or other instrument, and the consolidated corporation shall handle, use and administer such trust funds upon the same uses and trusts and not otherwise; and the consolidated corporation shall be deemed to embrace each separate corporation and to constitute a continuation thereof, and no trust fund or other asset of a separate corporation shall be construed to revert and/or pass to other ownership on the ground that such separate corporation has ceased to exist for the purpose of administering such trust or otherwise. (1933, c. 408, s. 3.)

ARTICLE 17.

Severance of Certain Partially Merged Charitable, Educational or Social Corporations.

§ 55-174. **Application of article.**—This article shall apply only to a charitable, educational or social corporation, not under the patronage or control of the State nor under the patronage or control of any religious denomination, which has been formed by the de jure merger of two or more corporations of such character, the merger having been brought about either under §§ 55-165 to 55-173, or under other special or general laws, but where for any reason the merger has not been carried out in fact to the extent of the actual surrender of shares of stock or of other evidences of membership in the respective corporations and the issuance of new stock or new evidences of membership in the merged corporation. A charitable, educational or social corporation, organized by the merger of two such corporations, may be severed and restored to the status of the merging or original corporations by complying with the provisions of this article with the exceptions above set out. (1937, c. 256, s. 1.)

§ 55-175. **Resolution providing for severance; accounting.**—At any regular or duly called meeting of the board of directors or other governing body of such merged corporation, a resolution may be adopted providing for the severance of the corporations and restoration to each of the original corporations of the properties owned by each at the time of the merger, and the restoration to the stockholders or members of the stock, rights and privileges owned by them in the merging corporations at the time of the merger, and providing for an accounting as between the respective corporations of their receipts, disbursements and obligations incurred since the attempted merger, the accounting to be on the assumption the corporations had never been merged. (1937, c. 256, s. 2.)

§ 55-176. **Stockholders' meeting; notice; ratification of resolution.**—Upon the adoption by the board of directors or other governing body of the merged corporations of such resolution of severance, a meeting shall be called by the said governing body of the members or stockholders of the merged corporation. A notice shall be sent to each stockholder or member of the merged corporation by registered mail at least ten days before the date of the stockholders' or members' meeting. Such notice shall be mailed to the last address of the stockholder or member as it appears on the records of the merged corporation. Such notice shall also be published once in a newspaper of general circulation in the county in which the corporation has its principal office at least ten days before the meeting, stating the substance of the resolution of severance and giving the time and place of the meeting. If at such meeting of stockholders or members a resolution shall be adopted ratifying the resolution of the board of directors or governing body, and providing for the severance of the merged corporation into its constituent corporations as they existed immediately prior to the merger, and such resolution shall be adopted by a majority of three-fourths of the total membership or total number of stockholders by shares, as the voting privilege may be exercised in the merged corporation, then the merged corporation shall be severed, on compliance with the further procedural provisions of this article. (1937, c. 256, s. 3.)

§ 55-177. **Election of officers for severed corporations.**—On the adoption of such resolution of severance by the stockholders or members, the president of the merged corporation shall, either at said meeting or within ten days thereafter, appoint an acting chairman of the membership or stockholders of each corporation, and shall call a meeting of the members or stockholders of each corporation for the purpose of electing officers of each of the severed cor-

porations, such meetings to be held in accordance with the charter and bylaws of the severed corporations as they existed prior to the merger. (1937, c. 256, s. 4.)

§ 55-178. Agreement between officers and directors for division and accounting.—The officers and directors of the several corporations shall thereupon enter into an agreement setting out in substantial detail the division of the properties of the merged corporation and providing for the accounting of all receipts and disbursements as between the severed corporations on the same basis as if the respective corporations had never been merged. Such agreement shall thereupon be submitted to the stockholders or members of the severed corporations at a meeting to be called in accordance with the charter or bylaws of the severed corporations. At such meeting such agreement shall become effective when approved by a majority of the stockholders or members. Thereupon said agreement shall be executed by the respective officers of the severed corporations, and deeds and other appropriate instruments shall be executed by the officers of the respective corporations to carry out the terms of the agreement. (1937, c. 256, s. 5.)

§ 55-179. Certificates of severance.—Upon the approval of the terms of the severance agreement, as provided in the preceding section, the president and board of directors of the respective corporations shall execute a certificate under the seal of the corporation setting forth in substance the terms of the resolution of severance adopted by the stockholders or members of the merged corporation provided for by § 55-176, and also setting forth the fact and date of the ratification of such severance agreement by the majority of the members or stockholders of the severed corporations, and shall file the same with the Secretary of State of North Carolina. Such certificate, duly certified by the Secretary of State under the seal of his office, shall also be recorded in the office of the clerk of the superior court of the county in this State in which the principal office of the merged corporation was established, and also in the offices of the clerks of the superior court for each of the counties in which the respective severed corporations shall have or shall establish their principal offices. On the filing of such certificates in the office of the clerk or clerks of the superior courts, as herein provided, said severance shall be complete to all intents and purposes as if the merger had never taken place. Upon the recording of such certificate it shall be presumptive evidence of the statements of fact contained in said certificate, and after sixty days it shall be conclusive evidence of such statements of fact, except as to any stockholder or member who shall have demanded the value of his stock or membership. (1937, c. 256, s. 6.)

§ 55-180. Original rights restored; liabilities unaffected.—On the completion of the procedure set out in the previous section the stockholders or members in the respective corporations, or their representatives or assigns, as the case may be, shall to all intents and purposes be restored to the same rights and privileges which they, or their predecessors in interest, held in the original corporations: Provided, that any member or stockholder who has conveyed or for any reason forfeited his rights in the merged corporation shall not, by reason of the severance of the merged corporations, be restored to the rights he had in the original corporations at the time of the merger. Nothing contained in this article, however, shall be deemed to affect any debts, liabilities or obligations assumed or incurred by the merged corporation during the period of the merger, but each of the severed corporations shall, with respect to such debts or other obligations, remain liable jointly and severally. (1937, c. 256, s. 7.)

§ 55-181. Objection to severance and demand for payment for stock; failure to object deemed assent.—If any stockholder or member entitled to vote in the merged corporation shall vote against the severance at the stockholders' or members' meeting provided in § 55-176, or shall, prior to the

taking of the vote at such meeting, object thereto in writing, and if such dissenting or objecting stockholder or member shall, within twenty days after such meeting, demand in writing from the merged corporation payment of his stock or of his interest in the merged corporation by reason of his membership therein, the merged corporation shall, within thirty days thereafter, pay to him the value of his stock or membership at the date of the adoption of the resolution of severance at the stockholders' or members' meeting. In case of disagreement as to the value thereof, it shall be lawful for any such stockholder or member, within thirty days after he has made demand in writing as aforesaid, or has voted against the resolution as aforesaid, and upon written notice to the merged corporation to appeal by petition to the superior court of the county in which the principal office of the merged corporation is located to appoint three appraisers, or a majority of them, if not opposed within ten days after the same shall have been filed in court, shall be confirmed by the court or clerk, and when confirmed shall be final and conclusive. If such report is opposed and excepted to, the exceptions shall be transferred to the civil issue docket of the superior court, and there tried in the same manner, as nearly as may be practicable, as is provided in § 40-20 for the trial of exceptions to the appraisal of land condemned for public purposes. The court shall assess against the merged corporation the costs of said proceeding. On the making of such demand in writing, as aforesaid, any such stockholder or member shall cease to be a stockholder or member in said merged corporation, and shall have no rights with respect thereto, except the right to receive payment for the value of his stock or membership. Each stockholder or member in the merged corporation entitled to vote, who does not vote against the severance, and each stockholder or member at the time of the adoption of the resolution of severance provided in § 55-176 not entitled to vote, who does not object thereto in writing, as aforesaid, shall be deemed to have assented to the severance. (1937, c. 256, s. 8.)

§ 55-182. Pending litigation not affected.—Any action or proceeding pending by or against the merged corporation may be prosecuted to judgment as if such severance had not taken place, or the severed corporation, or either of them, may be substituted in its place. (1937, c. 256, s. 9.)

§ 55-183. Fees of Secretary of State.—The fees to be charged by the Secretary of State for filing the certificate of severance and the issuance of his certificate thereon shall be the same as provided by law for the filing of an original certificate of incorporation of charitable, educational or social corporations. (1937, c. 256, s. 10.)

Cross Reference.—As to fees charged for filing original certificate of incorporation, see § 55-158.

Chapter 56.

Electric, Telegraph and Power Companies.

Article 1.

Acquisition and Condemnation of Property.

Sec.

- 56-1. Use of public highways.
- 56-2. Electric and hydro-electric power companies may appropriate highways; conditions.
- 56-3. Powers granted corporations under chapter exercisable by persons, firms or copartnerships.
- 56-4. Acquisition of right of way by contract.
- 56-5. Grant of eminent domain; exception as to mills and water powers.

Sec.

- 56-6. Residences, etc., may be taken under certain cases.
- 56-7. Condemnation on petition; parties' interests only taken; no survey required.
- 56-8. Copy of petition to be served.
- 56-9. Proceedings as under eminent domain.
- 56-10. Commissioners to inspect premises.

Article 2.

Intrastate Telegraph Messages.

- 56-11. Penalty for nondelivery of intrastate telegraph message.

ARTICLE 1.

Acquisition and Condemnation of Property.

§ 56-1. **Use of public highways.**—Any person, firm or copartnership operating electric power lines for lights or power, or authorized by law to establish such lines, or any duly incorporated company possessing the power to construct telegraph or telephone lines, lines for the conveying of electric power or for lights, either or all, has the right to construct, maintain and operate such lines along any railroad or other public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway. (1874-5, c. 203, s. 2; Code, s. 2007; 1899, c. 64, s. 1; 1903, c. 562; Rev., s. 1571; C. S., s. 1695; 1939, c. 228, s. 1.)

Cross Reference.—See § 55-45.

Editor's Note.—The 1939 amendment added that part of this section preceding the words "any duly incorporated company."

Constitutionality.—The provisions of §§ 56-1 to 56-10, empowering electric power or lighting companies, etc., to condemn lands for the erection of poles, establishment of offices, and other appropriate purposes, are constitutional and valid. *Wissler v. Yadkin River Power Co.*, 158 N. C. 465, 74 S. E. 460 (1912).

Application to Foreign Companies.—The right to construct and operate telegraph lines along any railroad or other public highway in the State, and to obtain the right of way therefor by a condemnatory proceeding, is expressly conferred upon any telegraph company incorporated by this or by any other state. *North Carolina, etc., R. Co. v. Carolina Cent., etc., R. Co.*, 83 N. C. 489 (1880); *Yadkin River Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267 (1912).

No Rights over Private Land.—This

section applies to constructing lines along the highway and not to constructing the lines over private land. *Wade v. Carolina Tel., etc., Co.*, 147 N. C. 219, 60 S. E. 987 (1908).

An Additional Burden.—A telegraph line along a railroad and on the right of way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation. *Phillips v. Postal Tel.-Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902); *Hodges v. Western Union Tel. Co.*, 133 N. C. 225, 45 S. E. 572 (1903); *Query v. Postal Tel.-Cable Co.*, 178 N. C. 639, 101 S. E. 390 (1919). The same rule applies to electric light wires placed along the street. *Brown v. Electric Co.*, 138 N. C. 533, 51 S. E. 62 (1905). But the construction of a street passenger railway does not impose any additional servitude upon the property fronting on the street so occupied. *Hester v. Traction Co.*, 138 N. C. 288, 50 S. E. 411 (1905).

Cited in *Hildebrand v. Southern Bell Tel., etc., Co.*, 216 N. C. 235, 4 S. E. (2d) 439 (1939).

§ 56-2. Electric and hydro-electric power companies may appropriate highways; conditions.—Every electric power or hydro-electric power corporation, person, firm or copartnership which may exercise the right of eminent domain under the chapter Eminent Domain, where in the development of electric or hydro-electric power it shall become necessary to use or occupy any public highway, or any part of the same, after obtaining the consent of the public road authorities having supervision of such public highway, shall have power to appropriate said public highway for the development of electric or hydro-electric power: Provided, that said electric power or hydro-electric power corporation shall construct an equally good public highway, by a route to be selected by and subject to the approval and satisfaction of the public road authorities having supervision of such public highway: Provided further, that said company shall pay all damages to be assessed as provided by law, by the damming of water, the discontinuance of the road, and for the laying out of said new road. (1911, c. 114; C. S., s. 1696; 1939, c. 228, s. 2.)

Cross Reference.—As to what corporations, etc., may exercise the right of eminent domain, see § 40-2.

Editor's Note.—The 1939 amendment inserted the words "person, firm or copartnership" near the beginning of this section.

Change in Section of Highway.—Where under the provisions of this section, a hydro-electric power company has ap-

propriated a section of a public highway and built another section in lieu thereof, the provisions of the statute that the company pay all damages assessed as provided by law does not entitle the plaintiff to recover damages for the slight change in the road causing inconvenience to him in hauling wood, etc., to and from his market town. *Crowell v. Tallassee Power Co.*, 200 N. C. 208, 156 S. E. 493 (1931).

§ 56-3. Powers granted corporations under chapter exercisable by persons, firms or copartnerships.—All the rights, powers and obligations given, extended to, or that may be exercised by any corporation or incorporated company under this chapter shall be extended to and likewise be exercised and are hereby granted unto all persons, firms or copartnerships engaged in or authorized by law to engage in the business herein described. Such persons, firms, copartnerships and corporations engaging in such business shall be subject to the provisions and requirements of the public laws which are applicable to others engaged in the same kind of business. (1939, c. 228, s. 3.)

§ 56-4. Acquisition of right of way by contract.—Such telegraph, telephone, or electric power or lighting company has power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right of way for planting, repairing and preservation of its poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation. This section shall not be construed as requiring electric power or lighting companies to erect offices for public accommodation. (1874-5, c. 203, s. 3; Code, s. 2008; 1899, c. 64; 1903, c. 562, ss. 1, 2; Rev., s. 1572; C. S., s. 1697.)

Cross References.—As to recording deeds of easement, see § 47-27. As to right of directors of the various State institutions to grant easements to telegraph, telephone or power companies, see § 143-151.

Owner Must Grant Easement.—A railroad company, not being the owner of the soil, cannot grant an easement to a telegraph company. *Hodges v. Western Union Tel. Co.*, 133 N. C. 225, 45 S. E. 572 (1903). See also *Narron v. Wilmington*

etc., *R. Co.*, 122 N. C. 856, 29 S. E. 356 (1898).

How Easement Acquired.—A telegraph company can acquire an easement in lands for construction and maintenance of its lines by grant, or pursuant to statute, or by adverse and continuous use for the period of twenty years. *Teeter v. Postal Tel.-Cable Co.*, 172 N. C. 783, 90 S. E. 941 (1916).

§ 56-5. Grant of eminent domain; exception as to mills and water powers.—Such telegraph, telephone, electric power or lighting company shall be

entitled, upon making just compensation therefor, to the right of way over the lands, privileges and easements of other persons and corporations, and to the right to erect poles and towers, to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, railroads, or sidetracks, or powerhouses, with the right to divert the water from such ponds or reservoirs and conduct the same by flume, ditch, conduit, waterway or pipe line, or in any other manner, to the point of use for the generation of power at its said powerhouses, returning said water to its proper channel after being so used. Nothing in this section authorizes interference with any mill or power plant actually in process of construction or in operation; or the taking of water powers, developed or undeveloped, with the land adjacent thereto necessary for their development: Provided, however, that if the court, upon filing of the petition by such electric power or lighting company, shall find that any mill, excepting cotton mills now in operation, whether operated by water power or otherwise, together with the lands and easements adjacent thereto or used in connection therewith, or that any water power, developed or undeveloped, with land adjacent thereto necessary for its development, excepting any water power, right or property of any person, firm or corporation engaged in the actual service of the general public where such water power, right or property is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public, is necessary for the development of any hydro-electric power plant which is to be operated for the purpose of generating electric power for sale to the general public, and that said electric power or lighting company is unable to agree for the purchase of such property with the owners thereof, and that the failure to acquire such property will affect the ability of such electric power or lighting company to supply power to the general public, and that the taking of such mill or water power will be greatly more to the benefit of the public than the continued existence of such mill or the continuation of the existing ownership of such water power, then the court, upon such finding, shall make an order authorizing the condemnation of such property and easements in all respects as in the cases of other property referred to in this section. Any provisions in conflict with this chapter in any special charters granted before January thirty-first, one thousand nine hundred and seven, in respect to the exercise of the right of eminent domain are repealed. (1874-5, c. 203, s. 4; Code, s. 2009; 1899, c. 64; 1903, c. 562; Rev., s. 1573; 1907, c. 74; C. S., s. 1698; 1921, c. 115; 1923, c. 60; 1925, c. 175.)

Cross Reference.—As to the right of eminent domain in general, see § 40-1 et seq.

Editor's Note.—This section as it stood in 1919 expressly prohibited interference with any mill or power plant actually in process of construction or operation, also the taking of water powers, developed or undeveloped, with the necessary adjacent land. The 1923 amendment added a provision for condemning mills, except cotton mills, when to the best interests of the public. And the 1925 amendment added a provision giving the power to condemn any water powers, developed or undeveloped, not being held for use or actually used in the furnishing of power to the public. Thus by these two amendments the legislature has practically abolished the restrictions which existed in the section in 1919. See 1 N. C. Law Rev. 290; 3

N. C. Law Rev. 144.

The General Assembly originally inserted the proviso "water powers, developed or undeveloped with the necessary land adjacent thereto for their development, shall not be taken," for the purpose of preventing the acquisition of all of the water powers by one or more of the great aggregations of capital. *Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co.*, 169 N. C. 471, 86 S. E. 296 (1915).

Right Granted for Public Benefit.—The power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large. *Wissler v. Yadin River Power Co.*, 158 N. C. 465, 74 S. E. 460 (1912).

Limitation of Right of Eminent Domain.

—This section limits the right of eminent domain and any special power claimed by the charter must clearly appear. *Yadkin River Power Co. v. Whitney Co.*, 150 N. C. 31, 63 S. E. 188 (1908). See *Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co.*, 169 N. C. 471, 86 S. E. 296 (1915).

The right of eminent domain is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. *Thomason v. Railroad*, 142 N. C. 318, 55 S. E. 205 (1906); *Yadkin River Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267 (1912).

Effect of Federal Statute.—See *Phillips v. Postal Tel.-Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902).

Quasi-Public Corporations also Conducting Business of Private Character.—Where a charter is granted a corporation, conferring quasi-public as well as private powers, the corporation may proceed to condemn lands when so empowered, in pursuance of its business of a quasi-public nature, and this will not be denied it because it was authorized to conduct a business of a private character. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 171 N. C. 248, 88 S. E. 349 (1916).

Compensation Essential.—Private property may not be taken for public use, directly or indirectly, without just compensation. *Phillips v. Postal Tel.-Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902). See §§ 40-16, 40-17 as to fixing compensation.

Conflict of Claims.—Where the claims

of two companies conflict the prior right belongs to that company which first defines and marks its route. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 171 N. C. 248, 88 S. E. 349 (1916).

Effect of Subsequent Charter.—Where a legislative charter has been granted since this section was passed, the powers given therein are not subject to the restriction of this section. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 171 N. C. 248, 88 S. E. 349 (1916).

Extent of Rights Usually Determined by Companies.—The extent of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of facts tending to show bad faith on the part of the companies, or an oppressive or manifest abuse of their discretion. *Love v. R. R.*, 81 N. C. 432 (1879), cited and distinguished. *Yadkin River Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267 (1912).

Burden of Proof on Defendant.—Where a quasi-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water power within the provision of the statute excepting them. *Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co.*, 171 N. C. 314, 88 S. E. 245 (1916).

Applied in Carolina Power, etc., Co. v. Bowman, 229 N. C. 682, 51 S. E. (2d) 191 (1949).

§ 56-6. Residences, etc., may be taken under certain cases.—Residence property or vacant lots adjacent thereto in towns or cities, or other residences, gardens, orchards, graveyards or cemeteries, may be taken under § 56-5 only when the company alleges, and upon the proceedings to condemn makes it appear to the satisfaction of the court, that it owns or otherwise controls not less than seventy-five per cent of the fall of the river or stream on which it proposes to erect its works, from the location of its proposed dam to the head of its pond or reservoir; or when the utilities commission, upon the petition filed by the company, shall, after due inquiry, so authorize. Nothing in this section repeals any part or feature of any private charter, but any firm or corporation acting under a private charter may operate under or adopt any feature of this section. (1907, c. 74; 1917, c. 108; C. S., s. 1699; 1933, c. 134, ss. 7, 8.)

§ 56-7. Condemnation on petition; parties' interests only taken; no survey required.—When such telegraph, telephone, electric power or lighting company fails on application therefor to secure by contract or agreement such right of way for the purposes aforesaid over the lands, privilege or easement of another person or corporation, it is lawful for such company, first giving security for costs, to file its petition before the superior court for the county in which

said lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant.

Only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right of way of a railroad or railway company sought to be condemned extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such right of way extends.

It is not necessary for the petitioner to make any survey of or over the right of way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its board of directors. (1874-5, c. 203, s. 5; Code, s. 2010; 1899, c. 64, s. 2; 1903, c. 562; Rev., s. 1574; C. S., s. 1700.)

Telegraph, etc., Company Alone Can File Petition.—The telegraph, etc., company named in this section alone has the right to file the petition in condemnation proceedings. The landowner is not given such right. *Phillips v. Postal Tel.-Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902).

Condemnation Not Confined to Right of Way.—The power of condemnation granted to the companies named in this section is not confined to a right of way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries when required for reasonable preservation and protection of their lines and other property. *Yadkin River Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267 (1912).

No Entry Until Damage Paid.—Under this section a telegraph company seeking to condemn a right of way for its line cannot be authorized to enter into possession and construct its line until the damages have been assessed and paid into court. *Postal Tel. Cable Co. v. Southern R. Co.*, 89 F. 190 (1898).

Permanent Damage Awarded.—Permanent damages may be awarded a landowner who injured by telegraph poles placed on his land. And the company then acquires an easement. *Phillips v. Postal Tel.-Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902); *Lamberth v. Southern Power Co.*, 152 N. C. 371, 67 S. E. 921 (1910).

Subsequent Purchaser May Recover Damages.—A purchaser of land subsequent to the taking and erection thereon of a telegraph line may recover permanent damages for the easement taken, and the telegraph company thereby acquires the easement and right to maintain its line thereon. *Phillips v. Postal Tel.-Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902).

Limitation of City Authority.—Authority granted by a city to the defendant electric company to remove a shade tree in front of the plaintiff's home in order to put up its poles and wires does not justify the act of the defendant in removing the tree, the city has no power to deprive the plaintiff of his own property for such purpose without compensation. *Brown v. Electric Co.*, 138 N. C. 533, 51 S. E. 62 (1905).

When Jury Trial Necessary.—While ordinarily a jury trial is not required in condemnation proceedings, except as to the assessment of damages, the general rule does not apply where the pleadings put at issue the question as to whether the character of the lands is such as to be embraced within the right conferred, or within an exception to that right under the terms of a statute. *Blue Ridge Interurban R. Co. v. Oates*, 164 N. C. 167, 80 S. E. 398 (1913).

Condemnation of Railroad Right of Way.—The words "right of way," as used in the second paragraph of this section, are not used as synonymous with "easement," but, as applied to railroads, they include in their meaning the strip of land over which the track is laid through the country, and which is used in connection therewith, whether the railroad company owns only an easement therein or the title in fee. *Postal Tel. Cable Co. v. Southern R. Co.*, 90 F. 30 (1898).

Same—Petition Need Not State Railroad Company's Tenure.—Under this section it is not necessary that a petition asking for the condemnation of a right of way over the right of way of a railroad should state by what tenure the railroad company holds. *Postal Tel. Cable Co. v. Southern R. Co.*, 89 F. 190 (1898).

Same—Proceeding Does Not Affect Landowner Not a Party.—Condemnation proceeding by a telegraph company against a railroad company to condemn the right of way, to which the landowner is not a party, gives no rights against the landowner, but gives rights only against the parties before the court. *Phillips v. Postal Tel.-Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902).

Limitation of Federal Statute.—The federal statute authorizing telegraph companies to construct their lines over and along any military or post roads of the United States, does not give such companies the right to build their lines over the right of way of a railroad or other private property without the consent of the owner, or the condemnation of the right

of way over such property in accordance with the laws of the state where situated. *Postal Tel. Cable Co. v. Southern R. Co.*, 89 F. 190 (1898).

Judgment Necessary to Give Vested Right under Prior Act.—In order to acquire a vested right under a statute to condemn lands, which has subsequently been repealed, it is necessary to show a finality by judgment in the proceedings before the later act has become effective; and where it appears that the summons was served in time, but that the prosecution bond, made a prerequisite by § 1-109, was not, no vested right in the former statute can be acquired by the further prosecution of the condemnation proceedings. *Blue Ridge Interurban R. Co. v. Oates*, 164 N. C. 167, 80 S. E. 398 (1913).

§ 56-8. Copy of petition to be served.—A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the persons whose interests are to be affected by the proceeding at least ten days prior to the presentation of the same to the said court. (1874-5, c. 203, s. 6; Code, s. 2011; 1899, c. 64, s. 3; Rev., s. 1575; C. S., s. 1701.)

Cross Reference.—As to failure to serve prosecution bond, see note to § 56-7.

§ 56-9. Proceedings as under eminent domain.—The proceedings for the condemnation of lands, or any easement or interest therein, for the use of telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in Article 2, entitled "Condemnation Proceedings," of the chapter Eminent Domain. (Code, s. 2012; 1899, c. 64; 1903, c. 562; Rev., s. 1576; C. S., s. 1702.)

This section refers to proceedings subsequent to the filing of the petition and the service of the required notices. In other words, it refers to the proceedings after the parties are all before the court. Hence § 40-12, as to filing and service, does not apply. *Phillips v. Postal Tel.-Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902).

Subsequent Provisions Not Incorporated.—The reference in this section to

article 2 of the chapter on Eminent Domain incorporates into the telegraph statute the provisions of the railroad statute referred to, only as they existed at the time of the enactment, and not as thereafter amended. *Postal Tel. Cable Co. v. Southern R. Co.*, 89 F. 190 (1898).

Cited in *Carolina Power & Light Co. v. Reeves*, 198 N. C. 404, 151 S. E. 871 (1930).

§ 56-10. Commissioners to inspect premises.—In considering the question of damages when the interest sought is over an easement, privilege or right of way, the commissioners may inspect the premises or rest their finding on such testimony as to them may be satisfactory. (1874-5, c. 203, s. 9; Code, s. 2013; Rev., s. 1577; C. S., s. 1703.)

ARTICLE 2.

Intrastate Telegraph Messages.

§ 56-11. Penalty for nondelivery of intrastate telegraph message.—Any telegraph company doing business in this State that shall fail to transmit

and deliver any intrastate message within a reasonable time shall forfeit and pay to anyone who may sue for same a penalty of twenty-five dollars. Such penalty shall be in addition to any right of action that any person may have for the recovery of damages. Proof of the sending of any message from one point in this State to another point in this State shall be prima facie evidence that it is an intrastate message. (1919, c. 175; C. S., s. 1704.)

Sending Message Through Another State to Avoid Liability for Damages.—A telegraph company accepting a telegram to be transmitted between points in this State, where a recovery for mental anguish is allowed, may not avoid such liability by unnecessarily sending the message through another state, when it could have reasonably been otherwise transmitted. *Speight v. Western Union Tel. Co.*, 178 N. C. 146, 100 S. E. 351 (1919).

Same — Burden of Proof.—Where a telegraph company has direct available facilities for transmitting an intrastate telegram altogether within the State, and relays it at offices in another state, the burden of proof is upon it to show that it was not done to evade the jurisdiction of the State court. *Speight v. Western Union Tel. Co.*, 178 N. C. 146, 100 S. E. 351 (1919).

Chapter 57.

Hospital and Medical Service Corporations.

| Sec. | Sec. |
|---|--|
| 57-1. Regulation and definition; application of other laws; profit and foreign corporations prohibited. | 57-12. Licensing of agents. |
| 57-2. Incorporation. | 57-13. Revocation of certificate of authority; dissolution. |
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| 57-7. Subscribers' contracts; required and prohibited provisions. | 57-18. Construction of chapter as to single employer plans; associations exempt. |
| 57-8. Investments and reserves. | 57-19. Merger or consolidation, proceedings for. |
| 57-9. Reports filed with Commissioner of Insurance. | 57-20. Commissioner of Insurance determines corporations exempt from this chapter. |
| 57-10. Visitations and examinations. | |
| 57-11. Expenses. | |

§ 57-1. **Regulation and definition; application of other laws; profit and foreign corporations prohibited.**—Any corporation heretofore or hereafter organized under the general corporation laws of the State of North Carolina for the purpose of maintaining and operating a nonprofit hospital and/or medical service plan whereby hospital care and/or medical service may be provided in whole or in part by said corporation or by hospitals and/or physicians participating in such plan, or plans, shall be governed by this chapter and shall be exempt from all other provisions of the insurance laws of this State, heretofore enacted, unless specifically designated herein, and no laws hereafter enacted shall apply to them unless they be expressly designated therein.

The term "hospital service plan" as used in this chapter includes the contracting for certain fees for, or furnishing of, hospital care, laboratory facilities, X-ray facilities, drugs, appliances, anesthesia, nursing care, operating and obstetrical equipment, accommodations and/or any and all other services authorized or permitted to be furnished by a hospital under the laws of the State of North Carolina and approved by the North Carolina Hospital Association and/or the American Medical Association.

The term "medical service plan" as used in this chapter includes the contracting for the payment of fees toward, or furnishing of, medical, obstetrical, surgical and/or any other professional services authorized or permitted to be furnished by a duly licensed physician.

The term "hospital service corporation" as used in this chapter is intended to mean any nonprofit corporation operating a hospital and/or medical service plan, as herein defined. Any corporation heretofore or hereafter organized and coming within the provisions of this chapter, the certificate of incorporation of which authorizes the operation of either a hospital or medical service plan, or both, may, with the approval of the Commissioner of Insurance, issue subscribers' contracts or certificates approved by the Commissioner of Insurance, for the payment of either hospital or medical fees, or the furnishing of such services, or both, and may enter into contracts with hospitals or physicians, or both, for the furnishing of fees or services respectively under a hospital or medical service plan, or both.

No hospital service corporation within the meaning of this chapter shall be converted into a corporation organized for pecuniary profit. Every such cor-

poration shall be maintained and operated for the benefit of its members and subscribers as a co-operative corporation.

No foreign or alien hospital or medical service corporation as herein defined shall be authorized to do business in this State. (1941, c. 338, s. 1; 1943, c. 537, s. 1.)

Cross Reference.—As to authority of State Board of Health to establish sanitary standards and methods of inspection for private hospitals, etc., see §§ 130-280 to 130-282.

Editor's Note.—For comment on this chapter, see 19 N. C. Law Rev. 487.

The 1943 amendment, which made this section applicable to medical service corporations, changed the first, fourth and sixth paragraphs and inserted the second and third paragraphs.

Cited in *Cato v. Hospital Care Ass'n*, 220 N. C. 479, 17 S. E. (2d) 671 (1941).

§ 57-2. Incorporation.—Any number of persons not less than seven, desiring to form a nonprofit hospital service corporation, shall incorporate under the provisions of the general laws of the State of North Carolina governing corporations, but subject to the following provisions:

1. The certificate of incorporation of each such corporation shall have endorsed thereon or attached thereto, the consent of the Commissioner of Insurance, if he shall find the same to be in accordance with the provisions of this chapter.

2. A statement of the services to be rendered by the corporation and the rates currently to be charged therefor which said statement shall be accompanied by two copies of each contract for services which the corporation proposes to make with its subscribers, and two copies of the type of contract which said corporation proposes to make with participating hospitals, shall have been furnished the Commissioner of Insurance; provided, however, that if the articles of incorporation of any such corporation within the meaning of this chapter shall have been filed with the Secretary of State prior to the effective date of this chapter, the approval thereof by the Commissioner of Insurance shall be evidenced by a separate instrument in writing filed with the Secretary of State. (1941, c. 338, s. 2.)

Cross Reference.—As to general laws governing incorporation, see § 55-1 et seq.

§ 57-3. Hospital and physician contracts.—Any corporation organized under the provisions of this chapter may enter into contracts for the rendering of hospital service to any of its subscribers by hospitals approved by the American Medical Association and/or the North Carolina Hospital Association, and may enter into contracts for the furnishing of, or the payment in whole or in part for, medical services rendered to any of its subscribers by duly licensed physicians. All obligations arising under contracts issued by such corporations to its subscribers shall be satisfied by payments made directly to the hospital or hospitals and/or physicians rendering such service, or direct to the subscriber or his, her, or their legal representatives upon the receipt by the corporation from the subscriber of a statement marked paid by the hospital(s) and/or physician(s) or both rendering such service, and all such payments heretofore made are hereby ratified. Nothing herein shall be construed to discriminate against hospitals conducted by other schools of medical practice. (1941, c. 338, s. 3; 1943, c. 537, s. 2; 1947, c. 820, s. 1.)

Editor's Note.—The 1943 amendment rewrote the latter part of the second sentence. added the provisions relating to contracts with physicians. And the 1947 amendment

§ 57-4. Supervision of Commissioner of Insurance; form of contract with subscribers; schedule of rates.—No hospital service corporation shall enter into any contract with subscribers unless and until it shall have filed with the Commissioner of Insurance a specimen copy of the contract or certificate and of all applications, riders, and endorsements for use in connection with the issuance or renewal thereof to be formally approved by him as conforming to the

section of this chapter entitled "Subscribers' Contracts," and conforms to all rules and regulations promulgated by the Commissioner of Insurance under the provisions of this chapter. The Commissioner of Insurance shall, within a reasonable time after the filing of any such form, notify the corporation filing the same either of his approval or of his disapproval of such form.

No corporation subject to the provisions of this chapter shall enter into any contract with a subscriber after the enactment hereof unless and until it shall have filed with the Commissioner of Insurance a full schedule of rates to be paid by the subscribers to such contracts and shall have obtained the Commissioner's approval thereof. The Commissioner may refuse approval if he finds that such rates are excessive, inadequate or discriminatory or if he finds the form of subscribers' contracts is unfair or discriminatory. At all times such rates and form of subscribers' contracts shall be subject to modification and approval of the Commissioner of Insurance under rules and regulations adopted by the Commissioner, in conformity to this chapter. (1941, c. 338, s. 4.)

§ 57-5. Application for certificate of authority or license.—No corporation subject to the provisions of this chapter shall issue contracts for the rendering of hospital or medical service to subscribers, until the Commissioner of Insurance has, by formal certificate or license, authorized it to do so. Application for such certificate of authority or license shall be made on forms to be supplied by the Commissioner of Insurance, containing such information as he shall deem necessary. Each application for such certificate of authority or license, as a part thereof shall be accompanied by duplicate copies of the following documents duly certified by at least two of the executive officers of such corporation:

- (a) Certificate of incorporation with all amendments thereto.
- (b) Bylaws with all amendments thereto.
- (c) Each contract executed or proposed to be executed by and between the corporation and any participating hospital, and/or physicians under the terms of which hospital and/or medical service is to be furnished to subscribers to the plan.
- (d) Each form of contract, application, rider, and endorsement, issued or proposed to be issued to subscribers to the plan, or in renewal of any of contracts with subscribers to the plan, together with a table of rates charged or proposed to be charged to subscribers for each form of such contract.
- (e) Financial statement of the corporation which shall include the amounts of each contribution paid or agreed to be paid to the corporation for working capital, the name or names of each contributor and the terms of each contribution. (1941, c. 338, s. 5; 1943, c. 537, s. 3.)

Editor's Note.—The 1943 amendment inserted the words "or medical" near the beginning of the section. It also inserted in subsection (c) the words "and/or physicians" and "and/or medical."

§ 57-6. Issuance of certificate.—Before issuing any such license or certificate the Commissioner of Insurance may make such an examination or investigation as he deems expedient. The Commissioner of Insurance shall issue a certificate of authority or license upon the payment of an annual fee of one hundred dollars (\$100.00) and upon being satisfied on the following points:

- (a) The applicant is established as a bona fide nonprofit hospital service corporation as defined by this chapter.
- (b) The rates charged and benefits to be provided are fair and reasonable.
- (c) The amounts provided as working capital of the corporation are repayable only out of earned income in excess of amounts paid and payable for operating expenses and hospital and medical expenses and such reserve as the Department of Insurance deems adequate, as provided hereinafter.
- (d) That the amount of money actually available for working capital be suffi-

cient to carry all acquisition costs and operating expenses for a reasonable period of time from the date of the issuance of the certificate. (1941, c. 338, s. 6; 1943, c. 537, s. 4; 1947, c. 820, s. 2.)

Editor's Note.—The 1943 amendment added to subsection (a) the words “as defined by this chapter.” inserted the words “and medical” in subsection (c). And the 1947 amendment

§ 57-7. Subscribers' contracts; required and prohibited provisions.—

1. Every contract made by a corporation subject to the provisions of the chapter shall be for a period not to exceed twelve months, and no contract shall be made providing for the inception of benefits at a date later than one year from the date of the contract. Any such contract may provide that it shall be automatically renewed for a similar period unless there shall have been one month's prior written notice of termination by either the subscriber or the corporation.

2. Contracts may be issued which entitle one or more persons to benefits thereunder, provided that persons entitled to benefits thereunder, other than the certificate holder, are either spouse, lawful or legally adopted child of the certificate holder or his spouse, or other members of the immediate family of the certificate holder who reside in the same household with certificate holder and are legally, equitably, or morally dependent upon and rely upon certificate holder to a material degree for the reasonable necessities of life, such as food, clothing, lodging, maintenance, support, and/or education.

3. Every contract entered into by any such corporation with any subscriber thereto shall be in writing and a certificate stating the terms and conditions thereof shall be furnished to the subscriber to be kept by him. No such certificate form shall be made, issued or delivered in this State unless it contains the following provisions:

(a) A statement of the amount payable to the corporation by the subscriber and the times at which and manner in which such amount is to be paid; this provision may be inserted in the application rather than in the certificate. Application need not be attached to certificate.

(b) A statement of the nature of the benefits to be furnished and the period during which they will be furnished.

(c) A statement of the terms and conditions, if any, upon which the contract may be canceled or otherwise terminated at the option of either party.

(d) A statement that the contract includes the endorsements thereon and attached papers, if any, and together with the application contains the entire contract.

(e) A statement that if the subscriber defaults in making any payment, under the contract, the subsequent acceptance of a payment by the corporation at its home office shall reinstate the contract, but with respect to sickness and injury, only to cover such sickness as may be first manifested more than ten days after the date of such acceptance.

4. In every such contract made, issued or delivered in this State:

(a) All printed portions shall be plainly printed;

(b) The exceptions from the contract shall appear with the same prominence as the benefits to which they apply; and

(c) If the contract contains any provision purporting to make any portion of the articles, constitution or bylaws of the corporation a part of the contract, such portion shall be set forth in full.

5. A hospital service corporation may issue a master group contract with the approval of the Commissioner of Insurance provided such contract and the individual certificates issued to members of the group, shall comply in substance to the other provisions of this chapter. Any such contract may provide for the adjustment of the rate of the premium or benefits conferred as provided in said contract, and in accordance with an adjustment schedule filed with and approved by the Commissioner of Insurance. If such master group contract is issued, altered or modified, the subscribers' contracts issued in pursuance thereof are al-

tered or modified accordingly, all laws and clauses in subscribers' contracts to the contrary notwithstanding. Nothing in this chapter shall be construed to prohibit or prevent the same. Forms of such contract shall at all times be furnished upon request of subscribers thereto. (1941, c. 338, s. 7; 1947, c. 820, ss. 3, 4.)

Editor's Note.—The 1947 amendment rewrote subsection 2 and the second sentence of subsection 5.

§ 57-8. Investments and reserves.—No hospital service corporation shall invest in any securities other than securities permitted by the laws of this State for the investment of assets of life insurance companies, banks, trust companies, executors, administrators and guardians.

Every such corporation after the first full year of doing business after the passage of this chapter shall accumulate and maintain, in addition to proper reserves for current administrative liabilities and whatever reserves are deemed adequate and proper by the Commissioner of Insurance for unpaid hospital and/or medical bills, and unearned membership dues, a special contingent surplus or reserve at the following rates annually of its gross annual collections from membership dues, exclusive of receipts from cost plus plans, until said reserve shall equal three times its average monthly expenditures for hospital and/or medical claims and administrative and selling expenses.

| | |
|---------------------------------|----|
| 1. 1st \$200,000.00 | 4% |
| 2. Next \$200,000.00 | 2% |
| 3. All above \$400,000.00 | 1% |

Any such corporation may accumulate and maintain a contingent reserve in excess of the reserve hereinabove provided for, not to exceed an amount equal to six times the average monthly expenditures for hospital and/or medical claims and administrative and selling expenses.

In the event the Commissioner of Insurance finds that special conditions exist warranting an increase or decrease in the reserves or schedule of reserves, hereinabove provided for, it may be modified by the Commissioner of Insurance accordingly, provided however, when special conditions exist warranting an increase in said schedule of reserves, said schedule shall not be increased by the Commissioner of Insurance until a reasonable length of time shall have elapsed after notice of such increase. (1941, c. 338, s. 8; 1943, c. 537, s. 5; 1947, c. 820, s. 5.)

Cross References.—As to investments by banks, see §§ 53-44, 53-45 and 53-60. As to investments by executors, administrators and guardians, see §§ 36-1 to 36-5.

inserted the words "and/or medical" in the second and third paragraphs, and the 1947 amendment substituted "six" for "three" in the next to the last paragraph.

Editor's Note.—The 1943 amendment

§ 57-9. Reports filed with Commissioner of Insurance.—Every such corporation shall annually on or before the first day of March of each year, file in the office of the Commissioner of Insurance a sworn statement verified by at least two of the principal officers of the said corporation showing its condition on the thirty-first day of December, then next preceding; which shall be in such form and shall contain such matter as the Commissioner of Insurance shall prescribe. In case any such corporation shall fail to file any such annual statement as herein required, the said Commissioner of Insurance shall be authorized and empowered to suspend the certificate of authority issued to such corporation until such statement shall be properly filed. (1941, c. 338, s. 9.)

§ 57-10. Visitations and examinations.—The Commissioner of Insurance or any deputy or examiner or other person whom he may appoint, shall have the power of visitations and examination into the affairs of any such corporation and free access to all the books, papers and documents that relate to the business of the corporation, and may summon and qualify witnesses under oath

to examine its officers, agents, or employees or other persons in relation to the affairs, transactions and conditions of the corporation, the actual expense of which shall be paid by the association so examined. (1941, c. 338, s. 10.)

§ 57-11. Expenses.—All acquisition expenses in connection with the solicitation of subscribers to such hospital and/or medical service plan and administration costs including salaries paid to officers of the corporations, if any, shall at all times be subject to inspection by the Commissioner of Insurance. (1941, c. 338, s. 11; 1943, c. 537, s. 6.)

Editor's Note.—The 1943 amendment inserted the words "and/or medical."

§ 57-12. Licensing of agents.—Every agent of any hospital service corporation authorized to do business in this State under the provisions of this chapter shall be required to obtain annually from the Commissioner of insurance a license under the seal of his office showing that the company for which he is agent is licensed to do business in this State and that he is an agent of such company and duly authorized to do business for it. And every such agent, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit hospital service. For said license, each agent shall annually pay the sum of one (\$1.00) dollar. Before a license is issued to an agent, hereunder, the agent and the company for which he desires to act, shall apply for the license on forms to be prescribed by the Commissioner of Insurance, and before he issues a license to such agent, the Commissioner of Insurance shall satisfy himself by examination, or otherwise, that the person applying for a license as an agent is a person of good moral character, that he intends to hold himself out in good faith as a hospital and/or medical service agent and has sufficient knowledge of the business proposed to be done; that he has not willfully violated any of the insurance laws of the State, and that he is a proper person for such position, and that such license, if issued, shall serve the public's interest. For said examination applicant shall pay the sum of ten (\$10.00) dollars: Provided, that where an applicant has already paid the ten (\$10.00) dollar examination fee prescribed in § 105-228.7, such applicant shall not be required to pay an additional examination fee. All agents operating as such for corporation subject to the provisions of this chapter on the date of its ratification are deemed qualified to act as such without the examination herein provided for. Licenses issued hereunder shall be subject to revocation by the Commissioner of Insurance for cause and if any person shall assume to act as an agent or broker without obtaining the license herein provided for, or makes any false statements or representations concerning the said hospital and/or medical service, knowingly or willfully, he shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars for each offense. (1941, c. 338, s. 12; 1943, c. 537, s. 7; 1947, c. 1023, s. 1.)

Editor's Note.—The 1943 amendment inserted in the fourth sentence the words "or otherwise," and also the words "and/or medical." It added the proviso to the fifth sentence, and inserted in the last

sentence the words "and/or medical." The 1947 amendment substituted in the proviso to the fifth sentence "§ 105-228.7" for "sub-section three of section 105-121."

§ 57-13. Revocation of certificate of authority; dissolution.—Whenever the Commissioner of Insurance shall find as a fact that any corporation subject to the provisions of this chapter, is being operated for profit or fraudulently conducted, or is not complying with the provisions of this chapter, he shall be authorized to revoke the certificate of authority or license theretofore granted and may at any time thereafter institute or cause to be instituted the necessary proceedings under the laws of this State looking to the dissolution of such corporation, and any dissolution, liquidation, merger, or reorganization of a corpo-

ration or corporations subject to the provisions of this chapter shall be under the supervision of the Commissioner of Insurance who shall have all powers with respect thereto granted to him under the insurance laws of this State. If, at any time, a corporation organized under the provisions of this chapter is financially unable to comply with the provisions of this chapter or to comply with any of the provisions of any of the hospital contracts or subscribers' contracts issued by said corporation in pursuance of this chapter, the Commissioner of Insurance shall have the right without court action, to transfer all its assets, liabilities, and obligations, to any other corporation, whether organized under the provisions of this chapter, or not, under such contract of reinsurance with such transferee corporation, that he deems to the best interests of the corporation, its members and creditors whose assets, obligations and liabilities, are transferred. This action on the part of the Commissioner of Insurance is without prejudice to the rights of the corporations whose assets, liabilities and obligations are so transferred, to institute other and proper legal remedies, and to question the action so taken by the Commissioner of Insurance as herein provided, provided, however, that the action taken by the Commissioner of Insurance herein shall not be affected pending a final determination by the court with reference thereto. (1941, c. 338, s. 13; 1943, c. 537, s. 8.)

Editor's Note.—The word "affected" proper correction was made by the 1943 amendment. near the end of this section erroneously appeared as "effected" in the 1941 act. The

§ 57-14. Taxation.—Every corporation subject to the provisions of this chapter is hereby declared to be a charitable and benevolent corporation and all of its funds and property shall be exempt from every State, county, district, municipal and school tax or assessment, and all other taxes and license fees, from the payment of which charitable and/or benevolent institutions are now or shall be hereafter exempt. For the purpose of raising revenues sufficient to defray the expenses of the administration of this chapter, and in lieu of all other taxes, an annual franchise or privilege tax is hereby levied upon every corporation subject to the provisions of this chapter at the rate of one-third of one per cent of the gross annual collections from membership dues exclusive of receipts from cost plus plans. The General Assembly of North Carolina does hereby appropriate the sum of four thousand dollars (\$4,000.00) annually from its general funds to be paid over to the Department of Insurance of this State for its use in the discharge of the duties by this chapter imposed upon the Commissioner of Insurance of this State. (1941, c. 338, s. 14.)

Editor's Note.—For comment on this provision, see 19 N. C. Law Rev. 518.

§ 57-15. Amendments to certificate of incorporation.—Any corporation subject to the provisions of this chapter may hereafter amend its charter in the following manner only:

1. (a) A meeting of the board of directors, trustees or other governing authority shall be called in accordance with the bylaws specifying the amendment to be voted upon at such meeting.

(b) If at such meeting two-thirds of the directors, trustees or other governing authority present vote in favor of the proposed amendment, then the president and secretary shall under oath make a certificate to this effect, which certificate shall set forth the call for such meeting, a statement showing service of such call upon all directors, and a certified copy of so much of the minutes of the meeting as relate to the adoption of the proposed amendment;

(c) Said officers shall cause said certificate to be published once a week for two consecutive weeks in a newspaper in Raleigh and in the county where the corporation's principal office is located, or posted at the courthouse door if no newspaper be published within the county. Said printed or posted notices shall

be in such form and of such size as the Commissioner may approve, and in addition to setting forth in full the certificate required in paragraph (b) shall state that application for amending the corporation's charter in the manner specified has been proposed by the board of directors, trustees, or other governing authority, and shall also state the time set for the meeting of certificate holders thereby called to be held at the principal office of the corporation to take action on the proposed amendment. A true copy of such notice shall be filed with the Commissioner. Such publication and filing of notice shall be completed at least thirty days prior to the date set therein for the meeting of the certificate holders and due proof thereof shall be filed with the Commissioner at least fifteen days prior to the date of such meeting. If the meeting at which the proposed amendment is to be considered is a special meeting, rather than a regular annual meeting of certificate holders, such special meeting can be called only after the Commissioner has given his approval in writing, and the published notice shall show the fact of such approval. At said meeting those present in person or represented by proxy shall constitute a quorum.

(d) If at such certificate holders' meeting two-thirds of those present in person or by proxy shall vote in favor of any proposed amendment, the president and secretary shall make a certificate under oath setting forth such fact together with the full text of the amendment thus approved. Said certificate shall, within thirty days after such meeting, be submitted to the Commissioner for his approval as conforming to the requirement of law, and it shall be the duty of the Commissioner to act upon all proposed amendments within ten days after filing of such certificates with him. Should the Commissioner approve the proposed amendment or amendments, he shall certify this fact, together with the full text of such amendments as are approved by him, to the Secretary of State who shall thereupon issue the charter amendment in the usual form. Should the Commissioner disapprove of any amendment, then the same shall not be allowed.

2. All charters and charter amendments heretofore issued upon application of the board of directors, trustees or other governing authority of any corporations subject to the provisions of this chapter are hereby validated. (1941, c. 338, s. 15; 1947, c. 820, s. 6.)

Cross Reference.—As to amendments generally, see § 55-31.

Editor's Note.—The 1947 amendment rewrote this section.

§ 57-16. Cost plus plans.—Any corporation organized under the provisions of this chapter shall be authorized as agent of any other corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, to administer on behalf of such corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, any group hospitalization or medical service plan, promulgated by such corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, on a cost plus administrative expense basis, provided said other corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof shall have had an active existence for at least one (1) year preceding the establishment of such plan, and was formed for purposes other than procuring such group hospitalization and/or medical service coverage on a cost plus administrative expense basis, and provided only that administrative costs of such a cost plus plan administered by a corporation organized under the provisions of this chapter, acting as an agent as herein provided, shall not exceed the remuneration received therefor, and provided further that the corporation organized under this chapter administering such a plan shall have no liability to the subscribers or to the hospitals for the success or failure, liquidation or dissolution of such group hospitalization or medical service plan and provided

further, that nothing herein contained shall be construed to require of said corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, conformity to the provisions of this chapter if such group hospitalization is administered by a corporation organized under this chapter, on a cost plus expense basis. The administration of any cost plus plans as herein provided, shall not be subject to regulation or supervision by the Commissioner of Insurance. (1941, c. 338, s. 16; 1943, c. 537, s. 9; 1947, c. 820, s. 7.)

Editor's Note.—The 1943 amendment plan," and the 1947 amendment rewrote inserted the words "or medical service portions of the section.

§ 57-17. Pre-existing hospital service corporations.—No corporations organized under the laws of this State prior to the ratification of this chapter, for the purposes herein provided, shall be required to reincorporate as provided for herein, and the provisions of this chapter shall apply to said corporations only with regard to operations by said corporations with respect to subscribers' contracts, participating hospital contracts, reserves, investments, reports, visitations, expenses, taxation, amendments to charters, supervision of Commissioner of Insurance, application for certificate, issuance of certificates, licensing of agents after the date of the passage of this chapter, provided, however, as soon as practical hereafter and in accordance with rules and regulations adopted by the Commissioner of Insurance said corporations shall conform to this chapter as near as practical with respect to subscribers' contracts, endorsements, riders, and applications entered into prior to the ratification of this chapter. (1941, c. 338, s. 17.)

§ 57-18. Construction of chapter as to single employer plans; associations exempt.—Nothing in this chapter shall be construed to affect or apply to hospital or medical service plans which limit their membership to employees and the immediate members of the families of the employees of a single employer or his or its subsidiary or subsidiaries and which plans are operated by such employer or such limited group of the employees; nor shall this chapter be construed to affect or apply to any nonstock, nonprofit medical service association which was, on January first, one thousand nine hundred and forty-three, organized solely for the purpose of, and actually engaged in, the administration of any medical service plan in this State upon contracts and participating agreements with physicians, surgeons, or medical societies, whereby such physicians or surgeons underwrite such plan by contributing their services to members of such association upon agreement with such association as to the schedule of fees to apply and the rate and method of payment by the association from the common fund paid in periodically by the members for medical, surgical and obstetrical care; and such hospital service plans, and such medical service associations as are herein specifically described, are hereby exempt from the provisions of this chapter. The Commissioner of Insurance may require from any such hospital service plan or medical service association such information as will enable him to determine whether such hospital service plan or medical service association is exempt from the provisions of this chapter. (1941, c. 338, s. 18; 1943, c. 537, s. 10; 1947, c. 140.)

Editor's Note.—The 1943 amendment extended the exemption to the specified medical service plans and medical service associations. And the 1947 amendment inserted the words "or his or its subsidiary or subsidiaries" after the word "employer" near the beginning of the section.

§ 57-19. Merger or consolidation, proceedings for.—Any two (2) or more hospital and/or medical service corporations organized under and/or subject to the provisions of this chapter as determined by the Commissioner of Insurance may, as shall be specified in the agreement hereinafter required, be merged into one of such constituent corporations, herein designated as the surviving corporation, or may be consolidated into a new corporation to be formed

by the means of such consolidation of the constituent corporations, which new corporation is herein designated as the resulting or consolidated corporation, and the directors and/or trustees, or a majority of them, of such corporations as desire to consolidate or merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation or merger, the mode of carrying the same into effect and stating such other facts as can be stated in the case of a consolidation or merger, stated in such altered form as the circumstances of the case require, and with such other details as to conversion of certificates of the subscribers as are deemed necessary and/or proper.

Said agreement shall be submitted to the certificate holders of each constituent corporation, at a separate meeting thereof, called for the purpose of taking the same into consideration; of the time, place and object of which meeting due notice shall be given by publication once a week for two consecutive weeks in some newspaper published in Raleigh, North Carolina and in the counties in which the principal offices of the constituent corporations are located, and if no such paper is published in the county of the principal office of such constituent corporations, then said notice shall be posted at the courthouse door of said county or counties for a period of two weeks.

Said printed or posted notices shall be in such form and of such size as the Commissioner of Insurance may approve. A true copy of said notices shall be filed with the Commissioner of Insurance.

Such publication and filing of notices shall be completed at least fifteen (15) days prior to the date set therein for the meeting, and due proof thereof shall be filed with the Commissioner of Insurance at least ten days prior to the date of such meeting.

At this meeting those present in person or represented by proxy shall constitute a quorum and said agreement shall be considered and voted upon by ballot in person or by proxy or both taken for the adoption or rejection of the same; and if the votes of two thirds of those at said meeting voting in person or by proxy shall be for the adoption of the said agreement, then that fact shall be certified on said agreement by the president and secretary of each such corporation, under the seal thereof.

The agreement so adopted and certified shall be signed by the president or vice-president and secretary or assistant secretary of each of such corporations under the corporate seals thereof and acknowledged by the president or vice-president of each such corporation before any officer authorized by the laws of this State to take acknowledgment of deeds to be the respective act, deed, and agreement of each of said corporations.

The said agreement shall be submitted to and approved by the Commissioner of Insurance, in advance of the merger or consolidation and his approval thereof shall be indicated by his signature being affixed thereto under the seal of his office.

The Commissioner shall not approve any such plans, unless, after a hearing, he finds that it is fair, equitable to certificate holders and members, consistent with law, and will not conflict with the public interest.

The agreement so certified and acknowledged with the approval of the Commissioner of Insurance noted thereon, shall be filed in the office of the Secretary of State, and shall thenceforth be taken and deemed to be the agreement and act of consolidation or merger of said corporations; and a copy of said agreement and act of consolidation or merger duly certified by the Secretary of State under the seal of his office shall also be recorded, in the office of the clerk of the superior court of the county of this State in which the principal office of the surviving or consolidated corporation is, or is to be established, and in the office of the clerks of the superior courts of the counties of this State in which the respective corporations so merging or consolidating shall have their original certi-

cates of incorporation recorded, and also in the office of the register of deeds in each county in which either or any of the corporations entering into merger or consolidation owns any real estate; and such record, or a certified copy thereof, shall be evidence of the agreement and act of consolidation or merger of said corporations, and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation or merger. When an agreement shall have been signed, authorized, adopted, acknowledged, approved, and filed and recorded as hereinabove set forth in this section, for all purposes of the laws of this State, the separate existence of all constituent corporations, parties to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, of each of said constituent corporations, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, shall be vested in the corporation resulting from or surviving such consolidation or merger, and all property, rights, privileges, powers, and franchises and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate, whether vested by deed or otherwise, under the laws of this state, vested in any such constituent corporations shall not revert or be in any way impaired by reason of such consolidation or merger; provided, however, that all rights of creditors and all liens upon the property of either of or any of said constituent corporations shall be preserved, unimpaired, limited in lien to the property affected by such lien at the time of the merger or consolidation, and all debts, liabilities, and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it; and further provided that notice of any said liens, debts, liabilities, and duties is given in writing to the resulting or surviving corporation within six months after the date of the filing of the agreement of merger in the office of the Secretary of State. All such liens, debts, liabilities, and duties of which notice is not given as provided herein are forever barred. The certificate of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that the changes in its certificates of incorporation are stated in the agreement of merger. All certificates theretofore issued and outstanding by each constituent corporation and in good standing upon the date of the filing of such agreement with the Secretary of State without reissuance thereof by the resulting or surviving corporation shall be the contract and agreement of the resulting or surviving corporation with each of the certificate holders thereof and subject to all terms and conditions thereof and of the agreement of merger filed in the office of the Secretary of State.

Any action or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted to judgment as if such consolidation or merger had not taken place, or the corporations resulting from or surviving such consolidation or merger may be substituted in its place.

The liability of such constituent corporations to the certificate holders thereof, and the rights or remedies of the creditors thereof, or persons doing or transacting business with such corporations, shall not, in any way, be lessened or impaired by the consolidation or merger of two or more of such corporations under the provisions of this section, except as provided in this section.

When two or more corporations are consolidated or merged, the corporation

resulting from or surviving such consolidation or merger shall have the power and authority to continue any contracts which any of the constituent corporations might have elected to continue. All contracts entered into between any constituent corporations and any other persons shall be and become the contract of the resulting corporations according to the terms and conditions of said contract and the agreement of consolidation or merger.

For the filing of the agreement as hereinabove provided, the Secretary of State is entitled to receive such fees only as he would have received had a new corporation been formed.

Any agreement for merger and/or consolidation as shall conform to the provisions of this section, shall be binding and valid upon all the subscribers, certificate holders and/or members of such constituent corporations, provided only that any subscriber, certificate holder and/or member who shall so indicate his disapproval thereof to the resulting, consolidated or surviving corporation within ninety days after the filing of said agreement with the Secretary of State shall be entitled to receive all unearned portions of premiums paid on his certificate from and after the date of the receipt of the application therefor by the resulting, surviving, or consolidated corporation; each subscriber, certificate holder and/or member who shall not so indicate his or her disapproval of said agreement and said merger within said period of ninety days is deemed and presumed to have approved said agreement and said merger and/or consolidation and shall have waived his or her right to question the legality of said merger and/or consolidation.

No director, officer, subscriber, certificate holder and/or member as such of any such corporation, except as is expressly provided by the plan of merger or consolidation, shall receive any fee, commission, other compensation or valuable consideration whatever, for in any manner aiding, promoting or assisting in the merger or consolidation. (1947, c. 820, s. 8.)

§ 57-20. Commissioner of Insurance determines corporations exempt from this chapter.—The Commissioner of Insurance may require from any corporation writing any hospital service contracts and any corporation writing medical service contracts or both, such information as will enable him to determine whether such corporation is subject to the provisions of this chapter. (1947, c. 820, s. 9.)

Chapter 58.

Insurance.

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SUBCHAPTER I.**INSURANCE DEPARTMENT.****ARTICLE 1.***Title and Definitions.*

§ 58-1. **Title of the chapter.**—This chapter may be cited and shall be known as the Insurance Law. (1899, c. 54; Rev., s. 4677; C. S., s. 6260.)

Editor's Note.—For article on the 1945 revision of the Insurance Law, see 23 N. C. Law Rev. 283. For changes made by the Session Laws of 1947, see 25 N. C.

Law Rev. 429.

Purpose of Chapter.—The statute law makes elaborate and minute provisions for the protection of the people from imposi-

tion under the guise of insurance, and the Department of Insurance is charged with the special duty of seeing that these pro-

visions are complied with. *State v. Arlington*, 157 N. C. 640, 73 S. E. 122 (1911).

§ 58-2. **Definitions.**—In this chapter, unless the context otherwise requires,

(a) "Commissioner" means Commissioner of Insurance of North Carolina.

(b) "Department" means Department of Insurance of North Carolina.

(c) "Company" or "insurance company" or "insurer" shall be deemed to include any corporation, association, partnership, society, order, individual or aggregation of individuals engaging or proposing or attempting to engage as principals in any kind of insurance business, including the exchanging of reciprocal or interinsurance contracts between individuals, partnerships and corporations.

(d) "Domestic company" means a company incorporated or organized under the laws of this State.

(e) "Foreign company" means a company incorporated or organized under the laws of the United States or of any jurisdiction within the United States other than this State.

(f) "Alien company" means a company incorporated or organized under the laws of any jurisdiction outside of the United States.

(g) "Person" includes an individual, aggregation of individuals, corporation, company, association and partnership.

(h) The singular form shall include the plural, and the masculine form shall include the feminine wherever appropriate. (1899, c. 54, s. 1; Rev., s. 4678; C. S., s. 6261; 1945, c. 383.)

Editor's Note.—The 1945 amendment rewrote this section.

corporated and unincorporated companies. *State v. Arlington*, 157 N. C. 640, 73 S. E. 122 (1911).

Companies Contemplated.—The Insurance Law clearly contemplates both in-

§ 58-3. **Contract of insurance.**—A contract of insurance is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for, the destruction, loss, or injury of something in which the other party has an interest. (1899, c. 54, s. 2; Rev., s. 4679; C. S., s. 6262; 1945, c. 383.)

Editor's Note.—The 1945 amendment substituted the words "the insurer is bound" for the words "one party for a consideration promises," and inserted the

words "or reimbursement."

Cited in *Charleston, etc., Ry. Co. v. Lassiter & Co.*, 207 N. C. 408, 177 S. E. 9 (1934).

ARTICLE 2.

Commissioner of Insurance.

§ 58-4. **Department established.**—The Insurance Department is hereby established as a separate and distinct department, which is charged with the execution of laws relating to insurance and other subjects placed under the Department. (1899, c. 54, s. 3; 1901, c. 391, s. 1; Rev., s. 4680; C. S., s. 6263.)

Cited in *O'Neal v. Wake County*, 196 N. C. 184, 145 S. E. 28 (1928).

§ 58-5. **Commissioner's election and term of office.**—The chief officer of the Insurance Department shall be called the Commissioner of Insurance; whenever in the statutes of this State the words "Insurance Commissioner" appear, they shall be deemed to refer to and to be synonymous with the term "Commissioner of Insurance." He shall be elected by the people in the manner prescribed for the election of members of the General Assembly and State officers, and the result of the election shall be declared in the same manner and at the same time as the election of State officers is now declared. His term of office begins

on the first day of January next after his election, and is for four years or until his successor is elected and qualified. If a vacancy occurs during the term, it shall be filled by the Governor for the unexpired term. (Rev., ss. 4680, 4681; 1907, c. 868; C. S., s. 6264; 1943, c. 170.)

Cross References.—As to Commissioner taking oath and being inducted into office, see § 147-4. As to penalty for failure to take oath, see § 128-5.

Editor's Note.—The 1943 amendments substituted "Commissioner of Insurance" for "Insurance Commissioner" in the first

sentence, and added the part of the sentence appearing after the semi-colon. By virtue of this amendatory act the words "Insurance Commissioner" wherever appearing in this chapter have been changed to "Commissioner of Insurance."

§ 58-6. Salary of Commissioner.—The salary of the Commissioner of Insurance shall be nine thousand dollars a year, payable in equal monthly installments. (1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, cc. 42, 771, s. 3; Rev., s. 2756; 1907, c. 830, s. 10, c. 994; 1909, c. 839; 1913, c. 194; 1915, cc. 158, 171; 1917, c. 70; 1919, c. 247, s. 4; C. S., s. 3874; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 342; 1945, c. 383; 1947, c. 1041; 1949, c. 1278.)

Editor's Note.—The 1945 amendment increased the salary from six thousand to six thousand six hundred dollars. The 1947 amendment increased the salary to seven thousand five hundred dollars. And

the 1949 amendment, effective April 23, 1949, increased the salary, from and after the expiration of the present term of office of the Commissioner, to nine thousand dollars.

§ 58-7. Bond of Commissioner.—The Commissioner of Insurance, before he enters upon the execution of his official duties, must give a bond to the State in the sum of twenty-five thousand dollars, with sufficient surety, to be approved by the State Treasurer, conditioned upon the faithful performance of the duties of his office during his term of office; this bond extends to the faithful execution of the office of Commissioner of Insurance by the person elected or appointed thereto until a new election or appointment of Commissioner of Insurance is made and a new bond given. (1899, c. 54, s. 55; 1905, c. 430, s. 2; Rev., s. 293; C. S., s. 6265.)

§ 58-7.1. Chief deputy commissioner.—The Commissioner shall appoint and may remove at his discretion a chief deputy commissioner, who, in the event of the absence, death, resignation, disability or disqualification of the Commissioner, or in case the office of Commissioner shall for any reason become vacant, shall have and exercise all the powers and duties vested by law in the Commissioner. He shall receive such compensation as fixed and provided by the Budget Bureau. (1945, c. 383.)

§ 58-7.2. Chief actuary.—The Commissioner shall appoint and may remove at his discretion a chief actuary, who shall receive such compensation as fixed and provided by the Budget Bureau. (1945, c. 383.)

§ 58-7.3. Other deputies, actuaries, examiners and employees.—The Commissioner shall appoint or employ and may remove at his discretion such other deputies, actuaries, examiners, clerks and other employees as may be found necessary for the proper execution of the work of the Insurance Department, at such compensation as shall be fixed and provided by the Budget Bureau. (1945, c. 383.)

§ 58-8. Seal of Department.—The Commissioner of Insurance, with the approval of the Governor, shall devise a seal, with suitable inscription, for his office, a description of which, with the certificate of approval by the Governor, shall be filed in the office of the Secretary of State, with an impression thereof, which seal shall thereupon become the seal of office of the Commissioner of the Insurance Department. The seal may be renewed whenever necessary. (1899, c. 54, s. 11; Rev., s. 4682; C. S., s. 6266.)

§ 58-9. Powers and duties of Commissioner.—The Commissioner shall:

(1) See that all laws of this State governing insurance companies, associations, orders or bureaus relating to the business of insurance are faithfully executed, and to that end he shall have power and authority to make rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this chapter, and to make such further rules and regulations not contrary to any provision of this chapter which will prevent practices injurious to the public by insurance companies, fraternal orders and societies, agents and adjusters. The Commissioner may likewise, from time to time, withdraw, modify or amend any such regulation.

(2) Furnish to the companies, associations, orders or bureaus required by this chapter to report to him, the necessary blank forms for the statements required, which forms may be changed by him from time to time when necessary to secure full information as to the standing, condition and such other information desired of companies, associations, orders or bureaus under the Insurance Department.

(3) Receive and thoroughly examine each annual statement required by this chapter and prepare an abstract of each annual statement at the expense of the company, association, order or bureau making the same and receive therefor the sum of four dollars. If the annual statement is made in compliance with the laws of this State, the Commissioner shall publish the abstract of the same, at the expense of the company, association, order or bureau making it, in one of the newspapers of the State, which newspaper may be selected by the company, association, order or bureau making the statement, if within thirty days after the filing of the statement, the Commissioner is notified in writing of the name of the paper selected.

(4) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance, and he shall have power to institute civil actions or criminal prosecutions either by the Attorney General or such other attorney as the Attorney General may select, for any violation of the provisions of this chapter.

(5) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to such citizen.

(6) Administer by himself or by his deputy all oaths required in the discharge of his official duty. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C. S., s. 6269; 1945, c. 383; 1947, c. 721.)

Cross References.—As to control over building and loan associations, see §§ 54-24 to 54-33. As to duties with regard to Fireman's Relief Fund, see § 118-1 et seq. As to certain duties with regard to fire inspection and prevention, see §§ 69-1 to 69-7.

Editor's Note.—The 1945 amendment

rewrote this section. The 1947 amendment added to the first sentence of subsection (1) the provision as to rules and regulations, struck out former subsection (4) relating to certain filings with the clerk of the superior court, and renumbered the remaining subsections.

§ 58-9.1. Orders of Commissioner; when writing required.—Whenever by any provision of this chapter, the Commissioner is authorized to grant any approval, authorization or permission or to make any other order affecting any insurer, insurance agent, insurance broker or other person or persons subject to the provisions of this chapter, such order shall not be effective unless made in writing and signed by the Commissioner or by his authority. (1945, c. 383.)

§ 58-9.2. Examinations, investigations and hearings; notice of hearing.—All examinations, investigations and hearings provided for by this chapter may be conducted by the Commissioner personally or by one or more of his deputies, actuaries, examiners or employees designated by him for the purpose. All hearings shall, unless otherwise specially provided, be held at such time and place as shall be designated in a notice which shall be given by the

Commissioner in writing to the person cited to appear, at least ten days before the date designated therein. The notice shall state the subject of inquiry and the specific charges, if any. It shall be sufficient to give such notice either by delivering it to such person or by depositing the same in the United States mail, postage prepaid, and addressed to the last known place of business of such person. (1945, c. 383.)

§ 58-9.3. Court review of orders and decisions.—(1) Any order or decision made, issued or executed by the Commissioner, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets, shall be subject to review in the superior court of Wake County on petition by any person aggrieved filed within thirty days from the date of the delivery of a copy of the order or decision made by the Commissioner upon such person. A copy of such petition for review as filed with and certified to by the clerk of said court shall be served upon the Commissioner or in his absence upon someone in active charge of the Department within five days after the filing thereof. If such petition for review is not filed within the said thirty days, the parties aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed and there shall be no trial of the merits thereof by any court to which application may be made by petition or otherwise, to enforce or restrain the enforcement of the same.

(2) The Commissioner shall within thirty days, unless the time be extended by order of court, after the service of the copy of the petition for review as provided in paragraph (1) of this section, prepare and file with the clerk of the superior court of Wake County a complete transcript of the record of the hearing, if any, had before him, and a true copy of the order or decision duly certified. The order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper. The court may change the place of hearing, (a) upon consent of the parties; or (b) when the convenience of witnesses and the ends of justice would be promoted by the change; or (c) when the judge has at any time been interested as a party or counsel. The cause shall be heard by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only. It shall be the duty of the trial judge to hear and determine such petition with all convenient speed and to this end the cause shall be placed on the calendar for the next succeeding term for hearing ahead of all other cases except those already given priority by law. If on the hearing before the trial judge it shall appear that the record filed by the Commissioner is incomplete, he may by appropriate order direct the Commissioner to certify any or all parts of the record so omitted.

(3) The trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Commissioner and to restrain the enforcement thereof.

(4) Appeals from all final orders and judgments entered by the superior court in reviewing the orders and decisions of the Commissioner may be taken to the Supreme Court of North Carolina by any party to the action as in other civil cases.

(5) The commencement of proceedings under this section shall not operate as a stay of the Commissioner's order or decision, unless so ordered by the court, except orders increasing or reducing rates and orders affecting the continuation of the license of a rating organization. (1945, c. 383; 1947, c. 721.)

Editor's Note.—The 1947 amendment For comment on amendment, see 25 N. rewrote subsection (2) and substituted C. Law Rev. 439. "trial judge" for "court" in subsection (3).

§ 58-10. Commissioner to provide books; make inspection; compensation.—The Commissioner of Insurance shall provide all books and blanks of every kind required to carry out the provisions of the law for inspection of buildings in towns and cities, and he or his deputy shall make inspections of the cities and towns of the State. Whenever the Commissioner has reason to be-

lieve that the local inspectors are not doing their duty, he or his deputy shall make special trips of inspection and take proper steps to have all the provisions of law relative to the investigation of fires and the prevention of fire waste enforced. (1905, c. 506, s. 6; Rev., s. 4690; C. S., s. 6270; 1925, c. 89.)

§ 58-11. Office of Commissioner a public office; records, etc., subject to inspection.—The office of the Commissioner shall be a public office and the records, reports, books and papers thereof on file therein shall be accessible to the inspection of the public, except as the Commissioner, for good reason, may decide otherwise, or except as may be otherwise provided in this chapter. (1899, c. 54, ss. 9, 77; Rev., s. 4683; 1907, c. 1000, s. 1; C. S., s. 6271; 1945, c. 383.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 58-12. Original documents and certified copies as evidence.—Every certificate, assignment, or conveyance executed by the Commissioner, in pursuance of any authority conferred on him by law and sealed with his seal of office, may be used as evidence and may be recorded in the proper recording offices, in the same manner and with like effect as a deed regularly acknowledged or proved before an officer authorized by law to take the probate of deeds; and all copies of papers in the office of the Commissioner, certified by him and authenticated by his official seal, shall be evidence as the original. (1899, c. 54, s. 11; Rev., s. 4684; C. S., s. 6272.)

§ 58-13. Admissibility as evidence of agent's authority.—In any case or controversy arising in any court of original jurisdiction within this State wherein it is necessary to establish the question as to whether any insurance or other corporation or agent thereof is or has been licensed by the State Insurance Department to do business in this State, the certificate of the Commissioner of Insurance under the seal of his office shall be admissible in evidence as proof of such corporation or agent's authority as conferred by the State Insurance Department. (1929, c. 289, s. 1.)

§ 58-14. Reports of Commissioner to the Governor and General Assembly.—The Commissioner shall biennially submit to the General Assembly, through the Governor, a report of his official acts, including a summary of official rulings and regulations. The Commissioner shall, from time to time, report to the General Assembly any change which in his opinion should be made in the laws relating to insurance and other subjects pertaining to his department. On or before the first day of February of each year in which the General Assembly is in session he shall make to the Governor the recommendations called for in this section, to be transmitted to the General Assembly, with the last annual report of this department, including receipts and disbursements. (1899, c. 54, ss. 6, 7, 10; 1901, c. 391, s. 2; Rev., ss. 4687, 4688; 1911, c. 211, s. 2; C. S., s. 6273; 1927, c. 217, s. 5; 1945, c. 383.)

Editor's Note.—Before the 1927 amendment an annual report to the Governor was required. The 1945 amendment added

at the end of the first sentence the words "including a summary of official rulings and regulations."

§ 58-15. Authority over all insurance companies; no exemptions from license.—Every insurance company must be licensed and supervised by the Commissioner of Insurance, and must pay all licenses, taxes, and fees as prescribed in the insurance laws of the State for the class of company, association, or order to which it belongs. No provision in any statute, public or private, may relieve any company, association, or order from the supervision prescribed for the class of companies, associations, or orders of like character, or release it from the payment of the licenses, taxes, and fees prescribed for companies, associations, and orders of the same class; and all such special provisions or exemptions are hereby repealed. It is unlawful for the Commissioner of Insurance to

grant or issue a license to any company, association, or order, or agent for them, claiming such exemption from supervision by his department and release for the payment of license, fees, and taxes. (1903, c. 594, ss. 1, 2, 3; Rev., s. 4691; C. S., s. 6274; 1945, c. 383.)

Editor's Note.—The 1945 amendment struck out the words "association or order, as well as every bond, investment, dividend, guarantee, registry, title guarantee, debenture, or such other like company (not strictly an insurance company, as defined in the general insurance laws)." The stricken words formerly appeared after the word "company" near the beginning of the section.

A fraternal insurance order incorporated under the laws of another state, but with branch offices in this State, comes within the meaning of this section and must be licensed and supervised by the Insurance Commissioner. *State v. Arlington*, 157 N. C. 640, 73 S. E. 122 (1911).

Cited in *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733 (1935).

§ 58-16. Examinations to be made.—Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the Commissioner shall be satisfied, by such examination and evidence as he sees fit to make and require, that the company is otherwise duly qualified under the laws of the State to transact business therein. As often as once in three years he shall personally or by his deputy visit each domestic insurance company and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfill its obligations and whether it has complied with the laws. He shall also make an examination of any such company whenever he deems it prudent to do so, or upon the request of five or more of the stockholders, creditors, policyholders, or persons pecuniarily interested therein, who shall make affidavit of their belief, with specifications of their reasons therefor, that the company is in an unsound condition. Whenever the Commissioner deems it prudent for the protection of policyholders in this State he shall in like manner visit and examine, or cause to be visited and examined by some competent person appointed by him for that purpose, any foreign insurance company applying for admission or already admitted to do business in this State, and such company shall pay the proper charges incurred in this examination, including the expenses of the Commissioner or his deputy and the expenses and compensation of his assistants employed therein. The refusal of any insurer to submit to examination, or the refusal or failure of an insurer to pay the expenses of examination upon presentation of a bill therefor by the Commissioner, shall be grounds for the revocation or refusal of a license. The Commissioner is authorized to make public any such revocation or refusal of license as he may determine and to give his reasons therefor. The Commissioner shall promptly institute a civil action to recover the expenses of examination against any insurer which refuses or fails to pay. For these purposes the Commissioner or his deputy or persons making the examination shall have free access to all the books and papers of the insurance company that relate to its business, and to the books and papers kept by any of its agents, or to the books and papers of any affiliated or subsidiary corporations or partnerships that affect the affairs or financial condition of said company and may summon, administer oaths to, and examine as witnesses, the directors, officers, agents, and trustees of any such company, and any other person, affiliate or subsidiary in relation to its affairs, transactions, and condition. (1899, c. 54, s. 13; Rev., s. 4692; C. S., s. 6275; 1945, c. 383.)

Editor's Note.—The 1945 amendment inserted the fifth, sixth and seventh sentences. It also made the last sentence applicable to affiliates and subsidiaries.

§ 58-16.1. Examination dispensed with under certain circumstances.—Before ordering or making the examination provided for in § 58-16 of any foreign or alien company, the Commissioner shall first inquire of the insurance department of the state or country (if there be any such department

therein), in which is located the principal office of such company, as to the financial and business standing and solvency of such company. If, upon such inquiry, it shall appear that such company is of good financial and business standing, and is solvent, and it be certified, in writing, attested by the seal (if any) of the insurance department of the state or country wherein is located the principal office of such company, that it has been examined by the insurance department of such state or country in the manner prescribed by the laws thereof, and was by such examination found to be in sound condition, that there is no reason to doubt its solvency, and that it is still permitted, under the laws of such state or country, to do business therein, then in the discretion of the Commissioner, further examination may be dispensed with, and the information so obtained, and such certificate so furnished, may be accepted as sufficient evidence of the solvency of such company. (1945, c. 383.)

§ 58-16.2. Results of examination not to be made public until company is given opportunity to be heard; exception.—Pending, during and after the examination of any domestic, foreign or alien insurance company neither the Commissioner nor his representative or representatives shall make public or allow to be made public the financial statement, findings or report of examination, or any report affecting the status or standing of the company examined until the company has either accepted and approved the final report of examination or has been afforded a reasonable opportunity to be heard thereon and to answer or rebut any statements or findings therein. Such hearing, if requested, shall be informal and private.

If within thirty days after the final report of examination has been submitted to it, the company examined has neither notified the Commissioner of its acceptance and approval of the report nor requested to be heard thereon, the report shall thereupon be filed as a public document and shall be open to public inspection.

The provisions of this section shall not, however, prohibit the Commissioner from taking any action provided for, or from exercising any power conferred by, any other provision of this chapter to suspend or revoke the license of any insurance company. (1945, c. 383.)

§ 58-17. Oath required for compliance with law.—Before issuing license to any insurance company to transact the business of insurance in this State, the Commissioner of Insurance shall require, in every case, in addition to the other requirements provided for by law, that the company file with him the affidavit of its president or other chief officer that it has not violated any of the provisions of this chapter for the space of twelve months last past, and that it accepts the terms and obligations of this chapter as a part of the consideration of the license. (1899, c. 54, s. 110; 1901, c. 391, s. 8; Rev., s. 4693; C. S., s. 6276.)

§ 58-18. Investigation of charges.—Upon his own motion or upon complaint being filed by a citizen of this State that a company authorized to do business in the State has violated any of the provisions of this chapter, the Commissioner shall investigate the matter, and, if necessary, examine, under oath, by himself or his accredited representatives the president and such other officer or agents of such companies as may be deemed proper; also all books, records, and papers of the same. In case the Commissioner shall find upon substantial evidence that any complaint against a company is justified, said company, in addition to such penalties as are imposed for violation of any of the provisions of this chapter, shall be liable for the expenses of the investigation, and the Commissioner shall promptly present said company with a statement of such expenses. If the company refuses or neglects to pay, the Commissioner is authorized to bring a civil action for the collection of these expenses. (1899, c. 54, s. 111; 1903, c. 438, s.

11; Rev., s. 4694; C. S., s. 6277; 1921, c. 136, s. 4; 1925, c. 275, s. 6; 1945, c. 383.)

Cross Reference.—As to penalties for using funds of insurance companies for political purposes, see § 163-206.

Editor's Note.—The 1925 amendment struck out the former provision that a

bond to secure expenses could be required by the Commissioner from the complaining party. And the 1945 amendment rewrote this section.

§§ 58-19, 58-20: Repealed by Session Laws 1945, c. 383.

§ 58-21. **Annual statements to be filed with Commissioner.**—Every insurance company shall file in the office of the Commissioner of Insurance, on or before the first day of March in each year, in form and detail as the Commissioner of Insurance prescribes, a statement showing the business standing and financial condition of such company, association, or order on the preceding thirty-first day of December, signed and sworn to by the chief managing agent or officer thereof, before the Commissioner of Insurance or some officer authorized by law to administer oaths. The Commissioner of Insurance shall, in December of each year, furnish to each of the insurance companies authorized to do business in the State two or more blanks adapted for their annual statements. (1899, c. 54, ss. 72, 73, 83, 90, 97; 1901, c. 706, s. 2; 1903, c. 438, s. 9; Rev., s. 4698; C. S., s. 6280; 1945, c. 383.)

Editor's Note.—The 1945 amendment struck out the words “association, or order—domestic, through its officers, and

foreign, through its general agent—” formerly appearing after the word “company” near the beginning of the section.

§ 58-22. **Punishment for making false statement.**—If any insurance company in its annual or other statement required by law shall willfully misstate the facts, the insurance company and the person making oath to or subscribing the same shall severally be punished by a fine of not less than five hundred nor more than one thousand dollars. (1899, c. 54, s. 97; Rev., s. 3493; C. S., s. 6281.)

§§ 58-23, 58-24: Repealed by Session Laws 1945, c. 383.

§ 58-25. **Record of business kept by companies and agents; Commissioner may inspect.**—All companies, agents, or brokers doing any kind of insurance business in this State must make and keep a full and correct record of the business done by them, showing the number, date, term, amount insured, premiums, and the persons to whom issued, of every policy or certificate or renewal. Information from these records must be furnished to the Commissioner of Insurance on demand, and the original books of records shall be open to the inspection of the Commissioner when demanded. (1899, c. 54, s. 108; 1903, c. 438, s. 11; Rev., s. 4696; C. S., s. 6284; 1945, c. 383.)

Editor's Note.—The 1945 amendment struck out the words “his deputy or clerk”

formerly appearing after the word “Commissioner” near the end of the section.

§ 58-25.1. **Commissioner may require special reports.**—The Commissioner may also address to any authorized insurer or its officers any inquiry in relation to its transactions or condition or any matter connected therewith. Every corporation or person so addressed shall reply in writing to such inquiry promptly and truthfully, and such reply shall be verified, if required by the Commissioner, by such individual, or by such officer or officers of a corporation, as he shall designate. (1945, c. 383.)

§ 58-26: Repealed by Session Laws 1945, c. 383.

§ 58-27. **Books and papers required to be exhibited.**—It is the duty of any person having in his possession or control any books, accounts, or papers of any company licensed under this chapter, to exhibit the same to the Commissioner of Insurance or to any deputy, actuary, accountant, or persons acting with

or for the Commissioner of Insurance. Any person who shall refuse, on demand, to exhibit the books, accounts, or papers, as above provided, or who shall knowingly or willfully make any false statement in regard to the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1899, c. 54, s. 76; Rev., ss. 3494, 4697; 1907, c. 1000, s. 3; C. S., s. 6286; 1945, c. 383.)

Editor's Note.—The 1945 amendment formerly appearing after the word "company" near the beginning of the section.

§ 58-27.1. Insurance advisory board; organization and powers.—

(1) There shall be in the Insurance Department an insurance advisory board which shall consist of seven members. The Commissioner shall be a member of the board and its chairman and executive head. The remaining six members shall be appointed by the Governor and any of them may be removed from office by the Governor whenever, in his judgment, the public interest may require. Of the six members appointed, three shall have had experience of such a nature as to make them familiar with the purposes and practices of the insurance business. Three members shall be appointed for two years and three for four years, and thereafter all appointments shall be for a term of four years and until a successor has been appointed; and in case of a vacancy for any reason, the Governor shall appoint a member to fill the unexpired term of office. The members of the insurance advisory board shall receive no salary but shall be paid for their services seven dollars (\$7.00) per diem and their expenses. The board shall meet in regular session at least once each three months on call of the chairman. Special meetings may be had at any time upon call of the Commissioner, or at the request of any two members of the board. The board may adjourn its meetings from day to day or until a day certain until all its business has been transacted. The Commissioner shall keep a record of all proceedings of the board, which records shall be open to public inspection.

(2) The insurance advisory board shall have power to consider and, by a majority vote of its members present, to make recommendations to the commissioner upon any matter which may be submitted to the board.

(3) The insurance advisory board shall, within three months of the ratification of this subsection promulgate rules and regulations to provide for the holding of public hearings before the Commissioner of Insurance, or any person employed by the Insurance Department authorized by the Commissioner to act in his stead, on such proposals, to revise an existing rating schedule the effect of which is to increase or decrease the charge for insurance or to set up a new rating schedule, as are subject to the approval of the Commissioner and as, in the judgment of the board, are of such nature and importance as to justify and require a public hearing. The board shall have authority to determine by such rules and regulations the circumstances under which such public hearings shall be held and the Commissioner of Insurance shall hold public hearings in accordance with such rules and regulations. From time to time the board may revise and change its promulgated rules and regulations in such manner as, in its judgment, the public interest may require. (1945, c. 383; 1949, c. 1079, s. 1.)

Editor's Note.—The 1949 amendment, five on April 21, 1949. See 27 N. C. Law which added subsection (3), became effective Rev. 460.

§ 58-27.2. Public hearings on revision of existing schedule or establishment of new schedule; publication of notice.—

(1) Whenever any statutory or licensed insurance rating bureau or any insurance company making its own rate filings makes any proposal to revise an existing rating schedule, the effect of which is to increase or decrease the charge for insurance, or to set up a new rating schedule, and such rating schedules are subject to the approval of the Commissioner, such bureau or company shall file its proposed change and supporting data with the Commissioner who shall thereafter, before acting upon

any such proposal, order a public hearing thereon, if such hearing is required by the rules and regulations adopted by the insurance advisory board and then in accordance therewith, and fix a time and place for such hearing not earlier than twenty days thereafter. The bureau or the company making such proposal shall, not more than ten days prior to the time of such public hearing, cause to be published in a daily newspaper or newspapers published in North Carolina, and in accordance with the rules and regulations of the insurance advisory board, a notice, in the form and content approved by the Commissioner, setting forth the nature and effect of such proposal and the time and place of the public hearing to be held.

(2) The provisions of this section shall be applicable to all rating bureaus operating in North Carolina and all companies making independent filings under the provisions of chapters 58 and 97 of the General Statutes of North Carolina, and shall be in addition to any requirements otherwise made specifically applicable to said bureaus and companies. (1949, c. 1079, s. 1.)

ARTICLE 3.

General Regulations for Insurance.

§ 58-28. **State law governs insurance contracts.**—All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein; and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof. (1899, c. 54, s. 2; 1901, c. 705, s. 1; Rev., s. 4806; C. S., s. 6287.)

Editor's Note.—See 13 N. C. Law Rev. 213, for note on validity of statutes localizing insurance contracts.

Constitutionality.—This section is constitutional. *Williams v. Life Ass'n*, 145 N. C. 128, 28 S. E. 802 (1907).

Laws in Force Become Part of Insurance Contract.—Laws in force at the time of executing a policy of insurance are binding on the insurer and become a part of the insurance contract. *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733 (1935).

Application Taken Out of State.—When neither party was a resident of the State at the time of the contract of insurance and the application was taken out of the State the rule of *lex loci contractu* will apply. *Keesler v. Mutual Ben. Life Ins. Co.*, 177 N. C. 394, 99 S. E. 97 (1919).

Applications Taken within State.—Policies of insurance issued by a foreign company, the applications for which are taken in this State, are to be construed in accordance with the laws of this State. *Horton v. Life Ins. Co.*, 122 N. C. 498, 29 S. E. 944 (1898). This is true although the insurance company may under its charter be allowed privileges which are contrary to statutes of this State. *Wilson v. Supreme Conclave*, 174 N. C. 628, 94 S.

E. 443 (1917). See *Cordell v. Brotherhood of Locomotive Firemen, etc.*, 208 N. C. 632, 182 S. E. 141 (1935).

A contract of insurance, based upon the application of insured made while residing in this State, must be construed in accordance with the laws of this State rather than the laws in force at the time of the inception of the contract in the state in which insurer is incorporated. *Pace v. New York Life Ins. Co.*, 219 N. C. 451, 14 S. E. (2d) 411 (1941).

Stipulation Making Policy a Foreign Contract.—A provision in a contract of insurance that, "This contract shall be governed by, subject to, and construed only according to the laws of the State of New York, the home office of said association," is void in so far as the courts of this State are concerned. *Blackwell v. Life Ass'n*, 141 N. C. 117, 53 S. E. 833 (1906). See *Cordell v. Brotherhood of Locomotive Firemen, etc.*, 208 N. C. 632, 182 S. E. 141 (1935).

Applied in Wells v. Jefferson Standard Life Ins. Co., 211 N. C. 427, 190 S. E. 744 (1937); *Petty v. Pacific Mut. Life Ins. Co.*, 212 N. C. 157, 193 S. E. 228 (1937); *Fountain v. Mutual Life Ins. Co.*, 55 F. (2d) 120 (1932).

§ 58-29. **No insurance contracts except under this chapter.**—It is unlawful for any company to make any contract of insurance upon or concerning any property or interest or lives in this State, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit,

or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this chapter. (1899, c. 54, s. 2; Rev., s. 4807; C. S., s. 6288.)

Recovery by Insured Where Contract Void as to Insurer.—The statute does not impose on the insured the duty of showing the authority of the company or its agent, as the statute is for the protection of the policyholder, and a recovery can be had by the insured although as to the insurer the contract may be void. *Gazzam v. Ins. Co.*, 155 N. C. 330, 71 S. E. 434 (1911).

When a statute or valid regulation in restraint only of the company's action is made for protection of the policyholder, a recovery may ordinarily be had, though the contract is in breach of the regulation. *Blount v. Fraternal Ass'n*, 163 N. C. 167, 79 S. E. 299 (1913); *Robinson v. Life, etc.*, Co., 163 N. C. 415, 79 S. E. 681 (1913); *Morgan v. Fraternal Ass'n*, 170 N. C. 75, 86 S. E. 975 (1915).

When Resident Process Agent Not Re-

§ 58-30. Statements in application not warranties.—All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy. (1901, c. 705, s. 2; Rev., s. 4808; C. S., s. 6289.)

The purpose of the statute is to prevent insurance companies from escaping the payment of honest losses upon technicalities and strict construction of contracts. *Cottingham v. Maryland Motor Car Ins. Co.*, 168 N. C. 259, 84 S. E. 274 (1915).

Material Representations.—In an application for a policy of life insurance every fact stated will be deemed material, which would materially influence the judgment of the insurance company either in accepting the risk or in fixing the premium rate. *Bryant v. Metropolitan Life Ins. Co.*, 147 N. C. 181, 60 S. E. 983 (1908); *Gardner v. North State Mut. Life Ins. Co.*, 163 N. C. 367, 79 S. E. 806 (1913).

A material representation shall avoid the policy if it is also false and calculated to influence the company, if without notice of its falsity, in making the contract at all, or in estimating the degree and character of the risk, or in fixing the premiums. *Gardner v. North State Mut. Life Ins. Co.*, 163 N. C. 367, 79 S. E. 806 (1913).

Misrepresentations admitted, of which the court will take judicial notice, must be deemed material as a matter of law; and their making is sufficient ground for canceling of the policy, whatever may be proved in extenuation of the conduct of in-

quired for Foreign Company.—The issuance of one or more policies of fire insurance, by a corporation, created and existing under the laws of another state, not by or through any agent, does not constitute "doing business" in the State of North Carolina, so as to require a resident process agent under § 55-38. *Ivy River Land, etc., Co. v. National Fire, etc., Co.*, 192 N. C. 115, 133 S. E. 424 (1926).

Applied in *Wells v. Jefferson Standard Life Ins. Co.*, 211 N. C. 427, 190 S. E. 744 (1937); *Glover v. Rowan Mut. Fire Ins. Co.*, 228 N. C. 195, 45 S. E. (2d) 45 (1947).

Cited in *Charleston, etc., Ry. Co. v. Lassiter & Co.*, 207 N. C. 408, 177 S. E. 9 (1934); *Petty v. Pacific Mut. Life Ins. Co.*, 212 N. C. 157, 193 S. E. 228 (1937).

sured in making them. *Jeffress v. New York Life Ins. Co.*, 74 F. (2d) 874 (1935).

Same—As to Attendance of Physicians, Diseases, etc.—Where the application declares that the statements the applicant makes below are true and there is no evidence that the company or its agents were aware of any facts to the contrary, all of the misrepresentations made as to the prior attendance of physicians, diseases, surgical operations, and the like, are deemed material. *Alexander v. Metropolitan Life Ins. Co.*, 150 N. C. 536, 64 S. E. 432 (1909); *Mutual Life Ins. Co. v. Leaksville Woolen Mills*, 172 N. C. 534, 90 S. E. 574 (1916).

A statement in an application for reinstatement of an insurance policy that applicant, in the year previous, had not had any injury, sickness, or ailment of any kind, and had not required the services of a physician, being a statement of fact within the knowledge of applicant, is a material representation as a matter of law. *Petty v. Pacific Mut. Life Ins. Co.*, 212 N. C. 157, 193 S. E. 228 (1937).

A representation by insured that he had never consulted a physician or been in a hospital is material, and testimony of physicians that insured was not in sound health at the date of the delivery of the policy is competent on the issue of fraud.

Fotts v. Life Ins. Co., 206 N. C. 257, 174 S. E. 123 (1934).

Same—As to Applications for Other Insurance.—Answers made in response to questions in the application as to applications for other insurance, where the applicant declares that they are true and offers them as an inducement to the issuance of the policy, are deemed material as a matter of law. *Fountain v. Mutual Life Ins. Co.*, 55 F. (2d) 120 (1932).

Immaterial Representations.—The false representation of the relationship between insured and beneficiary is, as a matter of law, immaterial. *Howell v. American Nat. Ins. Co.*, 189 N. C. 212, 126 S. E. 603 (1925).

A treatment for a mere temporary indisposition may well be regarded as immaterial where an applicant fully discloses medical treatment for a serious ailment administered at or about the same time. *Jeffress v. New York Life Ins. Co.*, 74 F. (2d) 874 (1935).

Under this section, a failure to disclose the fact that insured had had some time previous to her application one-half degree of fever due to a mild form of malaria and from which she had entirely recovered, taken in connection with the further fact that she was at the time of the application in sound health and otherwise insurable, was held not material. *Wells v. Jefferson Standard Life Ins. Co.*, 211 N. C. 427, 190 S. E. 744 (1937).

Misrepresentation Need Not Contribute to Loss.—It is not necessary, to defeat a recovery, that a material misrepresentation by the applicant must contribute in some way to the loss for which indemnity is claimed. *Bryant v. Metropolitan Life Ins. Co.*, 147 N. C. 181, 60 S. E. 963 (1908).

Unintentional Misrepresentations.—The company is entitled to have the policy canceled on bringing suit within the proper time, especially where, even if the misrepresentations are not intentional, the policy, when delivered, plainly discloses the untruthfulness of the representations. *Mutual Life Ins. Co. v. Leaksville Woolen Mills*, 172 N. C. 534, 90 S. E. 574 (1916).

Fraud is not essential under this section and as a general rule recovery will not be allowed if the statements made and accepted as inducements to the contract of insurance are false and material. *Wells v. Jefferson Standard Life Ins. Co.*, 211 N. C. 427, 190 S. E. 744 (1937).

False Material Representations, Although Not Fraudulent, Void Policy.—Where representations were material to the issuance of an insurance certificate, the cer-

tificate was void notwithstanding the evidence tended to show that the representations, although false, were not fraudulent. *Inman v. Sovereign Camp, W. O. W.*, 211 N. C. 179, 189 S. E. 496 (1937).

If the insurance company knew that the representations made by the insured were false, it cannot set the policy aside on the grounds that they were material or fraudulent. *Gardner v. North State Mut. Life Ins. Co.*, 163 N. C. 367, 79 S. E. 806 (1913).

The failure of insured to disclose treatment by a physician within five years prior to the application was held not a suppression of a material fact in light of the evidence, and was not adequate cause for cancellation of the policy. *Anthony v. Teachers' Protective Union*, 206 N. C. 7, 173 S. E. 6 (1934).

Where an insurance company has given a "binding slip" to an applicant for insurance, it only protects the applicant against the contingency of his sickness intervening its date and the delivery of the policy, if the application for insurance is accepted, and as such slip does not insure of itself, it does not affect the right of the insurer to avail itself of all defenses it may have, under the policy, after its delivery, to avoid payment thereof by reason of material misrepresentation made in the application for it. *Gardner v. North State Mut. Life Ins. Co.*, 163 N. C. 367, 79 S. E. 806 (1913).

Where insured stated she was not pregnant and died of childbirth in less than nine months, this statement did not preclude recovery, in view of the evidence that insurer issued its policy on the life of the insured when it knew she was 33 years of age, had been married about a year, and that ordinarily pregnancy might be expected, and it required an additional premium on that account. *Wells v. Jefferson Standard Life Ins. Co.*, 211 N. C. 427, 190 S. E. 744 (1937).

Burden Is on Insurer to Prove Misrepresentation.—By offering in evidence the policy of insurance and the insurer's admission of its execution and delivery and of the death of the insured, the beneficiaries made out a prima facie case, and the burden was then upon the insurer to rebut it by proof of the alleged misrepresentation. And though the beneficiaries, in anticipation of the defense, elected to offer testimony as to misrepresentations, this did not change the rule as to the burden of proof. *Wells v. Jefferson Standard Life Ins. Co.*, 211 N. C. 427, 190 S. E. 744 (1937).

Evidence Admissible.—After a contract

of life insurance has become effective, its terms may not be contradicted so as to affect its continued validity; but it may be shown that the delivery of the policy was made upon false representations in the application therefor, as to the health of the insured and as to his not having been subjected to contagious diseases for a prior period of one year, and the like, for such matters bear upon the question as to whether the policy had ever taken effect as a contract of insurance. *Gardner v. North State Mut. Life Ins. Co.*, 163 N. C. 367, 79 S. E. 806 (1913).

Evidence Not Showing Fraud.—Where the evidence shows that insured was suffering with an incurable disease, but the uncontradicted evidence shows he was ignorant of this fact, and that he had been assured by a physician, whom he had consulted, that there was nothing the matter with him at the date of application, there is no evidence from which the jury could find that the statement made by the applicant in the application was fraudulent and this section is applicable. *Missouri State Life Ins. Co. v. Hardin*, 208 N. C. 22, 179 S. E. 2 (1935).

Questions for Jury.—Where the insured had hernia at the time of his application, and, without specific question as to this, stated he was in sound physical and mental condition, "no exceptions," and there is evidence tending to show that the hernia did not affect the soundness of his health, it was for the jury to determine whether his representation was false and

material. *Hines v. New England Casualty Co.*, 172 N. C. 225, 90 S. E. 131 (1916).

Whether a misrepresentation is made with fraudulent intent by insured, or whether it is material, so that insurer would not have issued the policy had it known the truth, are ordinarily questions for the jury. *Harrison v. Metropolitan Life Ins. Co.*, 207 N. C. 487, 177 S. E. 423 (1934).

Same—Instruction.—The evidence tended to show that in her application for hospital insurance plaintiff inadvertently misrepresented that she did not have hernia, and that subsequent to the issuance of the policy plaintiff was hospitalized for appendicitis. The court held that a charge to the effect that the misrepresentation would bar recovery if the hernia in any way contributed to the hospitalization or materially affected the acceptance of the risk by insurer so that insurer would not have written the policy in the form it was issued if the existence of the hernia had been known, was without error, the question of materiality of the misrepresentation being for the jury upon the evidence. *Carroll v. Carolina Cas. Ins. Co.*, 227 N. C. 456, 42 S. E. (2d) 607 (1947), discussed in 26 N. C. Law Rev. 78.

Fraternal Benefit Associations and Fraternal Orders.—Fraternal benefit associations fall within the provision of this section as to representations, but fraternal orders as defined in § 58-264 do not. *Gray v. Woodmen of the World*, 179 N. C. 210, 102 S. E. 195 (1920).

§ 58-30.1. Additional or coinsurance clause.—No insurance company or agent licensed to do business in this State may issue any policy or contract of insurance covering property in this State which shall contain any clause or provision requiring the insured to take or maintain a larger amount of insurance than that expressed in such policy, nor in any way provide that the insured shall be liable as a coinsurer with the company issuing the policy for any part of the loss or damage to the property described in such policy, and any such clause or provision shall be null and void, and of no effect: Provided, the coinsurance clause or provision may be written in or attached to a policy or policies issued when there is printed or stamped on the filing face of such policy or on the form containing such clause the words "coinsurance contract," and the Commissioner may, in his discretion, determine the location of the words "coinsurance contract" and the size of the type to be used. If there be a difference in the rate for the insurance with and without the coinsurance clause, the rates for each shall be furnished the insured upon request. (1915, c. 109, s. 5; C. S., s. 6441; 1925, c. 70, s. 4; 1945, c. 377; 1947, c. 721.)

Cross Reference.—See § 58-177 and note.

Editor's Note.—The 1945 amendment

rewrote § 58-181 as this section. The 1947 amendment added the latter part of the proviso and made other changes therein.

§ 58-30.2. Group plans other than life, annuity or accident and health.—No policy of insurance other than life, annuity or accident and health may be written in North Carolina on a group plan which insures a group of in-

dividuals under a master policy at rates lower than those charged for individual policies covering similar risks. The master policy and certificates, if any, shall be first approved by the Commissioner and the rate, premiums or other essential information shall be shown on the certificate. (1945, c. 377.)

§ 58-31. Stipulations as to jurisdiction and limitation of actions.—No company or order, domestic or foreign, authorized to do business in this State under this chapter, may make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor may it limit the time within which such suit or action may be commenced to less than one year after the cause of action accrues or to less than six months from any time at which a plaintiff takes a nonsuit to an action begun within the legal time. All conditions and stipulations forbidden by this section are void. (1899, c. 54, ss. 23, 106; 1901, c. 391, s. 8; Rev., s. 4809; C. S., s. 6290.)

Limitation Not in Conflict with Statute Is Valid.—A stipulation in a policy as to time of bringing action is a contractual limitation, and has been held by the Supreme Court to be valid when it does not conflict with any provision of the statute. *Parker v. Insurance Co.*, 143 N. C. 339, 55 S. E. 717 (1906), citing *Muse v. London Assur. Corp.*, 108 N. C. 240, 13 S. E. 94 (1891), and *Dibrell v. Georgia Home Ins. Co.*, 110 N. C. 193, 14 S. E. 783 (1892).

Section Construed with Standard Fire Insurance Policy.—The provisions of a standard fire insurance policy, as set out in the statute, must be construed with the provision of this section, and when the action is brought within the time herein prescribed it will not be barred. *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605 (1909). Under the standard policy the insured has sixty days to file his proof of loss and then, according to the provisions of the statute, he has twelve months within which to commence his suit. *Lowe v. United States Mut. Acci. Ass'n*, 115 N. C. 18, 20 S. E. 169 (1894); *Gerringer v. North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. 773 (1903). See § 58-176.

The standard policy is not regulated by the statute of limitations, and the disabilities which stop the running of the statute have no effect upon it. Hence, the imprisonment of the insured will not give him the right to recover when he has delayed his action for more than a year. This rule applies likewise to minors. *Holly v. London Assur. Co.*, 170 N. C. 4, 86 S. E. 694 (1915).

Waiver of Stipulation of Standard Policy—Estoppel.—As the stipulation of the standard policy is a contract, and not a statute of limitations, it may be waived, or the party for whose benefit it was provided may be estopped by his conduct

from insisting upon its enforcement. *Dibrell v. Georgia Home Ins. Co.*, 110 N. C. 193, 14 S. E. 783 (1892).

The stipulations in accident insurance policies that proceedings shall not be begun until ninety days after proof of loss do not contravene this section, when the policy also states that the insured may bring his action within twelve months after the accident, this being construed to mean that he will have twelve months after the cause of action accrues. *Heilig v. Aetna Life Ins. Co.*, 152 N. C. 358, 67 S. E. 927 (1910).

Fraternal Orders.—Provisions of the constitution and bylaws of a fraternal insurance order, that suits shall not be brought or maintained for any cause or claim arising out of the benefit certificate of a member unless within one year from the time the right of action accrues, are valid. *Faulk v. Fraternal Mystic Circle*, 171 N. C. 301, 88 S. E. 431 (1916).

Contracts of indemnity against loss or surety bonds for the faithful performance of a building contract are regarded in the nature of contracts of insurance and any conflicting restriction in such contract as to the time of bringing an action to recover damages for the breach of the contract is void. *Guilford Lumber Mfg. Co. v. Johnson*, 177 N. C. 44, 97 S. E. 732 (1919).

Limitation Must Be Pleaded.—A limitation in a surety bond as to the time in which an action may be maintained against the surety thereon, after notice of default, is contractual, and affects the remedy, and it is necessary that the surety plead it in the action for it to be available as a defense. *Ideal Brick Co. v. Gentry*, 191 N. C. 636, 132 S. E. 800 (1926).

Nonsuit.—In case a nonsuit is entered and it does not appear on record when the nonsuit was entered it will be pre-

sumed that it was within six months prior to the date on which action was commenced. *Parker v. Insurance Co.*, 143 N. C. 339, 55 S. E. 717 (1906).

§ 58-31.1. Proof of loss forms required to be furnished.—When any company under any insurance policy requires a written proof of loss after notice of such loss has been given by the insured or beneficiary, the company or its representative shall furnish a blank to be used for that purpose. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss, upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made. (1945, c. 377.)

§ 58-32. Insurance as security for a loan by the company.—Where an insurance company, as a condition for a loan by such company, of money upon mortgage or other security, requires that the borrower insure either his life or that of another, or his property, or the title to his property, with the company, and assign or cause to be assigned to it a policy of insurance as security for the loan, and agree to pay premiums thereon during the continuance of the loan, whether the premium is paid annually, semiannually, quarterly, or monthly, such premiums shall not be considered as interest on such loans, nor will any loan be rendered usurious by reason of any such requirements, where the rate of interest charged for the loan does not exceed the legal rate and where the premiums charged for the insurance do not exceed the premiums charged to other persons for similar policies who do not obtain loans. (1915, c. 8; 1917, c. 61; C. S., s. 6291.)

Section Does Not Exempt from Usury Laws.—This section was held not to exempt insurance companies from the provisions of § 24-1 and § 24-2, relating to usury, the purport and effect of the section being merely to allow insurance companies to require as a condition precedent to the loan of money that the borrower take out a policy of insurance and assign same as security for the loan. If this section did provide that insurance companies should be exempt from § 24-1 and § 24-2, it would be void as in violation of

Art. I, § 7, of the Constitution. *Cowan v. Security Life, etc., Co.*, 211 N. C. 18, 188 S. E. 812 (1936).

Endowment Policy.—A ten-year endowment policy comes within the provisions of this section, when such endowment policy provides that the face amount thereof shall be paid to the beneficiary if insured dies during the ten-year period while the policy is in force. *Cowan v. Security Life, etc., Co.*, 211 N. C. 18, 188 S. E. 812 (1936).

§ 58-33. Companies must do business in own name.—Every insurance company must conduct its business in the State in, and the policies and contracts of insurance issued by it shall be headed or entitled only by, its proper or corporate name. (1899, c. 54, s. 18; Rev., s. 4811; C. S., s. 6292; 1945, c. 377.)

Editor's Note.—The 1945 amendment struck out the words "foreign or domestic" formerly appearing after the word "company" in line one.

§ 58-33.1. Must not pay death benefits in services.—No insurance company now doing business in this State or that may hereafter be authorized to do business in this State issuing contracts providing benefits in the event of death shall issue any contract providing for the payment of benefits in merchandise or service to be rendered to such policyholder or his beneficiary. (1945, c. 377.)

§ 58-34. Publication of assets and liabilities; penalty for failure.—When any company publishes its assets, it must in the same connection and with equal conspicuousness publish its liabilities computed on the basis allowed for its annual statements; and any publications purporting to show its capital must exhibit only the amount of such capital as has been actually paid in cash. Any company or agent thereof violating the provision of this section shall be punished

by a fine of not less than fifty nor more than two hundred dollars. (1899, c. 54, ss. 18, 96; Rev., ss. 3492, 4812; C. S., s. 6293.)

§ 58-35. Unearned premium reserves.—Every insurance company other than life and real estate title insurance shall maintain unearned premium reserves equal to the unearned portions of the gross premiums charged on unexpired or unterminated risks and policies, provided, that excluding commissions thereon, unmatured installment premiums on such risks and policies may be treated as admitted assets or allowed as deductions from liabilities in computing the necessary reserves therefor, subject to regulations issued by the Commissioner. No deductions may be made from the gross premiums in force except for original premiums canceled on risks terminated or reduced before expiration, or except for premiums paid or credited for risks reinsured with other solvent assuming insurers. Premiums charged for bulk or portfolio reinsurance assumed from other insurers shall be included as premiums in force on the basis of the original premiums and the original terms of the policies of the ceding insurer. Reinsurance ceded to such an assuming insurer may be deducted on the basis of original premiums and original terms except in the case of excess loss or catastrophe reinsurance which may be deducted only on the basis of actual reinsurance premiums and actual reinsurance terms. The Commissioner of Insurance may accept the valuation made by the company upon such evidence of its correctness as the Commissioner may require.

If in the opinion of the Commissioner the above method does not produce an adequate reserve he may require the company to calculate its unearned premium reserve upon the monthly pro rata fractional basis, or, if necessary, on each respective risk from the date of the issuance of the policy, and in case of premiums covering indefinite terms he may prescribe special regulations. (1899, c. 54, s. 67; 1901, c. 391, s. 5; Rev., s. 4704; 1907, c. 1000, s. 4; C. S., s. 6294; 1945, c. 377; 1947, c. 721.)

Editor's Note.—The 1945 amendment repealed the former section and inserted in lieu thereof the present section and §§ 58-35.1 and 58-35.2. The 1947 amendment substituted in the first sentence the word "unterminated" for the word "undetermined", and added the proviso to the sentence. For comment on the 1947 amendment, see 25 N. C. Law Rev. 440.

Section Constitutional.—This section in no way impinges on the Constitution. *Hardware Mut. Fire Ins. Co. v. Stinson*, 210 N. C. 69, 185 S. E. 449 (1936).

Unearned premiums are a liability of the company. *Hardware Mut. Fire Ins. Co. v. Stinson*, 210 N. C. 69, 185 S. E. 449 (1936).

§ 58-35.1. Loss reserves of fire and marine insurance companies.—In any determination of the financial condition of any fire or marine or fire and marine insurance company authorized to do business in this State, such company shall be charged, in addition to its unearned premium liability as prescribed in § 58-35, with a liability for loss reserves in an amount equal to the aggregate of the estimated amounts payable on all outstanding claims reported to it which arose out of any contract of insurance or reinsurance made by it, and in addition thereto an amount fairly estimated as necessary to provide for unreported losses incurred on or prior to the date of such determination, and including, both as to reported and unreported claims, an amount estimated as necessary to provide for the expense of adjusting such claims, and there shall be deducted, in determining such liability for loss reserves, the amount of reinsurance recoverable by such company, in respect to such claims, from assuming insurers. (1945, c. 377.)

§ 58-35.2. Loss and loss expense reserves of casualty insurance and surety companies.—1. In determining the financial condition of any casualty insurance or surety company and in any financial statement or report of any such company, there shall be included in the liabilities of such company loss reserves and loss expense reserves at least equal to the amounts required under the provisions of this section, and the amount of such reserves shall be dimin-

ished by allowance or credit for reinsurance recoverable from assuming insurers. The date as of which such determination, statement or report is made is herein-after referred to as the date of determination.

2. For all outstanding losses, other than those incurred under policies of workmen's compensation, employer's liability or personal injury liability insurance, such loss reserves shall include the following:

(a) The aggregate estimated amounts due or to become due on account of all losses and claims incurred but not paid, including the estimated liability on any notice received by the company of the occurrence of any event which may result in a loss.

(b) The aggregate amounts of liability for all losses incurred but on which no notice has been received, estimated in accordance with the company's prior experience, if any, otherwise in accordance with the experience of similar companies under similar contracts of insurance. The estimated liabilities for such losses under all its bonds, policies or contracts of, or covering any of the risks of, fidelity insurance, shall be not less than ten per cent of the net premiums in force thereon, and the estimated liabilities for all such losses under all its surety contracts shall be not less than five per cent of the net premium in force thereon.

In any loss reserves computed in accordance with rules or regulations prescribed by the Commissioner under the provisions of subsections seven or eight there shall be included, for liability upon all losses incurred but on which no notice has been received, an amount not less than that indicated by the company's experience.

3. The reserves for outstanding losses and loss expenses under policies of personal injury liability insurance and under policies of employer's liability insurance, except as provided in subsections seven and eight, shall be computed as follows:

(a) For all liability suits being defended under policies written:

(1) Ten years or more prior to the date of determination, one thousand five hundred dollars for each suit.

(2) Five or more and less than ten years prior to the date of determination, one thousand dollars for each suit.

(3) Three or more and less than five years prior to the date of determination, eight hundred fifty dollars for each suit. In any event the total loss and loss expense reserves for all such liability policies written more than three years prior to the date of determination shall be not less than the aggregate of the estimated unpaid losses and loss expenses under such policies computed on an individual case basis.

(b) For all such liability policies written during the three years immediately preceding the date of determination, such reserves shall be the sum of the reserves for each such year, which shall be sixty per cent of the earned premiums on liability policies written during such year less all loss and loss expense payments made under such policies written in such year. In any event such reserves for each of such three years shall be not less than the aggregate of the estimated unpaid losses and loss expense for claims incurred under liability policies written in the corresponding year computed on an individual case basis.

4. The reserves for outstanding losses and loss expenses under policies of workmen's compensation insurance, except as provided in subsections seven and eight, shall be computed as follows:

(a) For all such compensation policies written more than three years prior to the date of determination, such reserves shall be the present values, at three and one-half per cent interest per annum, of the determined and estimated future loss and loss expense payments under such policies computed on an individual case basis.

(b) For all such compensation policies written during the three years immediately preceding the date of determination, such reserve shall be the sum of the reserves for each such year, which shall be sixty-five per cent of the earned

premiums on such compensation policies written during such year less all loss and loss expense payments made under such policies written in such year. In any event such reserves for each of such three years shall be not less than the present values at three and one-half per cent interest per annum, of the determined and estimated unpaid losses and loss expenses in connection with claims incurred under compensation policies written in the corresponding year computed on an individual basis.

5. The earned premiums referred to in this section shall be computed as follows: Determine the gross premiums charged on all such policies written or assumed, including all determined excess and additional premiums thereon; then deduct return premiums thereon other than premiums returned to policyholders as dividends, and deduct premiums for reinsurance ceded thereon to assuming insurers, and from such net premiums deduct the unearned premiums on such policies in force. The policy year basis as used in this section means the year in which a policy is written and all premiums, losses and loss expenses relating to policies written in such year shall be credited or charged to such year.

The terms "loss payments" and "loss expense payments" as used in this section shall be determined by including all payments to claimants under such policies, payments for medical and surgical attendance, legal expenses, salaries and expenses of investigators, adjusters and field men, apportionable salaries and expenses of the home office and branch offices and all other payments made by such insurer on account of claims under such policies, whether such payments shall be allocated to specific claims or unallocated. Loss and loss expense payments shall be reduced by the amount of reinsurance recovered therefor from any assuming insurer.

6. All unallocated payments of liability loss expenses on policies referred to in subsection three, made in a given calendar year subsequent to the first four years in which an insurer has been issuing liability policies shall be distributed by policy years as follows: Thirty-five per cent shall be charged to that year, forty per cent to the preceding year, ten per cent to the second year preceding, ten per cent to the third year preceding and five per cent to the fourth year preceding. Such payments made in each of the first four calendar years in which an insurer issued liability policies shall be distributed by policy years as follows: In the first calendar year one hundred per cent shall be charged to that year, in the second calendar year fifty per cent to that year and fifty per cent to the preceding year, in the third calendar year forty per cent to that year and forty per cent to the preceding year and twenty per cent to the second year preceding, and in the fourth calendar year thirty-five per cent to that year and forty per cent to the preceding year and fifteen per cent to the second year preceding and ten per cent to the third year preceding. A schedule showing such distribution shall be included in the annual statement.

All unallocated payments of compensation loss expenses on policies referred to in subsection four, made in a given calendar year subsequent to the first three years in which an insurer has been issuing compensation policies shall be distributed by policy years as follows: Forty per cent shall be charged to that year, forty-five per cent to the preceding year, ten per cent to the second year preceding and five per cent to the third year preceding. Such payments made in each of the first three calendar years in which an insurer issues compensation policies shall be distributed by policy years as follows: In the first calendar year one hundred per cent shall be charged to that year, in the second calendar year fifty per cent to that year and fifty per cent to the preceding year, in the third calendar year forty-five per cent to that year, and forty-five per cent to the preceding year and ten per cent to the second year preceding. A schedule showing such distribution shall be included in the annual statement.

7. Whenever in the judgment of the Commissioner the loss and loss expense reserves of any casualty or surety company doing business in this State calculated in accordance with the foregoing provisions are inadequate, he may, in his

discretion, modify the formulas hereinbefore set forth or prescribe any other basis which will produce adequate reserves. Each insurer that writes liability or compensation policies shall include in the annual statement required by law a schedule of its experience thereunder in such form as the Commissioner may prescribe.

8. For the purpose of determining loss reserves every casualty insurance and every surety company doing business in this State shall keep a complete and itemized record showing all losses and claims on which it has received notice, including all notices received by it of the occurrence of any event which may result in a loss. (1945, c. 377.)

§ 58-36. Corporation or association maintaining office in State required to qualify and secure license.—Any corporation or voluntary association, other than an association of companies, the members of which are licensed in this State, issuing contracts of insurance and maintaining a principal, branch, or other office within this State, whether soliciting business in this State or in foreign states, shall qualify under the insurance laws of this State applicable to the type of insurance written by such corporation or association and secure license from the Commissioner of Insurance as provided under this chapter on insurance, as amended, and the officers and agents of any such corporation or association maintaining offices within this State and failing to qualify and secure license as herein provided shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1937, c. 39.)

§ 58-37. Revocation of license of foreign company; publication of notice.—If the Commissioner of Insurance is of the opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition, or, if a life insurance company, that its actual funds, exclusive of its capital, are less than its liabilities; or that it has failed to comply with the law, or if it, its officers or agents, refuse to submit to examination or to perform any legal obligation in relation thereto, he shall revoke or suspend all certificates of authority granted to it or its agents, and shall cause notification thereof to be published in one or more newspapers published in this State; and no new business may thereafter be done by it or its agents in this State while such default or disability continues, or until its authority to do business is restored by the Commissioner. (1899, c. 54, s. 14; 1901, c. 176, s. 1; Rev., s. 4701; C. S., s. 6295.)

§ 58-38. Revocation of license of domestic company; injunction and receiver.—If, upon examination, the Commissioner of Insurance is of the opinion that any domestic insurance company is insolvent, or has exceeded its powers, or failed to comply with any provision of law, or that its condition is such as to render its further proceeding hazardous to the public or to its policyholders, he shall revoke its license, and, if he deems it necessary, shall apply to a judge of the superior court to issue an injunction restraining it in whole or in part from further proceeding with its business. The judge may issue the injunction forthwith, or upon notice and hearing thereon, and after a full hearing of the matter may dissolve or modify the injunction or make it permanent, and may make all orders and judgments needful in the matter, and may appoint agents or a receiver to take possession of the property and effects of the company and to settle its affairs, subject to such rules and orders as the court from time to time prescribes. (1899, c. 54, s. 14; Rev., s. 4702; C. S., s. 6296.)

§ 58-39. Revocation, suspension and refusal to renew license.—The license of any insurer, including fraternal orders and societies, may in the discretion of the Commissioner be suspended or revoked or its renewal refused, (1) whenever it fails or refuses to comply with any law, order or regulation applicable to it; (2) whenever its condition is unsound, or its assets above its lia-

bilities, exclusive of capital, are less than the amount of its capital or required minimum surplus; (3) whenever it has published or made to the Department or to the public any false statement or report; (4) whenever it refuses to submit to any examination authorized by law; (5) whenever it is found to make a practice of unduly engaging in litigation, or delaying the investigation of claims or the adjustment or payment of valid claims.

Any such suspension, revocation or refusal to renew a license may also be made applicable to the license of an agent who is a party to such default or improper practice. (1899, c. 54, ss. 66, 75, 112; 1901, c. 391, s. 5; Rev., ss. 4703, 4705; C. S., s. 6297; 1947, c. 721.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 58-39.1. Limitation of risk.—Except as otherwise provided in this chapter, no insurer doing business in this State shall expose itself to any loss on any one risk in an amount exceeding ten per cent of its surplus to policyholders. Any risk or portion of any risk which shall have been reinsured shall be deducted in determining the limitation of risk prescribed in this section. This section shall not apply to life insurance or to the insurance of marine risks, or marine protection and indemnity risks, or workmen's compensation or employer's liability risks, or to certificates of title or guaranties of title or policies of title insurance. For the purpose of determining the limitation of risk under any provision of this chapter, "surplus to policyholders" shall (a) be deemed to include any voluntary reserves, or any part thereof, which are not required by or pursuant to law, and (b) be determined from the last sworn statement of such insurer on file with the Commissioner pursuant to law, or by the last report on examination filed by the Commissioner, whichever is more recent at the time of assumption of such risk. In applying the limitation of risk under any provision of this chapter to alien insurers, such provision shall be deemed to refer to the exposure to risk and to the surplus to policyholders of the United States branch of such alien insurer. (1945, c. 377.)

§ 58-39.2. Limitation of liability assumed.—No company transacting fidelity or surety business in this State shall expose itself to any loss on any one fidelity or surety risk or hazard in an amount exceeding ten per centum of its policyholders' surplus, unless it shall be protected in excess of that amount by:

(a) Reinsurance in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured jointly with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof; or

(b) The cosuretyship of such a company similarly authorized; or

(c) By deposit with it in pledge or conveyance to it in trust for its protection of property; or

(d) By conveyance or mortgage for its protection; or

(e) In case a suretyship obligation was made on behalf or on account of a fiduciary holding property in a trust capacity, by deposit or other disposition of a portion of the property so held in trust that no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such company; except by decree or order of a court of competent jurisdiction;

Provided: (1) That such company may execute what are known as transportation or warehousing bonds for United States internal revenue taxes to an amount equal to fifty per centum of its policyholders' surplus; (2) that, when the penalty of the suretyship obligation exceeds the amount of a judgment described therein as appealed from and thereby secured, or exceeds the amount of the subject matter in controversy or of the estate in the hands of the fiduciary

for the performance of whose duties it is conditioned, the bond may be executed if the actual amount of the judgment or the subject matter in controversy or estate not subject to the supervision or control of the surety is not in excess of such limitation; and (3) that, when the penalty of the suretyship obligation executed for the performance of a contract exceeds the contract price, the latter shall be taken as the basis for estimating the limit of risk within the meaning of this section.

No such company shall, anything to the contrary in this section notwithstanding, execute suretyship obligations guaranteeing the deposits of any single financial institution in an aggregate amount in excess of ten per centum of the policyholders' surplus of such surety, unless it shall be protected in excess of that amount by credits in accordance with subdivisions (a), (b), (c) or (d) of this section: Provided, nothing in this section shall be construed to make invalid any contract entered into by such company with another person, firm, corporation or municipal corporation, notwithstanding any provisions of this section. (1911, c. 28; C. S., s. 6382; 1931, c. 285; 1945, c. 377.)

Editor's Note.—The 1945 amendment rewrote former § 58-119 and transferred it to this section. For discussion of former section, see 9 N. C. Law Rev. 394.

fiduciaries and their sureties, see *Leonard v. York*, 202 N. C. 704, 163 S. E. 878 (1932), citing *Pierce v. Pierce*, 197 N. C. 348, 148 S. E. 438 (1929).

As to joint-control agreements between

§ 58-39.3. Reinsurance, when permitted; effect on reserves.—1. Every insurer authorized to do an insurance business in this State, hereinafter called the "ceding insurer" may, subject to the limitations of this chapter, reinsure its risks and policy liabilities in any other solvent insurer, hereinafter called the "assuming insurer," with the effects herein prescribed; but no prohibition or limitation herein contained shall invalidate any such contract of reinsurance as between the parties thereto. The Commissioner shall have authority to make investigations and call for information relating to all contracts of reinsurance and when in his judgment such reinsurance contracts are not satisfactory he may disallow credit therefor as an admitted asset or as a deduction from loss and unearned premium reserve.

2. For the purpose of determining the financial condition of a ceding insurer, it shall, in addition to any credit allowed against its loss reserves, receive credit for such reinsurance calculated in the following manner:

(a) In the case of reinsurance of the whole or any part of any risk other than as specified in paragraph (b) following, the ceding insurer shall receive credit for such reinsurance by way of deduction from its unearned premium liability calculated in accordance with the provisions of § 58-35.

(b) In the case of reinsurance of the whole or any part of any life insurance or annuity or noncancellable disability risk, the ceding insurer shall receive credit, by way of deduction from its reserve liability, in an amount not exceeding the amount of the reserve on the reinsured portion of such risk which the ceding insurer would have maintained if such portion had not been reinsured.

Nothing contained in this section shall be deemed to permit the ceding insurer to receive through the cession of the whole or any part of any risk or risks any advantage whereby its unearned premium reserve, or the net amount of its valuation reserves, as the case may be, is reduced below the required amount thereof by the provisions of this chapter.

3. For the purpose of determining the financial condition of any assuming insurer, such insurer shall be charged with an amount in its unearned premium liability equal to the amount of the deduction specified in paragraph (a) of subsection two, and in its valuation reserve liability with an amount at least equal to the amount which it would be required to maintain in accordance with the provisions of this chapter if it were the direct insurer of such assumed risks on the basis specified in the reinsurance agreement.

4. The Commissioner may revoke or suspend the license of any company violating the provisions of this section. (1945, c. 377.)

§ 58-39.4. Definitions.—1. An “insurance agent” is hereby defined to be an individual designated in writing by any insurance company lawfully licensed to do business in this State, to act as its agent, with authority to solicit, negotiate and effect contracts of insurance in its behalf, to collect the premiums thereon, or to do any of such acts.

2. An “insurance broker” is hereby defined to be an individual who being a licensed agent, procures insurance through a duly authorized agent of an insurer for which the broker is not authorized to act as agent.

3. A “general agent” is hereby defined to be an individual designated in writing by an insurance company lawfully licensed to do business in this State to act for it as agent or manager and with additional authority to appoint, designate or supervise local agents within a specified territory.

4. A “special agent” is hereby defined to be an individual other than an officer, manager, or general agent of the insurer, employed by an insurer or general agent to work with and assist agents in soliciting, negotiating, and effectuating insurance in such insurer or in the insurers represented by the general agent.

5. An “insurance adjuster” is hereby defined to be any person who for compensation, fee or commission as an employee of an insurance company, so designated by such company on forms furnished by the Commissioner, investigates or reports to his principal relative to claims arising under insurance contracts other than life, annuities, health or accident on behalf solely of the insurer.

6. An “independent adjuster” is hereby defined to be any person who for compensation, fee or commission as an independent contractor, or as an employee of an independent contractor, investigates or reports to an insurer relative to claims arising under contracts other than life, annuities, health or accident on behalf solely either of the insurer or the insured.

7. An attorney at law who adjusts insurance losses from time to time incidental to the practice of his profession, an adjuster of marine losses, or a special agent who adjusts for companies for which he is licensed as agent is not deemed to be an “adjuster” for the purposes of this chapter. A person who investigates and reports on claims arising under the terms of a hail insurance policy shall be deemed to be an employee of an insurance company for the purposes of this section. (1947, c. 922; 1949, c. 958, s. 1.)

Editor's Note.—The 1949 amendment For changes made by the 1947 act in the struck out former subsection 5 and inserted in lieu thereof subsections 5, 6 and 7. laws relating to insurance agents, brokers and adjusters, see 25 N. C. Law Rev. 441.

§ 58-39.5. Independent insurance adjuster to obtain license.—Every independent insurance adjuster shall obtain annually from the Commissioner a license under the seal of his office showing that he is authorized to act as an independent adjuster for companies licensed to do business in this State. Every such independent adjuster shall on demand exhibit his license to any representative of the Insurance Department or to any person interested in a loss under adjustment. (1949, c. 958, s. 1.)

Editor's Note.—For act relating to li- 1949 and to the chapter inserting this sec-
censes of insurance adjusters for the year tion, see Session Laws 1949, c. 1244.

§ 58-39.6. Companies to file authorization for independent adjusters.—Every insurance company licensed to do business in this State who uses for adjustment purposes the services of an independent adjuster shall be required to file in the office of the Commissioner a statement of authorization containing the names of those independent adjusters who are authorized, on its behalf, to investigate and report on claims arising under insurance contracts, other than life, annuities, health or accident, issued by such companies. No independent ad-

juster shall make any investigation, report or settlement of any claim on behalf of any company which has not filed in the office of the Commissioner a written statement authorizing the licensee to act on its behalf as provided herein. (1949, c. 958, s. 1.)

§ 58-40. Agents and adjusters must procure license.—Every agent or adjuster of any insurance company authorized to do business in this State shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office, showing that the company for which he is agent or proposes to adjust is licensed to do business in this State, and that he is an agent of such company and duly authorized to do business for it. And every such agent or adjuster, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit insurance. (1899, c. 54, s. 81; 1901, c. 391, s. 7; 1903, c. 438, s. 8, c. 774; Rev., s. 4706; 1915, c. 109, s. 7, c. 166, s. 1; C. S., s. 6298.)

Cross References.—As to punishment for violating this section, see § 58-47. As to license required of independent insurance adjuster, see § 58-39.5.

Validity of Contract When Agent Not Licensed.—Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another state which is unauthorized to write it here, because of not having obtained the license required by law, the policy is valid as to

the right of action of the insured thereon. *Hay v. Union Fire Ins. Co.*, 167 N. C. 82, 83 S. E. 241 (1914).

Agent of Fraternal Insurance Order.—This section is applicable to all agents including an organizer of a fraternal insurance order operating in North Carolina. *State v. Arlington*, 157 N. C. 640, 73 S. E. 122 (1911).

Cited in *Charleston, etc., Ry. Co. v. Lassiter & Co.*, 207 N. C. 408, 177 S. E. 9 (1934).

§ 58-40.1. Insurance brokers must procure license.—Every insurance broker shall be required to obtain annually from the Commissioner a license under the seal of his office, showing that he is authorized to procure insurance through duly authorized agents of insurers for which he is not authorized to act as agent. Such license shall be issued to cover only those kinds of insurance authorized by his agent's license. Every such broker shall, on demand, exhibit his license to any representative of the Insurance Department or to any person from whom he shall solicit insurance. (1947, c. 922.)

§ 58-40.2. Bond required of brokers.—1. Every applicant for a resident broker's license or for the renewal thereof shall file with the application and shall thereafter maintain in force while so licensed a bond in favor of the State of North Carolina for the use of aggrieved parties, executed by an authorized corporate surety approved by the Commissioner, in the amount of five thousand dollars. The bond may be continuous in form, and total aggregate liability on the bond may be limited to the payment of five thousand dollars. The bond shall be conditioned on the accounting by the broker to any person requesting the broker to obtain insurance, for moneys or premiums collected in connection therewith.

2. Any such bond shall remain in force until the surety is released from liability by the Commissioner, or until the bond is canceled by the surety. Without prejudice to any liability accrued prior to such cancellation, the surety may cancel the bond upon thirty days' advance notice in writing filed with the Commissioner. (1947, c. 922.)

§ 58-40.3. Broker's authority and commissions.—1. A broker, as such, is not an agent or other representative of an insurer, and does not have power, by his own act, to bind an insurer for which he is not agent upon any risk or with reference to any insurance contract.

2. An insurer or agent shall have the right to pay to a broker licensed under

this chapter, and such broker shall have the right to receive from the insurer or agent, the customary commissions upon insurance placed in the insurer by the broker. (1947, c. 922.)

§ 58-41. Agent's and adjuster's qualifications.—Before a license is issued to an insurance agent, general agent, independent adjuster or adjuster in this State, the agent, general agent, independent adjuster or adjuster shall apply for license on forms to be prescribed by the Commissioner; in all cases where application is made for the license mentioned herein except those licenses of independent adjusters, the company for which the agent, general agent, or adjuster desires to act shall also apply for the license on forms to be prescribed by the Commissioner; and before he issues a license to such agent, general agent, independent adjuster or adjuster, the Commissioner shall satisfy himself that such license, if issued, shall serve the public interest and that the person applying for license as an agent, general agent, independent adjuster, or adjuster:

- (a) Be twenty-one years of age or over;
- (b) Be a bona fide resident of and actually reside in this State, except as provided in §§ 58-43 and 58-51.2;
- (c) Successfully pass an examination as required under § 58-41.1;
- (d) Be a trustworthy person;
- (e) Has not willfully violated any of the insurance laws of this State;
- (f) Has had special education, training or experience of sufficient duration and extent reasonably to satisfy the Commissioner that he possesses the competence necessary to fulfill the responsibilities of an agent, general agent, independent adjuster or adjuster.

No license may be issued to any agent whose premium writings represented by the premiums on contracts of insurance signed, countersigned, issued or sold by him for the general public during the preceding year, shall not exceed those on insurance signed, countersigned, issued or sold by him covering his own property or life and the property and lives of members of his immediate family, his employer and his employees; but this limitation shall not be deemed to apply to agents originally licensed and duly qualified prior to the ratification of this law. (1913, c. 79, s. 1; 1915, c. 109, ss. 6, 7, c. 166, s. 7; C. S., s. 6299; 1931, c. 185; 1945, c. 458; 1947, c. 922; 1949, c. 958, s. 1.)

Editor's Note.—The 1931 amendment added the provision that the license, if issued, shall serve the public interest.

The 1945 amendment added the last paragraph, the 1947 amendment rewrote the rest of the section, and the 1949 amendment made the section applicable

to "independent adjusters."

Employment Security Law.—An insurance agent is within the Employment Security Law. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939).

§ 58-41.1. Examinations for license.—1. Each applicant for license as agent, general agent, independent adjuster or adjuster shall, prior to the issuance of any such license, personally take and pass to the satisfaction of the Commissioner an examination in writing given by the Commissioner as a test of his qualifications and competence; but this requirement shall not apply to:

- (a) Applicants for license under § 58-41.2 and as agents for companies or associations specified in § 58-131.9;
- (b) Applicants who have, within the three year period next preceding the date of application, not including time spent in military service of the United States during war, been licensed in this State in the same capacity and to engage in the same kinds of insurance for which they were previously licensed;
- (c) Applicants for an agent's, general agent's, independent adjuster's or adjuster's license covering the same kinds of insurance as authorized by the license then held by them except as provided in paragraph 2 of this section;
- (d) Applicants for license to write ocean marine insurance whenever the

Commissioner deems the applicant to be qualified by past experience to deal in such insurance.

2. The Commissioner may require any licensed agent, general agent, independent adjuster or adjuster to take and successfully pass an examination in writing, testing his competence and qualifications as a condition to the continuance or renewal of his license, if the licensee has been guilty of any violation of any provision of this chapter. If a person fails to pass such an examination, the Commissioner shall revoke all licenses issued in his name and no license shall be issued until such person has successfully passed an examination as provided in this chapter.

3. Each examination shall be as the Commissioner prescribes and shall be of sufficient scope to test the applicant's knowledge of the terms and provisions of the policies or contracts of insurance he proposes to effect or types of claims or losses he proposes to adjust, and of the duties and responsibilities of and the laws of this State applicable to such a license.

4. The answers of the applicant to any such examination shall be written by the applicant under the Commissioner's supervision. The Commissioner shall give examinations at such times and places within this State as he deems necessary reasonably to serve the convenience of both the Commissioner and applicants. The Commissioner shall require a waiting period of at least ninety days' duration before giving a new examination to an applicant who has failed to pass a previous similar examination.

5. The Commissioner shall collect in advance the examination fee provided in § 105-228.7. (1947, c. 922; 1949, c. 958, s. 1.)

Editor's Note.—The 1949 amendment made the section applicable to "independent adjusters."

§ 58-41.2. **Limited license.**—1. The Commissioner may issue limited licenses as travel insurance agents to employees of common carriers of persons, or to individuals or employees of persons engaged in selling transportation on such common carriers.

2. Travel insurance agents are restricted to the sale of insurance to individuals entitled to transportation on a common carrier, as follows:

(a) Transportation ticket policies of accident insurance;

(b) Baggage insurance on the personal effects of such individuals while in transit. (1947, c. 922.)

§ 58-41.3. **Temporary license.**—1. The Commissioner may issue an agent's, general agent's or broker's temporary license in the following circumstances:

(a) To applicants for licensing as agent of a life insurer pending the passing of the examination provided for in § 58-41.1;

(b) To the personal representative of a deceased licensed agent, general agent or broker, or to his surviving spouse or to some other proper person in case the personal representative or surviving spouse does not apply or is not qualified therefor;

(c) To an employee, legal guardian or spouse of a licensed agent, general agent or broker becoming disabled because of sickness, insanity or injury, or to some other proper person.

2. An individual to be eligible for any such temporary license must be qualified as for a permanent license except as to experience, training or the taking of the examination.

3. The fee paid to the Commissioner for issuance of a temporary license as specified in § 105-228.7 shall be credited toward the fee required for a permanent license which is issued to replace the temporary license prior to the expiration of such temporary license.

4. No such temporary license shall be effective for more than ninety days in

any twelve month period and shall automatically terminate upon such licensee's failing the examination required in § 58-41.1. The Commissioner may refuse so to license again any person who has previously held a temporary license.

5. An individual requesting a temporary license on account of death or disability of an agent, general agent or broker shall not be so licensed for any insurer as to which such agent, general agent or broker was not licensed at the time of death or commencement of disability. (1947, c. 922.)

§ 58-42. Revocation of license.—When the Commissioner is satisfied that any insurance agent, general agent, special agent, independent adjuster, adjuster, broker or nonresident broker licensed by this State has willfully violated any of the insurance laws of this State, or has willfully overinsured property or has willfully misrepresented any policy of insurance, or has dealt unjustly with or willfully deceived any person in regard to any insurance policies, or has exercised coercion in obtaining an application for or in selling insurance, or, on demand, has failed or refused to pay over or deliver to the company which he represents, or has represented, any money or property in his hands belonging to the company, or has become in any way disqualified according to any of the provisions necessary for obtaining or holding such license as set out in this chapter, or has obtained or attempted to obtain any license through willful misrepresentation or fraud, the Commissioner may immediately suspend his license or licenses and shall forthwith give to such licensee ten days' notice of the charge or charges and of a hearing thereon, and if the Commissioner finds there has been any of the violations hereinbefore set forth, he shall specifically set out such finding and shall revoke the license of such agent, general agent, special agent, independent adjuster, adjuster, broker or nonresident broker for all the companies which he represents in this State. Such agent, general agent, special agent, independent adjuster, adjuster, broker, or nonresident broker shall have the right to have such revocation reviewed as provided in § 58-9.3. For the purposes of investigation under this section the Commissioner shall have all the power conferred upon him by § 58-44.4. (1913, c. 79, ss. 2, 3; 1915, c. 166, s. 7; C. S., s. 6300; 1929, c. 301, s. 1; 1943, c. 434; 1945, c. 458; 1947, c. 922; 1949, c. 958, s. 1.)

Cross Reference. — As to insurance agents and brokers wrongfully converting money being guilty of larceny, see § 14-96.

Editor's Note.—The 1943 amendment inserted the words "or has exercised coercion in obtaining an application for or in selling insurance." The 1945 amend-

ment substituted, in the next to last sentence, the words "as provided in § 58-9.3" for the words "by any judge of the superior court of Wake County upon appeal." The 1947 amendment rewrote the section, and the 1949 amendment made it applicable to independent adjusters.

§ 58-43. Nonresident agents forbidden; exception.—No nonresident of the State shall be licensed as an agent to do business in the State, except as a special agent or organizer, and except as a representative of a life insurance company, and then only when he reports his business for record as North Carolina business to some general or district agent of his company in the State, or having territory within the State. No such nonresident shall be licensed to represent a life insurance company in this State unless he is licensed to represent the same company in his home state and meets the licensing requirements of this chapter. (1899, c. 54, s. 108; 1903, c. 438, s. 11; Rev., s. 4707; C. S., s. 6301; 1945, c. 458; 1947, c. 922.)

Editor's Note.—The 1945 amendment added the second sentence and inserted in the first sentence the words "and except as a representative of a life insurance

company." The 1947 amendment inserted the words "as an agent" near the beginning of the section.

§ 58-44. Resident agents required.—All business done in this State by insurance companies doing the business of insurance as defined in subsections 3

to 22 inclusive of § 58-72 shall be transacted by their regularly authorized agents residing in this State, or through applications of such agents; and all policies so issued must be countersigned by such agents. It shall be unlawful for any salaried officer, manager or other representative of any such company to transact for his company any of the business of a licensed agent unless he himself shall be a bona fide resident licensed agent. (1899, c. 54, ss. 107, 108; 1903, c. 438, s. 11; Rev., s. 4810; 1911, c. 196, s. 5; 1913, c. 140, s. 3; C. S., s. 6302; 1921, c. 136, s. 3; 1925, c. 70, s. 1; 1945, c. 458.)

Editor's Note.—The 1945 amendment repealed the former section and inserted in lieu thereof the present section and the three following sections, which were re-

written from former §§ 58-170 and 58-171. **Cited** in *Charleston, etc., Ry. Co. v. Lassiter & Co.*, 207 N. C. 408, 177 S. E. 9 (1934).

§ 58-44.1. Agents not to pay commissions to nonresidents or unlicensed persons.—No licensed agent of any insurer shall pay directly or indirectly, any commission or brokerage or other valuable consideration on account of any policy of insurance on any risk in this State to any person not licensed in this State to act as agent for the same kind of insurance, provided however that with respect to the kinds of insurance as defined in subsections 3 to 22 inclusive of § 58-72 an agent may pay to a licensed nonresident broker not exceeding fifty per centum of the regular commissions allowed upon the issuance of such policies. (1903, c. 488, s. 2; 1905, c. 170, s. 2; Rev., s. 4766; C. S., s. 6430; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458; 1947, c. 922.)

Editor's Note.—The 1945 amendment ceding sections. The 1947 amendment rewrote § 58-170 as this and the two succeeding sections. The 1947 amendment rewrote this section.

§ 58-44.2. Licensing nonresident brokers.—The Commissioner may license a nonresident as an insurance broker to represent companies doing the business of insurance as defined in subsections 3 to 22 inclusive of § 58-72, upon application made in the form prescribed by the Commissioner, and upon such applicant's filing an affidavit setting forth that he will not during the period of the license place, directly or indirectly, any insurance on any risk located in this State except through licensed agents of companies licensed to do business in this State, that he is a bona fide broker, and proposes to hold himself out as such. The fee for such license shall be as fixed in the Revenue Act. For any violation of the terms on which such license is issued the Commissioner may revoke the same. (1903, c. 488, s. 2; 1905, c. 170, s. 2; Rev., s. 4766; C. S., s. 6430; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458.)

§ 58-44.3. Discrimination forbidden.—No company doing the business of insurance as defined in subsections 3 to 22 inclusive of § 58-72, nor its agents, shall make any discrimination in favor of any person, and all provisions of this chapter prohibiting discrimination by companies doing the business of insurance as defined in subsections 1 and 2 of § 58-72, shall equally apply to the companies referred to herein and to their agents. (1903, c. 488, s. 2; 1905, c. 170, s. 2; Rev., s. 4766; C. S., s. 6430; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458.)

§ 58-44.4. Revocation of license for violation; power of Commissioner.—When the Commissioner has information of a violation of any of the provisions of §§ 58-44, 58-44.1, 58-44.2, 58-44.3, and 58-169, he shall immediately investigate or cause to be investigated such violation, and if any such insurance company has violated any of said provisions he may immediately revoke its license for not less than three nor more than six months for a first offense, and for each offense thereafter for not less than one year. If a licensed insurance agent violates or causes to be violated any of the provisions of said sections, he may for the first offense have his license revoked for all companies for which he has been licensed for not less than three nor more than six months, and for the second offense he shall have his license revoked for all companies for which he is licensed, and he shall not thereafter be licensed for any company for one year from the date

of the revocation. For the purpose of enforcing the provisions of said sections the Commissioner is authorized and empowered to examine persons, administer oaths, and require production of papers and records. A failure or refusal on the part of any such insurance company, licensed to do business in this State, or representative thereof, to appear before the Commissioner when requested to do so, or to produce records and papers, or answer under oath, subjects such company, or representative, to the penalties of this section. (1903, c. 488, ss. 3, 4; Rev., s. 4767; C. S., s. 6431; 1945, c. 458.)

Editor's Note.—The 1945 amendment rewrote § 58-171 as this section.

§ 58-45. Agents personally liable, when.—Any agent representing an insurer is personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for any company not authorized to do business in the State. A person or citizen of the State who fills up or signs any open policy, certificate, blank or coupon of, or furnished by, an unlicensed company, agent, or broker, the effect of which is to bind any insurance in an unlicensed company on property in this State, is the agent of such company, and personally liable for all licenses and taxes due on account of such transaction. (1899, c. 54, s. 70; 1903, c. 438, s. 7; Rev., s. 4813; C. S., s. 6303; 1947, c. 922.)

Editor's Note.—The 1947 amendment substituted at the beginning of the section “insurer” for the words “An insurance agent.” the words “Any agent representing an

§ 58-46. Payment of premium to agent valid; obtaining by fraud a crime.—Any agent or broker who acts for a person other than himself negotiating a contract of insurance is, for the purpose of receiving the premium therefor, the company's agent, whatever conditions or stipulations may be contained in the policy or contract. Such agent or broker knowingly procuring by fraudulent representations payment, or the obligation for the payment, of a premium of insurance, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or be imprisoned for not more than one year. (1899, c. 54, s. 69; Rev., ss. 3486, 4814; C. S., s. 6304; 1947, c. 922.)

Editor's Note.—The 1947 amendment substituted “Any” for “An insurance” at the beginning of the section.

Payment to Agent or Broker as Payment to Company.—Payment of the initial premium on a policy of life insurance to one who is a soliciting agent or broker of the company to solicit the insurance and deliver the policy, constitutes payment to the company by virtue of this section. *Creech v. Sun Life Assur. Co.*, 224 N. C. 144, 29 S. E. (2d) 348 (1944).

Where Broker Fails to Deliver Funds.—Where the insurer has credited the amount of the unearned premium to its broker's account, who in turn has credited the amount to account of the broker who has procured the employer's application for the insurance, the insurer is liable to the employer for the amount of the unearned premium not actually paid to the

employer by the broker. *Hughes v. Lewis*, 203 N. C. 775, 166 S. E. 909 (1932).

Where Policy Requires Receipt.—Where a policy provided that premiums were payable to a duly authorized agent only in exchange for insurer's official receipt and where plaintiff's evidence showed payment of a note given for a premium to insurer's agent without obtaining the note or insurer's official receipt, and there was no evidence that insurer received any part of the payment, in insured's action to recover the premium paid after insurer had declared the policy forfeited, it was held that insurer's motion to nonsuit was properly allowed, payment to the agent under the circumstances not constituting payment to insurer. *Mills v. New York Life Ins. Co.*, 209 N. C. 296, 183 S. E. 289 (1936).

§ 58-47. Representing unlicensed company prohibited; penalty.—If any person shall unlawfully solicit, negotiate for, collect or transmit a premium for a contract of insurance or act in any way in the negotiation or transaction of any unlawful insurance with an insurance company not licensed to do an insurance business in North Carolina, he shall be guilty of a misdemeanor and upon

conviction shall pay a fine of not less than two hundred dollars nor more than five hundred dollars, or be imprisoned for not less than one nor more than two years, or both, at the discretion of the court. (1899, c. 54, s. 94; Rev., s. 3484; 1907, c. 1000, s. 8; C. S., s. 6305; 1945, c. 458.)

Editor's Note.—The 1945 amendment rewrote this section. Prior to the amendment an agent or broker acting without a license was covered by the section. The section also applied to the violation of any provisions of the chapter where the punishment was not provided for elsewhere. These matters are now covered by § 58-52. The case cited below was decided prior to the amendment.

The purpose of this section is to protect people from harmful imposition in contracts of insurance, and the evil which the statute is designed to prevent is as threatening in the case of a bogus as a real company, perhaps more so. *State v. Arlington*, 157 N. C. 640, 73 S. E. 122

(1911).
Section Applies to Agents of Fraternal Insurance Orders.—The agents of fraternal insurance orders are punishable under this section. *State v. Arlington*, 157 N. C. 640, 73 S. E. 122 (1911), wherein the conduct of an agent assuming to represent a fraternal insurance order was held to come within the statute.

Same—Indictment.—An indictment under this section will not be held fatally defective because it contains no direct averment that the fraternal order for which insurance business has been solicited is a company subject to insurance regulations. *State v. Arlington*, 157 N. C. 640, 73 S. E. 122 (1911).

§ 58-48. Agent failing to exhibit license.—If any agent representing an insurer or any broker shall, on demand of any person from whom he shall solicit insurance, fail to exhibit a certificate from the Commissioner of Insurance bearing the seal of his office, and dated within one year from such demand, he shall be fined five dollars or imprisoned ten days for each offense. (1899, c. 54, s. 81; Rev., s. 3485; C. S., s. 6306; 1947, c. 922.)

Editor's Note.—The 1947 amendment struck out the words "of any insurance company," and inserted in lieu thereof the words "representing an insurer or any broker."

§ 58-49. Agents making false statements.—If any agent, examining physician, or other person shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for insurance or publication with reference to any or shall make any such statement for the purpose of obtaining any fee, commission, money or benefit from any company engaged in the business of insurance in this State, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars, or imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, at the discretion of the court. (1899, c. 54, s. 60; Rev., s. 3487; C. S., s. 6307; 1945, c. 458; 1947, c. 922.)

Editor's Note.—The 1945 amendment substituted the word "application" for "publication" and inserted the words "or publication with reference to any." And the 1947 amendment struck out "solicitor" formerly appearing before the word "agent" near the beginning of the section.

§ 58-50. Agents signing certain blank policies.—No agent shall sign any blank contract or policy of insurance, and any agent guilty of violating this section shall, upon conviction, be fined for each offense not less than one hundred (\$100.00) dollars nor more than two hundred (\$200.00) dollars; provided, however, that transportation ticket policies of accident insurance and baggage insurance policies may be countersigned in blank for issuance only through coin-operated machines, subject to regulations prescribed by the Commissioner. (1899, c. 54, ss. 108, 109; Rev., s. 3488; 1911, c. 196, s. 6; C. S., s. 6308; 1945, c. 458; 1947, c. 922.)

Editor's Note.—The 1945 amendment rewrote this section, and the 1947 amendment added the proviso.

§ 58-51. Adjuster acting for unauthorized company.—If any person shall act as independent adjuster or adjuster on a contract made otherwise than as authorized by the laws of this State, or by any insurance company or other person not regularly licensed to do business in the State, or shall adjust or aid in the adjustment, either directly or indirectly, of a claim arising under a contract of insurance not authorized by the laws of the State, he shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than two hundred dollars nor more than five hundred dollars, or imprisoned not less than six months nor more than two years, or both, in the discretion of the court. (1899, c. 54, s. 114; Rev., s. 3482; C. S., s. 6309; 1945, c. 458; 1949, c. 958, s. 1.)

Editor's Note.—The 1945 amendment substituted the words "claim arising under a contract of insurance" for the words "loss by fire on property located in this State, incurred on a contract." And the 1949 amendment made this section applicable to independent adjusters.

§ 58-51.1. Agent may adjust.—On behalf and on request of an insurer for which he is licensed, any agent may from time to time act as an adjuster and investigate and report upon claims without being required to be licensed as an adjuster. (1947, c. 922.)

§ 58-51.2. Nonresident adjusters.—The Commissioner may license a nonresident as an insurance adjuster upon his compliance with all the requirements of this chapter applicable to resident adjusters. No license shall be required of an adjuster licensed as such in another state for the adjustment in this State of a single loss, or of losses arising out of a catastrophe common to all such losses. (1947, c. 922.)

§ 58-51.3. Companies and agents to transact business through licensed agents.—No insurance company, nor any agent of any insurance company shall on behalf of such company or agent knowingly permit any person not licensed as an insurance agent as provided by law to solicit insurance, negotiate for, collect or transmit a premium for a contract of insurance or to act in any way in the negotiation for any contract or policy of insurance; provided, no license shall be required of a person making and transmitting deductions for premiums under pay roll deduction plans for life, accident and/or health insurance. (1949, c. 1120.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 461.

§ 58-52. Agent acting without a license or violating insurance law.—If any person shall assume to act either as principal, agent, broker, independent adjuster or adjuster without license as is required by law, or pretending to be a principal, agent, broker, independent adjuster or adjuster, shall solicit, examine, or inspect any risk, or shall examine into, adjust, or aid in adjusting any loss, or shall receive, collect, or transmit any premium of insurance, or shall do any other act in the soliciting, making or executing any contract of insurance of any kind otherwise than the law permits, or as principal or agent shall violate any provision of law contained in this chapter, the punishment for which is not elsewhere provided for, he shall be deemed guilty of a misdemeanor, and on conviction shall pay a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars, or be imprisoned for not less than one nor more than two years, or both, at the discretion of the court. (1899, c. 54, s. 115; Rev., s. 3490; C. S., s. 6310; 1945, c. 458; 1949, c. 958, s. 1.)

Editor's Note.—The 1945 amendment rewrote this section, and the 1949 amendment made it applicable to independent adjusters. Prior to the 1945 amendment some of the provisions in this section were covered by § 58-47. See note to § 58-47.

§ 58-52.1. Process against nonresident licensees.—1. Each licensed nonresident agent, adjuster or broker shall by the act of acquiring such license

thereby be deemed to appoint the Commissioner as his attorney to receive service of legal process issued against the agent, adjuster or broker in this State upon causes of action arising within this State.

2. The appointment shall be irrevocable for as long as there could be any cause of action against the agent, adjuster or broker arising out of his insurance transactions in this State.

3. Duplicate copies of such legal process against such agent, adjuster or broker shall be served upon the Commissioner either by a person competent to serve a summons, or through registered mail. At the time of such service the plaintiff shall pay to the Commissioner a fee of one dollar, taxable as costs in the action to defray the expense of such service.

4. Upon receiving such service, the Commissioner shall forthwith send one of the copies of the process, by registered mail with return receipt requested, to the defendant agent, adjuster or broker at his last address of record with the Commissioner.

5. The Commissioner shall keep a record of the day and hour of service upon him of all such legal process. No proceedings shall be had against the defendant agent, adjuster or broker, and such defendant shall not be required to appear, plead or answer until the expiration of forty days after the date of service upon the Commissioner. (1947, c. 922.)

§ 58-53. Informer to receive half of penalty.—The person, if other than the Commissioner of Insurance or his deputy, upon whose complaint a conviction is had for violation of the law, prohibiting insurance in or by companies not authorized to do business in the State, or for soliciting, examining, inspecting any risk, or receiving, collecting, or transmitting any premium, or adjusting or aiding in the adjustment of a loss, under a contract made otherwise than as authorized by the laws of this State, is entitled to one-half of the penalty recovered therefor. (1899, c. 54, s. 93; Rev., s. 4831; C. S., s. 6311; 1945, c. 377.)

Editor's Note.—The 1945 amendment struck out the word "foreign" formerly appearing before "companies."

§ 58-53.1. Citizens authorized to procure policies in unlicensed foreign companies.—(1) **What Applicant Must Show.**—The Commissioner, upon the annual payment of a fee of twenty dollars, may issue licenses to citizens of this State, subject to revocation at any time, permitting the person named therein to procure policies of insurance on property in this State in foreign or alien insurance companies not authorized to transact business in the State. Before the person named in such a license may procure any insurance in such companies or on any property in this State, he must execute and file with the Commissioner an affidavit that he is unable to procure in companies admitted to do business in the State the amount of insurance necessary to protect such property, and may only procure insurance under such license after he has procured insurance in companies admitted to do business in this State to the full amount which those companies are willing to write on the property. If the person licensed under the provisions of this section procures insurance on property of others in such nonadmitted companies he shall stamp or write upon the filing face and the first page of each policy so issued the words "This company is not licensed to do business in North Carolina."

(2) **Account and Report.**—Each person so licensed must keep a separate account of the business done under the license, a certified copy of which account he shall forthwith file with the Commissioner, showing the exact amount of such insurance placed by any person, firm or corporation, the gross premium charged thereon, the companies in which the same is placed, the date and terms of the poli-

cies, and also a report in the same detail of all such policies canceled and the gross return premium thereon.

(3) **Bond Filed.**—Before receiving such license the applicant therefor shall execute and deliver to the Commissioner a bond in the penal sum of one thousand dollars, with such sureties as the Commissioner may approve, with a condition that the licensee will faithfully comply with all the requirements of §§ 58-53.1, 58-53.2 and 58-53.3, and will file with the Commissioner in January of each year, a sworn statement of the gross premiums charged for insurance procured or placed, and the gross returned premiums on such insurance canceled under such license during the year ending on the thirty-first day of December next preceding, and at the time of filing such statement will pay into the treasury of the State a sum equal to five per centum of such gross premiums, less return premiums, so reported, or pay such tax at the time of taking out and delivering such policy or policies. (1899, c. 54, ss. 68, 95; 1903, c. 438, s. 7, c. 680; Rev., ss. 4715, 4769; C. S., s. 6425; 1945, c. 378.)

Editor's Note.—The 1945 amendment rewrote former § 58-165 as this section. For decision under former wording of statute, see *Ivy River Land, etc., Co. v. National Fire, etc., Ins. Co.*, 192 N. C. 115, 133 S. E. 424 (1926), citing *Commonwealth Mut. Fire Ins. Co. v. Edwards*, 124 N. C. 116, 32 S. E. 404 (1899).

§ 58-53.2. Punishment for failure to file affidavit and statements.—If any person licensed to procure insurance in an unauthorized foreign or alien company shall procure, or act in any manner in the procurement or negotiation of, insurance in any unauthorized foreign or alien company, and shall neglect to make and file the affidavit and statements required by the preceding section, he shall forfeit his license and be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than one year, or by both. (1899, c. 54, ss. 68, 95; Rev., ss. 3483, 4769; C. S., s. 6426; 1945, c. 378.)

Editor's Note.—The 1945 amendment transferred this section from § 58-166 and inserted the words "or alien."

The former statute was referred to in

§ 58-53.3. Tax deducted from premium; reports filed.—When any person procures insurance on any property located in this State with an insurance company not licensed to do business in this State, it shall be the duty of such person to deduct from the premium charged on the policy or policies issued for such insurance five per centum of the premium and remit the same to the Commissioner of Insurance of the State, at the same time reporting to the Commissioner of Insurance the name of the company or companies issuing the policy or policies, the location of the property insured, and the premium charged. The Commissioner of Insurance shall pay the said amounts to the Treasurer of the State. If such report is not made on or before the thirtieth days of July and January of each year for the business done prior to July first and January first preceding, there shall be added to the amount of taxes thereon the sum of one per centum on the first day of each month thereafter. (1915, c. 109, s. 8; C. S., s. 6427; 1945, c. 378.)

Editor's Note.—The 1945 amendment struck out the words "or corporation" formerly appearing after the word "person" at two places in the first sentence. It also substituted near the beginning of the sentence the words "procures insurance on" for the words "shall insure."

§ 58-54. Forms to be approved by Commissioner of Insurance.—It is unlawful for any insurance company doing business in this State to issue, sell, or dispose of any policy, contract, or certificate, or use applications in connection therewith, until the forms of the same have been submitted to and approved by

the Commissioner of Insurance of North Carolina, and copies filed in the Insurance Department. (1907, c. 879; 1913, c. 139; C. S., s. 6312; 1945, c. 377.)

Editor's Note.—The 1945 amendment struck out the words "association, order or society" formerly appearing after the word "company" near the beginning of the section.

Validity of Unapproved Policy.—The statute does not purport to deal with the

validity of the contract of insurance, but with the insurance company. It does not say a policy shall be void unless approved by the Commissioner, but that it shall be unlawful for the company to issue such policy. *Blount v. Royal Fraternal Ass'n*, 163 N. C. 167, 79 S. E. 299 (1913).

ARTICLE 3A.

Unfair Trade Practices.

§ 58-54.1. **Declaration of purpose.**—The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. (1949, c. 1112.)

Editor's Note.—For brief discussion of this article, see 27 N. C. Law Rev. 461.

§ 58-54.2. **Definitions.**—When used in this article: (a) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters. (b) "Commissioner" shall mean the Commissioner of Insurance of this State. (1949, c. 1112.)

§ 58-54.3. **Unfair methods of competition or unfair and deceptive acts or practices prohibited.**—No person shall engage in this State in any trade practice which is defined in this article as or determined pursuant to this article to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. (1949, c. 1112.)

§ 58-54.4. **Unfair methods of competition and unfair or deceptive acts or practices defined.**—The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) **Misrepresentations and False Advertising of Policy Contracts.**—Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share or surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) **False Information and Advertising Generally.**—Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any per-

son in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Defamation.—Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) Boycott, Coercion and Intimidation.—Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

(5) False Financial Statements.—Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) Stock Operations and Insurance Company Advisory Board Contracts.—Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or any insurance company advisory board contracts or other contracts of any kind promising returns and profit as an inducement to insurance.

(7) Unfair Discrimination.—(a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) Rebates.—(a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract. (b) Nothing in clause (7) or paragraph (a) of clause (8) of this section shall be construed as including within the definition of discrimination or rebates any of the following practices: (i) In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, pro-

vided, that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense; (iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experienced thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year. (c) No insurer or employee thereof, and no broker or agent shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy of insurance. Nothing herein contained shall be construed as prohibiting the payment of commissions or other compensation to regularly appointed and licensed agents and to brokers duly licensed by this State; nor as prohibiting any participating insurer from distributing to its policyholders dividends, savings or the unused or unabsorbed portion of premiums and premium deposits. (1949, c. 1112.)

§ 58-54.5. Power of Commissioner.—The Commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this State in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by § 58-54.3 of this article. (1949, c. 1112.)

§ 58-54.6. Hearings, witnesses, appearances, production of books and service of process.—(a) Whenever the Commissioner shall have reason to believe that any such person has been engaged or is engaging in this State in any unfair method of competition or any unfair or deceptive act or practice defined in § 58-54.4, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of the hearing thereon to be held at the time and place fixed in the notice, which shall not be less than ten days after the date of the service thereof.

(b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the Commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the Commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

(c) Nothing contained in this article shall require the observance at any such hearing of formal rules of pleading or evidence.

(d) The Commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The Commissioner, upon such hearing, may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the Commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the superior court of Wake County, on application of the Commissioner, may issue an order requiring such person to com-

ply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

(e) Statements of charges, notices, orders, and other processes of the Commissioner under this article may be served by anyone duly authorized by the Commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return postcard receipt for such statement, notice, order, or other process, registered and mailed as aforesaid, shall be proof of the service of the same. (1949, c. 1112.)

§ 58-54.7. Cease and desist orders and modifications thereof.—(a)

If, after such hearing, the Commissioner shall determine that the method of competition or the act or practice in question is defined in § 58-54.4 and that the person complained of has engaged in such method of competition, act or practice in violation of this article, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such method of competition, act or practice.

(b) Until the expiration of the time allowed under § 58-54.8 (a) of this article for filing a petition for review (by appeal) if no such petition has been duly filed within such time or, if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the superior court, as hereinafter provided, the Commissioner may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section.

(c) After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the Commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require. (1949, c. 1112.)

§ 58-54.8. Judicial review of cease and desist orders.—(a) Any person required by an order of the Commissioner under § 58-54.7 to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice defined in § 58-54.4 may obtain a review of such order by filing in the superior court of Wake County, within thirty days from the date of the service of such order, a written petition praying that the order of the Commissioner be set aside. A copy of such petition shall be forthwith served upon the Commissioner, and thereupon the Commissioner forthwith shall certify and file in such court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commissioner. Upon such filing of the petition and transcript such court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the Commissioner, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the Commissioner, in whole or in part. The findings of the Commissioner as to the facts, if supported by substantial evidence, shall be conclusive.

(b) To the extent that the order of the Commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commissioner,

the court may order such additional evidence to be taken before the Commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings which, if supported by substantial evidence shall be conclusive, and his recommendations, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(c) A cease and desist order issued by the Commissioner under § 58-54.7 shall become final:

(1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the Commissioner may thereafter modify or set aside his order to the extent provided in § 58-54.7 (b); or

(2) Upon the final decision of the court if the court directs that the order of the Commissioner be affirmed or the petition for review dismissed.

(d) No order of the Commissioner under this article or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this State. (1949, c. 1112.)

§ 58-54.9. Procedure as to unfair methods of competition and unfair or deceptive acts or practices which are not defined.—(a) Whenever the Commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this State in any method of competition or in any act or practice in the conduct of such business which is not defined in § 58-54.4, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in § 58-54.6. The Commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(b) If such report charges a violation of this article and if such method of competition, act or practice has not been discontinued, the Commissioner may, through the Attorney General of this State, at any time after ten days after the service of such report cause a petition to be filed in the superior court of this State of the county wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite. To the extent that the order of the Commissioner is affirmed, the court shall thereupon issue its order commanding obedience to the terms of such order of the Commissioner.

(c) A transcript of the proceedings before the Commissioner including all evidence taken and the report and findings shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commissioner, the court may order such additional evidence to be taken before the Commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the Commissioner with respect thereto is to the interest of the public and that the findings of the Commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice. (1949, c. 1112.)

§ 58-54.10. **Judicial review by intervenor.**—If the report of the Commissioner does not charge a violation of this article, then any intervenor in the proceedings may within ten days after the service of such report, cause a notice of appeal to be filed in the superior court of Wake County for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the Commissioner, constitutes a violation of this article. (1949, c. 1112.)

§ 58-54.11. **Penalty.**—Any person who willfully violates a cease and desist order of the Commissioner under § 58-54.7, after it has become final, and while such order is in effect, shall forfeit and pay to the Commissioner for the use of the public schools of the county or counties in which the act or acts complained of occurred a sum to be determined by the Commissioner not to exceed \$1,000 for each violation, which if not paid may be recovered in a civil action instituted in the name of the Commissioner in a court of competent jurisdiction in Wake County. (1949, c. 1112.)

§ 58-54.12. **Provisions of article additional to existing law.**—The powers vested in the Commissioner by this article shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive. (1949, c. 1112.)

§ 58-54.13. **Immunity from prosecution.**—If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must nonetheless comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this State. Any such individual may execute, acknowledge and file in the office of the Commissioner a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced. (1949, c. 1112.)

ARTICLE 4.

Deposit of Securities.

§§ 58-55 to 58-61: Transferred to §§ 58-188.1 to 58-188.7 by Session Laws 1945, c. 384.

ARTICLE 5.

License Fees and Taxes.

§ 58-62. **Commissioner to report and pay monthly.**—On or before the tenth day of each month the Commissioner of Insurance shall furnish to the auditor a statement in detail of the taxes and license fees received by him during the previous month, and shall pay to the Treasurer the amount in full of such taxes and fees. The auditor may examine the accounts of the Commissioner of Insurance and check them up with said statement. (1899, c. 54, s. 82; 1901, c. 391, s. 7; 1905, c. 430, s. 4; Rev., s. 4714; C. S., s. 6317.)

§ 58-63. **Schedule of fees and charges.**—The Commissioner of Insurance shall collect and pay in the State treasury fees and charges as follows:

1. For filing and examining statement preliminary to admission, twenty dollars; for filing and auditing annual statement, ten dollars; for filing any other papers required by law, one dollar; for each certificate of examination, condition, or qualification of company or association, two dollars; for each seal when required, one dollar; for filing charter and other papers of a fraternal order, preliminary to admission, twenty-five dollars.

2. To be paid to the publisher, for the publication of each financial statement, nine dollars.

3. The Commissioner shall receive for copy of any record or paper in his office ten cents per copy sheet and one dollar for certifying same, or any fact or data from the records of his office; for examination of any foreign company, twenty-five dollars per diem and all expenses, and for examining any domestic company, actual expenses incurred; for the examination and approval of charters of companies, five dollars. The traveling and other expenses of accountants, and other examiners when engaged in the work of examination shall be paid by the companies, associations, or orders under investigation. For the investigation of tax returns and the collection of any delinquent taxes disclosed by such investigation, the Commissioner may, in lieu of the above per diem charge, assess against any such delinquent company the expense of the investigation and collection of such delinquent tax, a reasonable percentage of such delinquent tax, not to exceed ten per centum (10%) of such delinquency, and in addition thereto.

4. He shall collect all other fees and charges due and payable into the State treasury by any company, association, order, or individual under his department. (1899, c. 54, ss. 50, 68, 80, 81, 82, 87, 90, 92; 1901, c. 391, s. 7, c. 706, s. 2; 1903, c. 438, ss. 7, 8, c. 536, s. 4, cc. 680, 774; 1905, c. 588, s. 68; Rev., s. 4715; 1913, c. 140, s. 1; 1919, c. 186, s. 6; C. S., s. 6318; 1921, c. 218; 1935, c. 334; 1939, c. 158, s. 208; 1945, c. 386; 1947, c. 721.)

Editor's Note.—The 1945 amendment struck out, from the end of the first sentence of subsection 3, the words "also, to defray the expense of computing the value of the policies of domestic life insurance companies, one cent for every thousand dollars of the whole amount in-

sured by its policies so valued." The 1947 amendment also deleted from the first sentence of subsection 3 the words "for making and mailing abstracts to the clerks of the superior courts in the counties of the State, four dollars."

§ 58-64: Repealed by Session Laws 1945, c. 386.

§ 58-65. **Licensing of underwriters reinsurance agencies.**—An underwriters agency, composed of two or more companies, proposing to do a reinsurance business only in the State may be licensed without a separate license for each

company, upon filing with the Commissioner of Insurance a statement of each company, the amount proposed to be assumed by them, and such other information as he may call for, showing that the companies are solvent and propose to conduct the business in a way that would be safe and fair to the citizens of the State. (1919, c. 186, s. 6; C. S., s. 6318.)

§ 58-66. **Licenses run from April first; pro rata payment.**—The license required of insurance companies shall continue for the next ensuing twelve months after April first of each year, unless revoked as provided in this chapter; but the Commissioner of Insurance may, when the annual license tax exceeds twenty-five dollars, receive from applicants after April first so much of the license fee required by law as may be due pro rata for the remainder of the year, beginning with the first day of the current month. (1899, c. 54, s. 78; Rev., s. 4718; C. S., s. 6321.)

§ 58-67. **Statements of gross receipts filed and tax paid.**—Every general agent shall, within the first thirty days of January and July of each year, make a full and correct statement, under oath of himself and of the president, secretary, or some officer at the home or head office of the company in this country, of the amount of the gross receipts derived from the insurance business under this chapter obtained from residents of this State, or on property located therein during the preceding six months, and shall, within the first fifteen days of February and August of each year, pay to the Commissioner of Insurance the tax imposed upon such gross receipts. (1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8; Rev., s. 4719; C. S., s. 6322.)

§ 58-68. **Policyholders to furnish information.**—To enable the Commissioner of Insurance the better to enforce the payment of the taxes imposed by this chapter and by § 105-121 every corporation, firm, or individual doing business in the State shall, upon demand of the Commissioner, furnish to him, upon blanks to be provided by him, a statement of the amount of all insurance held by them, giving the name of the company, number, and amount of policies and the premiums paid on each, and such other information as the Commissioner calls for, or shall file an affidavit with the Commissioner that all their insurance is placed in companies licensed to do business in this State. (1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8; Rev., s. 4720; C. S., s. 6323.)

Editor's Note.—Section 105-121, referred to in this section, has been repealed.

SUBCHAPTER II.

INSURANCE COMPANIES.

ARTICLE 6.

General Domestic Companies.

§ 58-69. **Application of this chapter and general laws.**—The general provisions of law relative to the powers, duties, and liabilities of corporations apply to all incorporated domestic insurance companies where pertinent and not in conflict with other provisions of law relative to such companies or with their charters. All insurance companies of this State shall be governed by this chapter, notwithstanding anything in their special charters to the contrary, provided notice of the acceptance of this chapter is filed with the Commissioner of Insurance. (1899, c. 54, s. 19; Rev., s. 4721; C. S., s. 6324.)

§ 58-70. **Extension of existing charters.**—Domestic insurance companies incorporated by special acts, whose charters are subject to limitation of time, shall, after the limitation expires, and upon filing statement and paying the taxes and fees required for an amendment of the charter, continue to be bodies corporate,

subject to all general laws applicable to such companies. (1899, c. 54, s. 20; Rev., s. 4722; C. S., s. 6325.)

§ 58-71. **Certificate required before issuing policies.**—No domestic insurance company may issue policies until upon examination of the Commissioner of Insurance, his deputy or examiner, it is found to have complied with the laws of the State, and until it has obtained from the Commissioner of Insurance a certificate setting forth that fact and authorizing it to issue policies. The issuing of policies in violation of this section renders the company liable to the forfeiture prescribed by law, but such policies are binding upon the company. (1899, c. 54, ss. 21, 99; 1903, c. 438, s. 10; Rev., s. 4723; C. S., s. 6326.)

§ 58-72. **Kinds of insurance authorized.**—The kinds of insurance which may be authorized in this State, subject to the other provisions of this chapter, are set forth in the following paragraphs. Nothing herein contained shall require any insurer to insure every kind of risk which it is authorized to insure. The power to do any kind of insurance against loss of or damage to property shall include the power to insure all lawful interests in such property and to insure against loss of use and occupancy, rents and profits resulting therefrom; but no kind of insurance shall be deemed to include life insurance or insurance against legal liability for personal injury or death unless specified herein. In addition to any power to engage in any other kind of business than an insurance business which is specifically conferred by the provisions of this chapter, any insurer authorized to do business in this State may engage in such other kind or kinds of business to the extent necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this State. Each of the following paragraphs indicates the scope of the kind of insurance business specified therein:

1. "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured, including industrial sick benefit; and optional modes of settlement of proceeds.

2. "Annuities," meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of subsection one.

3. "Accident and health insurance," meaning (a) insurance against death or personal injury by accident or by any specified kind or kinds of accident and insurance against sickness, ailment or bodily injury except as specified in paragraph (b) following; and (b) noncancellable disability insurance, meaning insurance against disability resulting from sickness, ailment or bodily injury (but not including insurance solely against accidental injury), under any contract which does not give the insurer the option to cancel or otherwise terminate the contract at or after one year from its effective date or renewal date.

4. "Fire insurance," meaning insurance against loss of or damage to any property resulting from fire, including loss or damage incident to the extinguishment of a fire or to the salvaging of property in connection therewith.

5. "Miscellaneous property insurance," meaning loss of or damage to property resulting from

(a) Lightning, smoke or smudge, windstorm, tornado, cyclone, earthquake, volcanic eruption, rain, hail, frost and freeze, weather or climatic conditions, excess or deficiency of moisture, flood, the rising of the waters of the ocean or its tributaries, or

(b) Insects, or blights, or from disease of such property other than animals, or

(c) Electrical disturbance causing or concomitant with a fire or an explosion in public service or public utility property, or

(d) Bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, any order of a civil authority made to prevent the spread of a conflagration, epidemic or catastrophe, vandalism or malicious mischief, strike or lockout, or explosion; but not including any kind of insurance specified in subsection nine, except insurance against loss or damage to property resulting from

(1) Explosion of pressure vessels (except steam boilers of more than fifteen pounds pressure) in buildings designed and used solely for residential purposes by not more than four families,

(2) Explosion of any kind originating outside of the insured building or outside of the building containing the property insured,

(3) Explosion of pressure vessels which do not contain steam or which are not operated with steam coils or steam jackets,

(4) Electrical disturbance causing or concomitant with an explosion in public service or public utility property.

6. "Water damage insurance," meaning insurance against loss or damage by water or other fluid or substance to any property resulting from the breakage or leakage of sprinklers, pumps or other apparatus erected for extinguishing fires or of water pipes or other conduits or containers, or resulting from casual water entering through leaks or openings in buildings or by seepage through building walls, but not including loss or damage resulting from flood or the rising of the waters of the ocean or its tributaries; and including insurance against accidental injury of such sprinklers, pumps, fire apparatus, conduits or containers.

7. "Burglary and theft insurance," meaning

(a) Insurance against loss of or damage to any property resulting from burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation or wrongful conversion, disposal or concealment by any person or persons, or from any attempt at any of the foregoing, and

(b) Insurance against loss of or damage to moneys, coins, bullion, securities, notes, drafts, acceptances or any other valuable papers or documents, resulting from any cause, except while in the custody or possession of and being transported by any carrier for hire or in the mail.

8. "Glass insurance," meaning insurance against loss of or damage to glass and its appurtenances resulting from any cause.

9. "Boiler and machinery insurance," meaning insurance against loss of or damage to any property of the insured, resulting from the explosion of or injury to (a) any boiler, heater or other fired pressure vessel; (b) any unfired pressure vessel; (c) pipes or containers connected with any of said boilers or vessels; (d) any engine, turbine, compressor, pump or wheel; (e) any apparatus generating, transmitting or using electricity; (f) any other machinery or apparatus connected with or operated by any of the previously named boilers, vessels or machines; and including the incidental power to make inspections of and to issue certificates of inspection upon, any such boilers, apparatus, and machinery, whether insured or otherwise.

10. "Elevator insurance," meaning insurance against loss of or damage to any property of the insured, resulting from the ownership, maintenance or use of elevators, except loss or damage by fire.

11. "Animal insurance," meaning insurance against loss of or damage to any domesticated or wild animal resulting from any cause.

12. "Collision insurance," meaning insurance against loss of or damage to any property of the insured resulting from collision of any other object with such property, but not including collision to or by elevators or to or by vessels, craft, piers or other instrumentalities of ocean or inland navigation.

13. "Personal injury liability insurance," meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of

such liability, and including an obligation of the insurer to pay medical, hospital, surgical and funeral benefits to injured persons, irrespective of legal liability of the insured, arising out of the death or injury of any person, or arising out of injury to the economic interests of any person as the result of negligence in rendering expert, fiduciary or professional service, but not including any kind of insurance specified in subsection fifteen.

14. "Property damage liability insurance," meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of such liability, arising out of the loss or destruction of, or damage to, the property of any other person, but not including any kind of insurance specified in subsection thirteen or fifteen.

15. "Workmen's compensation and employer's liability insurance," meaning insurance against the legal liability, whether imposed by common law or by statute or assumed by contract, of any employer for the death or disablement of, or injury to, his or its employee.

16. "Fidelity and surety insurance," meaning

(a) Guaranteeing the fidelity of persons holding positions of public or private trust;

(b) Becoming surety on, or guaranteeing the performance of, any lawful contract except the following: (1) A contract of indebtedness secured by title to, or mortgage upon, or interest in, real or personal property; (2) any insurance contract except reinsurance;

(c) Becoming surety on, or guaranteeing the performance of, bonds and undertakings required or permitted in all judicial proceedings or otherwise by law allowed, including surety bonds accepted by states and municipal authorities in lieu of deposits as security for the performance of insurance contracts;

(d) Guaranteeing contracts of indebtedness secured by any title to, or interest in, real property, only to the extent required for the purpose of refunding, extending, refinancing, liquidating or salvaging obligations heretofore lawfully made and guaranteed;

(e) Indemnifying banks, bankers, brokers, financial or monied corporations or associations against loss resulting from any cause of bills of exchange, notes, bonds, securities, evidences of debts, deeds, mortgages, warehouse receipts, or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, including any loss while the same are being transported in armored motor vehicles, or by messenger, but not including any other risks of transportation or navigation; also against loss or damage to such an insured's premises, or to his furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat.

17. "Credit insurance," meaning indemnifying merchants or other persons extending credit against loss or damage resulting from the nonpayment of debts owed to them; and including the incidental power to acquire and dispose of debts so insured, and to collect any debts owed to such insurer or to any person so insured by him.

18. "Title insurance," meaning insuring the owners of real property and chattels real and other persons lawfully interested therein against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property, including the power to procure and furnish information relative thereto, and such other incidental powers as are specifically granted in this chapter.

19. "Motor vehicle and aircraft insurance," meaning insurance against loss of or damage resulting from any cause to motor vehicles or aircraft and their equipment, and against legal liability of the insured for loss or damage to the property of another resulting from the ownership, maintenance or use of motor vehicles or aircraft and against loss, damage or expense incident to a claim of such liability.

20. "Marine insurance," meaning insurance against any and all kinds of loss or damage to:

(a) Vessels, craft, aircraft, cars, automobiles and vehicles of every kind, as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interests therein, in respect to, appertaining to or in connection with any and all risks or perils of navigation, transit, or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same or during any delays, storage, transshipment, or reshipment incident thereto, including marine builder's risks and all personal property floater risks, and

(b) Person or to property in connection with or appertaining to a marine, inland marine, transit or transportation insurance, including liability for loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such insurance (but not including life insurance or surety bonds nor insurance against loss by reason of bodily injury to the person arising out of the ownership, maintenance or use of automobiles), and

(c) Precious stones, jewels, jewelry, gold, silver and other precious metals, whether used in business or trade or otherwise and whether the same be in course of transportation or otherwise, and

(d) Bridges, tunnels and other instrumentalities of transportation and communication (excluding buildings, their furniture and furnishings, fixed contents and supplies held in storage) unless fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion are the only hazards to be covered; piers, wharves, docks and slips, excluding the risks of fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion; other aids to navigation and transportation, including dry docks and marine railways against all risks.

21. "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

22. "Miscellaneous insurance," meaning insurance against any other casualty authorized by the charter of the company, not included in subsections 1 to 21 inclusive of this section, which is a proper subject of insurance. No corporation so formed may transact any other business than that specified in its charter and articles of association. (1899, c. 54, ss. 24, 26; 1903, c. 438, s. 1; Rev., s. 4726; 1911, c. 111, s. 1; C. S., s. 6327; 1945, c. 386; 1947, c. 721.)

Editor's Note.—The 1945 amendment rewrote this section. The amendatory act, which amended, inserted or repealed a large number of sections in this chapter, provides: "This act shall not apply to common carriers having relief departments, pension or annuity plans, or other organizations or associations for the benefit of their employees or former employ-

ees; or to associations of such common carriers administering such departments, plans or organizations."

The 1947 amendment struck out in subsection 16, paragraph (b), the clause reading "(2) a bond or undertaking of the kind specified in paragraph (c)," and renumbered former clause (3) as (2).

§ 58-73. **Manner of creating such corporations.** — The procedure for organizing such corporations is as follows: The proposed incorporators, not less than ten in number, a majority of whom must be residents of the State, shall subscribe articles of association setting forth their intention to form a corporation; its proposed name, which must not so closely resemble the name of an

existing corporation doing business under the laws of this State as to be likely to mislead the public, and must be approved by the Commissioner of Insurance; the class of insurance it proposes to transact and on what business plan or principle; the place of its location within the State, and if on the stock plan, the amount of its capital stock. The words "insurance company," "insurance association," or "insurance society" must be a part of the title of any such corporation, and also the word "mutual," if it is organized upon the mutual principle. The certificate of incorporation must be subscribed and sworn to by the incorporators before an officer authorized to take acknowledgment of deeds, who shall forthwith certify the certificate of incorporation, as so made out and signed, to the Commissioner of Insurance of the State at his office in the city of Raleigh. The Commissioner of Insurance shall examine the certificate, and if he approves of it and finds that the requirements of the law have been complied with, shall certify such facts, by certificate on such articles, to the Secretary of State. Upon the filing in the office of the Secretary of State of the certificate of incorporation and attached certificates, and the payment of a charter fee in the amount required for private corporations, and the same fees to the Secretary of State, the Secretary of State shall cause the certificate and accompanying certificates to be recorded in his office, and shall issue a certificate in the following form:

Be it known that, whereas (here the names of the subscribers to the articles of association shall be inserted) have associated themselves with the intention of forming a corporation under the name of (here the name of the corporation shall be inserted), for the purpose (here the purpose declared in the articles of association shall be inserted), with a capital (or with a permanent fund) of (here the amount of capital or permanent fund fixed in the articles of association shall be inserted), and have complied with the provisions of the statute of this State in such case made and provided, as appears from the following certified articles of association: (Here copy articles of association and accompanying certificates). Now, therefore, I (here the name of the Secretary shall be inserted), Secretary of State, hereby certify that (here the names of the subscribers to the articles of association shall be inserted), their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of (here the name of the corporation shall be inserted), with such articles of association, and have all the powers, rights, and privileges and are subject to the duties, liabilities, and restrictions which by law appertain thereto.

Witness my official signature hereunto subscribed, and the seal of the State of North Carolina hereunto affixed, this the day of, in the year (in these blanks the day, month, and year of execution of this certificate shall be inserted; and in the case of purely mutual companies, so much as relates to capital stock shall be omitted).

The Secretary of State shall sign the certificate and cause the seal of the State to be affixed to it, and such certificate of incorporation and certificate of the Secretary of State has the effect of a special charter and is conclusive evidence of the organization and establishment of the corporation. The Secretary of State shall also cause a record of his certificate to be made, and a certified copy of this record may be given in evidence with the same effect as the original certificate. (1899, c. 54, s. 25; 1903, c. 438, ss. 2, 3; Rev., s. 4727; C. S., s. 6328.)

§ 58-74. First meeting; organization; license.—The first meeting for the purpose of organization under such charter shall be called by a notice signed by one or more of the subscribers to the certificate of incorporation, stating the time, place, and purpose of the meeting; and at least seven days before the appointed time a copy of this notice shall be given to each subscriber, left at his usual place of business or residence, or duly mailed to his post-office address, unless the signers waive notice in writing. Whoever gives the notice must make affidavit thereof, which affidavit shall include a copy of the notice and be entered

upon the records of the corporation. At the first meeting, or any adjournment thereof, an organization shall be effected by the choice of a temporary clerk, who shall be sworn; by the adoption of bylaws; and by the election of directors and such other officers as the bylaws required; but at this meeting no person may be elected director who has not signed the certificate of incorporation. The temporary clerk shall record the proceedings until the election and qualification of the secretary. The directors so chosen shall elect a president, secretary, and other officers which under the bylaws they are so authorized to choose. The president, secretary, and a majority of the directors shall forthwith make, sign, and swear to a certificate setting forth a copy of the certificate of incorporation, with the names of the subscribers thereto, the date of the first meeting and of any adjournments thereof, and shall submit such certificate and the records of the corporation to the Commissioner of Insurance, who shall examine the same, and who may require such other evidence as he deems necessary. If upon his examination the Commissioner of Insurance approves of the bylaws and finds that the requirements of the law have been complied with, he shall issue a license to the company to do business in the State, as is provided for in this chapter. (1899, c. 54, s. 25; 1903, c. 438, ss. 2, 3; Rev., s. 4728; C. S., s. 6329.)

§ 58-75. Bylaws; classification and election of directors.—A domestic company may adopt bylaws for the conduct of its business not repugnant to law or its charter, and therein provide for the division of its board of directors into two, three, or four classes, and the election thereof at its annual meetings so that the members of one class only shall retire and their successors be chosen each year. Vacancies in any such class may be filled by election by the board for the unexpired term. (1899, c. 54, s. 22; Rev., s. 4724; C. S., s. 6330.)

§ 58-76: Repealed by Session Laws 1945, c. 386.

§ 58-77. Amount of capital and/or surplus required.—The amount of capital and/or surplus requisite to the formation and organization of companies under the provisions of this chapter shall be as follows:

1. **Stock Life Insurance Companies.**—(a) A stock corporation may be organized in the manner prescribed in this chapter and licensed to do the business of life insurance, only when it shall have a paid-in capital of at least two hundred thousand dollars and a paid-in initial surplus of an amount at least equal to fifty per cent of its capital, and it may in addition do any one or more of the kinds of business specified in subsections two and three of § 58-72, without having additional capital or surplus. Every such company shall at all times thereafter maintain a minimum capital of not less than two hundred thousand dollars.

(b) If the Commissioner, after such investigation as he may deem it expedient to make, finds that a corporation may be organized to do the business of life insurance, or the writing of annuities or both, that its operations are restricted solely to one state, and that the organization of such corporation is in the public interest, he may permit the organization of a stock corporation to do on such restricted plan either or both of the kinds of business specified in subsections one and two of § 58-72, with the minimum paid-in capital and a minimum paid-in surplus in an amount to be prescribed by him, but in no event to be less than a paid-in capital of one hundred thousand dollars and a paid-in surplus of fifty thousand dollars. Every such company shall at all times thereafter maintain such prescribed minimum capital.

2. **Stock Accident and Health Insurance Companies.**—(a) A stock corporation may be organized in the manner prescribed in this chapter and licensed to do only the kind of insurance specified in subsection three (a) of § 58-72, when it shall have a paid-in capital of not less than one hundred thousand dollars, and a paid-in surplus at least equal to fifty per cent of such capital. Every such company shall at all times thereafter maintain a minimum capital of not less than one hundred thousand dollars.

(b) Any company organized under the provisions of paragraph (a) of this subsection may, by the provisions of its original charter or any amendment thereto, acquire the power to do the kind of business specified in paragraph (b) of subsection three of § 58-72, if it has a paid-in capital at least equal to one hundred and fifty thousand dollars, and a paid-in initial surplus at least equal to fifty per cent of such capital. Every such company shall at all times maintain a minimum capital of not less than one hundred and fifty thousand dollars.

3. Stock Fire and Marine Companies.—A stock corporation may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 4, 5, 6, 7, 8, 11, 12, 19, 20, 21 and 22 of § 58-72 only when it shall have a paid-in capital of not less than two hundred thousand dollars and a contributed surplus equivalent to not less than fifty per cent of such paid-in capital. Every such company shall at all times thereafter maintain a minimum capital of not less than two hundred thousand dollars, provided that, any such corporation may do all the kinds of insurance authorized for casualty, fidelity and surety companies, as set out in subsection four hereof where its charter so permits, when and if it meets all additional requirements as to capital and surplus as fixed in said section, and maintains the same.

4. Stock Casualty and Fidelity and Surety Companies.—A stock corporation may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22 of § 58-72 only when it shall have a paid-in capital of not less than three hundred thousand dollars and a contributed surplus equivalent to not less than fifty per cent of such paid-in capital. Every such company shall at all times thereafter maintain a minimum capital of not less than three hundred thousand dollars. If the Commissioner, after such investigation as he may deem it expedient to make, finds that a corporation may be organized to do one or more of such kinds of insurance, that its operations are restricted solely to one state, and that the organization of such corporation is in the public interest, he may permit such corporation to be organized and licensed to write the lines set out in this section with a paid-in capital of not less than two hundred thousand dollars and a contributed surplus equivalent to not less than fifty per cent of such paid-in capital, and every such company shall hereafter maintain a minimum capital of not less than two hundred thousand dollars, provided that, any casualty, fidelity and surety corporation may do all the kinds of insurance authorized for fire and marine companies, as set out in subsection three hereof where its charter so permits, when and if it meets all additional requirements as to capital and surplus as fixed in said section, and maintains the same.

5. Mutual Fire and Marine Companies.—(a) Limited assessment companies.—A limited assessment mutual company may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 4, 5, 6, 7, 8, 11, 12, 19, 20, 21 and 22 of § 58-72 only when it has no less than two hundred and fifty thousand dollars of insurance in not fewer than two hundred and fifty separate risks subscribed with a contributed initial surplus of at least fifty thousand dollars, which surplus shall at all times be maintained. The assessment liability of a policyholder of a company organized in accordance with the provisions of this paragraph shall not be limited to less than five annual premiums; provided, such limited assessment company may reduce the assessment liability of its policyholders from five annual premiums as set out herein to one additional annual premium when the free surplus of such company amounts to not less than one hundred thousand dollars, which surplus shall at all times be maintained.

(b) Assessable mutual companies.—An assessable mutual company may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 4, 5 and 6 of § 58-72 with an unlimited assessment liability of its policyholders only when it shall have not

less than two hundred and fifty thousand dollars of insurance in not fewer than two hundred and fifty separate risks subscribed with contributed surplus equal to twice the amount of the maximum net retained liability under the largest policy of insurance issued by such company; but not less than ten thousand dollars, which surplus shall at all times be maintained. Provided such company, when its charter so permits, in addition may be licensed to do one or more of the kinds of insurance specified in subsections 7, 8, 11, 12, 19, 20, 21 and 22 of § 58-72, with an unlimited assessment liability of its policyholders, when its free surplus amounts to not less than twenty-five thousand dollars, which surplus shall at all times be maintained.

(c) Nonassessable mutual companies.—A nonassessable mutual company may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 4, 5, 6, 7, 8, 11, 12, 19, 20, 21 and 22 of § 58-72 and may be authorized to issue policies under the terms of which a policyholder is not liable for any assessments in addition to the premium set out in the policy only when it shall have not less than two hundred and fifty thousand dollars of insurance in not fewer than two hundred and fifty separate risks subscribed with a contributed initial surplus of not less than two hundred thousand dollars, which surplus shall at all times be maintained.

(d) Town or county mutual insurance companies.—A town or county mutual insurance company, with unlimited assessment liability, may be organized in the manner prescribed in this chapter and licensed to do the kinds of insurance specified in subsection 4 of § 58-72 only when it shall have not less than twenty-five thousand dollars of insurance in not fewer than twenty-five separate risks subscribed with a contributed surplus at all times not less than the maximum liability under the largest policy issued or to be issued. A town or county mutual insurance company may, in addition to writing the business specified in subsection 4 of § 58-72, cover in the same policy the hazards usually insured against under an extended coverage endorsement when such company has and at all times maintains in addition to the surplus hereinbefore required, an additional surplus of not less than five thousand dollars or not less than an amount equivalent to one per cent of the total amount of insurance in force, whichever is the larger sum: Provided, that such company may not operate in more than three adjacent counties in this State.

6. Mutual Life, Accident and Health Insurance Companies.—(a) A nonassessable mutual insurance company may be organized in the manner prescribed in this chapter, and licensed to do only one or more of the kinds of insurance specified in subsections one, two and three of § 58-72 when it has complied with the requirements of this chapter and with those hereinafter set forth in paragraphs (1) to (4) inclusive, of this subsection, whichever shall be applicable.

(1) If organized to do only the kinds of insurance specified in subsections 1 and 2 of § 58-72, such company shall have not less than two hundred and fifty bona fide applications for life insurance in an aggregate amount not less than two hundred and fifty thousand dollars, and shall have received from each such applicant in cash the full amount of one annual premium on the policy applied for by him, in an aggregate amount at least equal to seven thousand and five hundred dollars, and shall in addition have a contributed surplus of seventy-five thousand dollars, and shall have and maintain at all times a minimum surplus of fifty thousand dollars.

(2) If organized to do only the kind of insurance specified in paragraph (a) of subsection three of § 58-72 such company shall have not less than one hundred and twenty-five bona fide applications for such insurance, and shall have received from each such applicant in cash the full amount of one annual premium on the policy applied for by him in an aggregate amount of at least six thousand dollars, and shall have a contributed surplus of seventy-five thousand dollars and shall have and maintain at all times a minimum surplus of fifty thousand dollars.

(3) If organized to do the kinds of insurance specified in subsection one and in paragraph (a) of subsection three of § 58-72, such company shall have complied with the provisions of both paragraph (1) and paragraph (2) hereof.

(4) If organized to do the kind of insurance specified in paragraph (b) of subsection three of § 58-72, in addition to the kind or kinds of insurance designated in any one of the foregoing paragraphs of this subsection, such company shall have a contributed surplus, and shall maintain a minimum surplus, each in an amount of at least fifty thousand dollars in excess of the respective amounts required by paragraphs (1), (2) and (3) hereof where applicable.

7. Organization of Mutual Casualty, Fidelity and Surety Companies.—(a) Nonassessable mutual companies.—A mutual insurance company with no assessment liability provided for its policyholders may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22 of § 58-72 when it has a minimum contributed surplus of three hundred thousand dollars and not less than two hundred and fifty thousand dollars of insurance subscribed in not less than two hundred and fifty separate risks. The surplus of such company shall at all times be maintained at or above the amount required hereinabove for organization of such company.

(b) Assessable mutual companies.—A mutual insurance company with assessment liability provided for its policyholders may be organized in the manner prescribed in this chapter and licensed to do one or more of the kinds of insurance specified in subsections 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22 of § 58-72 when it has a minimum contributed surplus of one hundred thousand dollars and not less than two hundred and fifty thousand dollars of insurance subscribed in not less than two hundred and fifty separate risks. Such company shall at all times maintain a surplus in an amount not less than one hundred thousand dollars. The assessment liability of a policyholder of such company shall not be limited to less than one annual premium.

8. (a) A company may do all the kinds of insurance authorized to be done by a company organized under the provisions of paragraph (a) of subsection 5, and paragraph (b) of subsection 7 where its charter so permits when and if it meets the combined maximum requirements of said paragraphs. The assessment liability of policyholders of such a company shall not be limited to less than one annual premium within any one policy year.

(b) A company may do all the kinds of insurance authorized to be done by a company organized under the provisions of paragraph (c) of subsection 5, and paragraph (a) of subsection 7 where its charter so permits when and if it meets the combined maximum requirements of said paragraphs. The policyholders of such a company shall not be subject to any assessment liability.

9. Any domestic, foreign or alien company licensed to do business in North Carolina on January 1, 1945, shall be permitted to continue to do the same kinds of business which it was authorized to do on such date without being required to increase its capital and/or surplus, but the requirements of this section as to capital and surplus shall apply to such companies as a prerequisite to writing additional lines of business. (1899, c. 54, s. 26; 1903, c. 438, s. 4; Rev., s. 4729; 1907, c. 1000, s. 5; 1913, c. 140, s. 2; C. S., s. 6332; 1929, c. 284, s. 1; 1945, c. 386; 1947, c. 721.)

Editor's Note.—By the 1929 amendment wrote this section. The 1947 amendment increased, and the 1945 amendment re- inserted "21" in subsection 3 and in paragraphs (a), (b) and (c) of subsection 5.

§ 58-78. Capital stock fully paid in cash.—The capital stock shall be paid in cash within twelve months from the date of the charter or certificate of organization, and no certificate of full shares and no policies may be issued until the whole capital is paid in. A majority of the directors shall certify on oath that the money has been paid by the stockholders for their respective shares and is

held as the capital of the company invested or to be invested as required by § 58-77. (1899, c. 54, s. 27; Rev., s. 4730; C. S., s. 6333; 1945, c. 386.)

Editor's Note.—The 1945 amendment changed the number referred to at the end of the section from 58-79 to 58-77.

§ 58-79. Investments; life.—1. Investments specified.—Every domestic stock and mutual life insurance company must have and continually keep to the extent of an amount equal to its entire reserves, as hereinafter defined, and entire capital, if any, and minimum required surplus, invested in:

(a) Coin or currency of the United States of America, on hand or on deposit in a national or state bank or trust company or invested in the shares of any building and loan or savings and loan association, or invested in the shares of any federal savings and loan association.

(b) Interest bearing bonds, notes, certificates of indebtedness, bills or other direct interest bearing obligations of the United States of America or of the Dominion of Canada or other interest bearing obligations fully guaranteed both as to principal and interest by the United States of America, or by the Dominion of Canada.

(c) Interest bearing bonds of any state, District of Columbia, territory or possession of the United States of America, or of any province of the Dominion of Canada, or of any county, or incorporated city of any state, District of Columbia, territory or possession of the United States of America.

(d) Interest bearing bonds of any commission, authority or political subdivision having legal authority to issue the same of any state, District of Columbia, territory or possession of the United States of America or of any county or incorporated city of any state, District of Columbia, territory or possession of the United States of America.

(e) Federal farm loan bonds issued by federal land banks organized under the provisions of the act of Congress known as the Federal Farm Loan Act. Interest bearing bonds, notes or other interest bearing obligations of any solvent corporation organized under the laws of the United States of America or of the Dominion of Canada, or under the laws of any state, District of Columbia, territory or possession of the United States of America. Equipment trust obligations or certificates or other secured instruments evidencing an interest in transportation equipment wholly or in part within the United States of America and a right to receive determined portions of rental, purchases or other fixed obligatory payments for the use or purchase of such transportation equipment.

(f) Dividend paying stocks or shares of any corporation created or existing under the laws of the United States of America or of any state, District of Columbia, territory or possession of the United States of America; notwithstanding any provisions in this section to the contrary no company may invest more than ten per cent (10%) of its total admitted assets in stocks; and further provided, that no company may invest more than three per cent (3%) of its admitted assets in the stock or shares of any one corporation. The restrictions in this section do not apply to shares of building and loan or savings and loan associations or federal savings and loan associations.

(g) Loans secured by first mortgages, or deeds of trust, on unencumbered fee simple or improved leasehold real estate in the District of Columbia or in any state, territory or possession of the United States of America, to an amount not exceeding sixty-six and two-thirds per cent ($66\frac{2}{3}\%$) of the fair market value of such fee simple or improved leasehold real estate. No loan may be made on leasehold real estate unless the lease has at least thirty years to run before its termination and the loan matures at least twenty years before expiration of the lease. Whenever such loans are made upon fee simple, or improved leasehold real estate which is improved by a building or buildings, the said improvements shall be insured against loss by fire, and the fire insurance policies shall contain

a standard mortgage clause and shall be delivered to the mortgagee as additional security for the said loan.

Loans secured by first mortgages which the Federal Housing Administrator has insured or has made a commitment to insure, or invested in mortgage notes or bonds, so insured, and neither the limitations of this section nor any other law of this State requiring security upon which loans shall be made, or prescribing the nature, amount or forms of such security, or limiting the interest rates upon loans, shall be deemed to apply to such insured mortgage loans.

Loans secured by first mortgages, or deeds of trust, on unencumbered fee simple real estate in connection with which the Veterans Administration of the United States has guaranteed, or has made a commitment to guarantee, a portion of the loan pursuant to the Service Men's Readjustment Act of 1944, and amendments thereto, provided the amount of any such loan, less the portion thereof guaranteed by said Veterans Administration, shall not exceed sixty-six and two-thirds per cent ($66\frac{2}{3}\%$) of the fair market value of such real estate.

In all investments made upon mortgages, the evidence of the debt, if any, shall accompany the mortgage or deed of trust.

(h) Ground rents in the District of Columbia or any state of the United States of America, provided, that in the case of unexpired redeemable ground rents the premiums paid, if any, shall be amortized over the period between date of acquisition and earliest redemption date or charged off at any time prior to redemption date; and in the case of expired redeemable ground rents the premium paid, if any, shall be charged off at the time of acquisition. Redeemable ground rents purchased at a discount shall be carried at an amount not greater than the cost of acquisition.

(i) Collateral loans secured by pledge of any security named in subparagraphs (a), (b), (c), (d), (e), (f), (g) and (h); provided that the current market value of such pledged securities shall be at all times during the continuance of such loans at least twenty-five per cent (25%) more than the unpaid balance of the amount loaned on them.

(j) Loans upon the policies of the company; provided that the total indebtedness against any policy shall not be greater than the loan value of such policy.

(k) No domestic company may directly or indirectly acquire or hold real property except as follows:

(1) Such land and buildings thereon in which it has its principal office and such real estate as shall be requisite for the convenient transaction of its own business; the amount invested in such real property shall not exceed ten per centum of the investing company's admitted assets, but the Commissioner may grant permission to the company to invest in real property for such purpose in such increased amount as he may deem proper upon a hearing held before him.

(2) Property mortgaged to it in good faith as security for loans previously contracted for money due.

(3) Property conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.

(4) Additional real property and equipment incident to real property, if necessary or convenient for the purpose of enhancing the sale value of real property previously acquired or held by it under subsections (2) and (3) of this section and subject to the prior written approval of the Commissioner.

(5) (A) Real estate acquired for the purpose of leasing the same to any person, firm, or corporation, or real estate already leased under the following conditions:

a. (1) Where there has already been erected on said property a building or other improvements satisfactory to the purchaser, or (2) where the lessee shall at its own cost erect thereon, free of liens, a building or other improvements satisfactory to the lessor, or (3) where the lessor under the terms and conditions

of a lease executed and entered into simultaneously with the purchase of the property agrees to erect a building or other improvements on said property;

b. That the said improvements shall remain on the said property during the period of the lease, and in cases where the said improvements are put upon said property at the cost of the lessee the said improvements at the termination of the lease shall vest, free of liens, in the owner of the real estate;

c. That during the term of the lease the tenant shall keep and maintain the said improvements in good repair. Real estate acquired pursuant to the provisions of this subsection (A) shall not be treated as an admitted asset unless and until the improvements herein required shall have been constructed and the lease agreement entered into in accordance with the terms of this subsection, nor shall real estate acquired pursuant to this subsection (A) be treated as an admitted asset in an amount exceeding the amount actually invested reduced each year by equal decrements sufficient to write off at least seventy-five per cent (75%) of the investment at the normal termination of the lease or at the end of thirty years should the term of the lease be for a longer period. The total investments of any company under this subsection (A) shall not exceed four per cent of its assets, nor more than fifty per cent (50%) of its capital and surplus whichever is less.

(B) Subject to approval of the Commissioner, real estate for recreation, hospitalization, convalescent and retirement purposes of its employees. Such investment under this subsection (B) shall not exceed five per cent (5%) of the company's surplus.

(C) No investment shall be made by any company pursuant to this subsection (5) which will cause such company's investment in all real property owned or held by it directly or indirectly to exceed ten per cent (10%) of its assets.

(6) It is unlawful for any such incorporated company to purchase or hold real estate in any other case or for any other purpose. Real estate acquired under subsections (1) and (5)(B) of this section which has ceased to be used or to be necessary for the purposes stated therein shall be sold within five years thereafter, unless the company procures a certificate from the Commissioner that the interest of the company will materially suffer by a forced sale of such real estate in which event the time for the sale may be extended to such a time as the Commissioner may direct in the certificate. Any real estate acquired under subsections (2), (3) and (4) of this subsection (k) shall be sold within five years after the company has acquired title thereto; provided, that the Commissioner may in his discretion extend the five year period as provided hereinabove. Any real estate acquired under subsection (5)(A) of this section shall within five years after the termination or expiration of such lease be sold or released for an additional term pursuant to the provisions of subsection (5)(A); provided, that the Commissioner may in his discretion extend the five year period as provided hereinabove. Nothing contained herein prevents any insurance company from improving or conveying its real estate, notwithstanding the lapse of five years without having procured such certificate from the Commissioner.

(l) Interest, rents or other fixed income due and accrued on any of the investments named in subparagraphs (a), (b), (c), (d), (e), (g), (h), (i), (j) and (k) pursuant to regulations promulgated by the Commissioner.

(m) To the extent necessary to satisfy the investment requirements as to reserves and entire capital, if any, and minimum required surplus, no company shall make any investment in or loan on any of the securities mentioned in this section, which are in default as to principal or interest or as to which the dividend on the last preceding dividend date has been passed.

II. General Provisions.—(a) The entire reserves of a domestic life insurance company, as used in this section, shall be the sum of:

Net present value of all outstanding policies in force (less reinsurance); reserves for accidental death benefits and total and permanent disability benefits (less reinsurance); present value of supplementary contracts and including divi-

dends left with the company to accumulate at interest; liability on policies canceled and not included in "net reserve" upon which a surrender value may be demanded, and policy claims and losses outstanding, less amount of net uncollected and deferred premiums.

(b) No investment or loan, except loans made on the company's own policies, shall be made by any domestic insurer unless the same be authorized or approved by the board of directors, or by a committee appointed by the board and charged with the duty of supervising or making such investment or loan. The minutes of any such committee shall be recorded and a report shall be submitted to the board of directors.

(c) No life insurance company doing business in this State shall make any loan to any director or officer of such insurer, either directly or indirectly; nor shall such insurer make any loan to any other corporation or business unit in which such officer or director is substantially interested; nor shall any such director or officer accept any such loan directly or indirectly.

No director or officer of any such insurance company doing business in this State shall receive any money or valuable thing either directly or indirectly, or through any substantial interest in any other corporation or business unit, for negotiating, procuring, recommending or aiding in any purchase or sale of property or loan from such insurer nor be pecuniarily interested either as principal, coprincipal, agent or beneficiary, in any such purchase, sale or loan, nor shall any financial obligation of any such director or officer be guaranteed by such insurer.

Nothing contained in this section shall be construed as prohibiting a director or officer of any such insurance company or fraternal benefit society from receiving the usual salary, compensation or emoluments for services rendered in the ordinary course of his duties as a director or officer, if such salary, compensation or emoluments be authorized by vote of the board of directors of such insurer, nor as prohibiting the payment to a director or officer of any such insurer who is a licensed attorney at law of a fee or fees in connection with loans made by any such insurer if and when such fees are paid by the borrower and do not constitute a charge against any such insurer; and, provided, that nothing herein contained shall prevent a life insurance corporation from making a loan upon a policy held therein by the borrower not in excess of the net value thereof.

A substantial interest in any corporation or business unit is defined to mean an interest equivalent to ownership or control by a director or officer or the aggregate ownership or control by all directors and officers of the same insurance or surety company or fraternal benefit society, of ten per centum or more of the stock of such corporation or business unit.

(d) When any of the investments mentioned in this section and held by any domestic insurer are of doubtful value, or without ascertainable value on a public exchange, unless the company by placing some of them upon the market and obtaining a bona fide offer therefor shall so establish a value, the Commissioner shall have the authority to cause the same to be appraised and such appraisement shall be taken to be the true value thereof. In such case, the appraisement shall be made by two disinterested and competent persons, one to be appointed by the Commissioner and one to be appointed by the company; in the event these two fail to agree, they shall appoint a third disinterested and competent person and the estimate of the value of such investment as arrived at by these three shall be taken to be the true value thereof.

(e) When any of the investments mentioned in this section shall default in the payment of interest or dividends after having been purchased by the company, such investments shall thereafter be carried at their respective market values or at valuations fixed in accordance with regulations promulgated by the Commissioner.

(f) The investments made by domestic companies on and after March 6, 1945, shall be in accordance with the provisions of this section, and any invest-

ments made prior to March 6, 1945, shall be made to conform to the requirements of this article by not later than three years after March 6, 1945, but the Commissioner may, on application by the company extend the time for such conformance for each period or periods as he may deem proper on the showing made, if he is satisfied that such company will suffer materially by the forced sale of any securities or property not conforming; and the Commissioner shall grant a hearing to the company upon request.

(g) Notwithstanding any provision of this chapter to the contrary, domestic insurance companies may be authorized by their charter to own, maintain and operate radio and television stations; provided, no such company may make any investment in the ownership, maintenance and operation of such stations in an amount greater than fifty per cent (50%) of the excess of its surplus over the minimum surplus required for the organization of such company.

III. Other Investments; Investments Unlawfully Acquired.—After satisfying the requirements hereinbefore set forth any funds of any domestic company in excess of its entire capital, if any, and minimum required surplus and reserves as defined in subdivision II (a) of this section shall be invested in such other securities or in any such safe manner as may be approved by the Commissioner.

Whenever it appears by examination as authorized by law that an insurance company organized under the laws of this State has acquired any investments in violation of the law in force at the date of such acquisition it is the duty of the Commissioner to disallow the amount of such investments, if wholly ineligible, or the amount of the value thereof in excess of any limitation prescribed in the law and to deduct such amount as a nonadmitted asset of such company. In any determination of the financial condition of any such company such amount shall be deducted as a nonadmitted asset of such company.

IV. Investments of Foreign and Alien Companies.—1. The Commissioner may refuse a new or renewal license to any foreign company if he finds that its investments do not comply in substance with the investment requirements and limitations imposed by this section upon like domestic companies wherever authorized to do the same kind or kinds of insurance business.

2. No alien company shall be authorized to do business in this State unless its general State deposits and its trustee assets comply in substance with the requirements and limitations of this section applicable to like domestic companies wherever authorized to do the same kind or kinds of insurance business, except that foreign investments shall be allowed to the following extent only:

(a) Bonds, notes or other evidences of indebtedness issued or guaranteed by the government of the country in which such alien company was organized or by any province or other major political subdivision thereof and not in default as to principal or interest in an amount not exceeding the minimum capital required of a domestic stock company wherever authorized to do the same kind or kinds of insurance business.

(b) Bonds, notes or other valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof or other political subdivisions, and such securities of corporations of the Dominion of Canada as may be approved by the Commissioner which are not in default as to principal or interest not exceeding ten per cent of the total admitted assets of the United States branch of such company. (1899, c. 54, s. 27; Rev., s. 4731; 1907, cc. 798, 998; 1911, c. 32; 1913, c. 200; C. S., s. 6334; 1923, c. 73; 1925, c. 187; 1945, c. 386; 1947, c. 721.)

Cross References.—As to authority to invest in bonds guaranteed by the United States, see § 53-44. As to authority to invest in bonds or notes secured by mortgages insured by the Federal Housing Administration, see § 53-45. See also §

53-60 as to investments in federal farm loan bonds, and see § 142-29 as to investments in refunding bonds of North Carolina.

Editor's Note.—The 1945 amendment repealed the former section and inserted

in lieu thereof this and the following section. The 1947 amendment substituted "entire capital" for "minimum required capital" in paragraph (m) of subsection

I; and in subsection III, near the beginning, it substituted the words "its entire" for the words "the amount of such necessary minimum."

§ 58-79.1. Investments; fire, casualty and miscellaneous.—I. Minimum Capital Investments.—Before investing any of its funds in any other classes of securities or types of investments, every domestic stock insurance company other than a life insurance company or a fraternal benefit association, shall to the extent of an amount equal in value to the minimum capital required by law for a domestic stock corporation authorized to transact the same kinds of insurance, invest its funds only in securities of the classes described in this section and which are not in default as to principal or interest. Every domestic mutual insurance company, other than a life insurance company, before investing any of its funds in any other classes of securities or types of investment, shall invest its funds only in such securities to the extent of an amount equal in value to the minimum assets or surplus required of such company by the laws of North Carolina. Investments equal in value to such an amount and of the kind or kinds hereinafter prescribed in this section shall at all times be maintained free and clear from any lien or pledge other than as impressed upon a deposit with any government within the United States or upon trustee assets held in trust for the security of all its policyholders and creditors. Minimum capital investments of such an insurer shall consist of the following classes of securities and not less than sixty per cent of the total amount of the required minimum capital investments shall consist of the classes specified in subparagraphs (a) and (b) following:

(a) Bonds, or other evidences of indebtedness of the United States of America or of any of its agencies when such obligations are guaranteed as to principal and interest by the United States of America.

(b) Bonds, or stocks or other evidences of indebtedness which are direct obligations of the State of North Carolina or of any county, district or municipality thereof.

(c) Bonds, or other evidences of indebtedness which are direct obligations of any state of the United States.

(d) Mortgage loans or deeds of trust as specified in subparagraphs (a) or (c) of subdivision 6 of subsection III on property located in this State.

(e) Ground rents as specified in subdivision 7 of subsection III.

II. Reserve Investments Required.—1. After satisfying requirements for minimum capital investments specified in subsection I, any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, may invest its funds in, or otherwise acquire, or loan upon, only the classes of reserve investments as specified in subsection III, unless it shall at all times have and maintain cash and such reserve investments (including its minimum capital investments), free from any lien or pledge, which, when valued in accordance with the provisions of this section, shall be at least equal in amount to fifty per centum of the aggregate amount of its unearned premium and loss reserves as shown by its last sworn statement, annual or quarterly on file with the Commissioner. The term "lien or pledge" as used in this subsection shall not include any deposit of securities or cash with any government, nor trustee assets, held in trust for the benefit or protection of all or any class of the policyholders, or policyholders and creditors, of such insurer.

2. No securities or other investments shall be eligible for purchase or acquisition under this section unless they are interest bearing or income paying, but defaults in interest or income occurring subsequent to such purchase or acquisition shall not affect the allowance thereof as an admitted asset at the market value thereof unless otherwise specifically provided in this section.

3. Nothing contained in this subsection shall prohibit the acquisition by an

insurer of other securities of property if distributed to it as a dividend or if acquired by it pursuant to a lawful plan of reorganization, or if acquired by it pursuant to a lawful and bona fide agreement of bulk reinsurance or consolidation.

4. Any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, which has investments fully complying with the requirements of subdivision 1 of this subsection may acquire investments eligible under the provisions of subsection IV. Any such insurer whose investments do not fully comply with such requirements may, during a period of ten years from March 6, 1945, acquire such additional kinds of securities if acquired in substitution for other securities heretofore lawfully acquired by it and if such substitution results in a net reduction in the aggregate amount of the insurer's investments in securities not eligible under subsection III.

III. Classes of Reserve Investments.—The reserve investments of every domestic stock and mutual insurance company, other than a life insurance company or a fraternal benefit association, shall consist of the following:

1. Bonds or other evidences of indebtedness, not in default as to principal or interest, which are valid and legally authorized obligations issued, assumed or guaranteed by the United States of America or by any state thereof or by any territory or possession of the United States or by the District of Columbia, or by any county, city, town, village, municipality or district therein or by any political subdivision thereof or by any civil division or public instrumentality of one or more of the foregoing, if by statutory or other legal requirements applicable thereto, such obligations are payable, as to both principal and interest, from taxes levied or by such law required to be levied upon all taxable property or all taxable income within the jurisdiction of such governmental unit or from adequate special revenues pledged or otherwise appropriated or by such law required to be provided for the purpose of such payment, but not including any obligations payable solely out of special assessments on properties benefited by local improvements.

2. Obligations, other than those eligible for investment under subdivision 6, issued, assumed, or guaranteed by any solvent institution created or existing under the laws of the United States or of any state, district or territory thereof, which are not in default as to principal or interest, and which are qualified under any of the following paragraphs:

(a) Obligations which are secured by adequate collateral security and bear fixed interest and if during each of any three, including the last two, of the five fiscal years next preceding the date of acquisition by such insurer, the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges, as hereinafter defined, shall have been not less than one and one-quarter times the total of its fixed charges for such year, or obligations which, at the date of acquisition by such insurer, are adequately secured and have investment qualities and characteristics wherein the speculative elements are not predominant. In determining the adequacy of collateral security, not more than one-third of the total value of such required collateral shall consist of stock other than stock meeting the requirements of subdivision III.

(b) Fixed interest bearing obligations, other than those described in paragraph (a) if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times its average annual fixed charges applicable to such period and if during the last year of such period such net earnings shall have been not less than one and one-half times its fixed charges for such year.

(c) Adjustment, income or other contingent interest obligations if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half

times the sum of its average annual fixed charges and its average annual maximum contingent interest applicable to such period and if during each of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges and maximum contingent interest for such year.

Within the meaning of this section the term "obligation" shall include bonds, debentures, notes or other evidences of indebtedness; the term "institution" shall include a corporation, a joint stock association and a business trust. The term "net earnings available for fixed charges" shall mean net income after deducting operating and maintenance expenses, taxes other than federal and State income taxes, depreciation and depletion, but excluding extraordinary nonrecurring items of income or expense appearing in the regular financial statements of the issuing, assuming or guaranteeing institutions. The term "fixed charges" shall include interest on funded and unfunded debt amortization of debt discount, and rentals for leased properties. If net earnings are determined in reliance upon consolidated earnings statements of parent and subsidiary institutions, such net earnings shall be determined after provision for income taxes of subsidiaries and after proper allowance for minority stock interest, if any; and the required coverage of fixed charges shall be computed on a basis including fixed charges and preferred dividends of subsidiaries other than those payable by such subsidiaries to the parent corporation or to any other of such subsidiaries, except that if the minority common stock interest in the subsidiary corporation is substantial, the fixed charges and preferred dividends may be apportioned in accordance with regulations prescribed by the Commissioner.

In applying the earnings tests under this section to any issuing, assuming or guaranteeing institution, whether or not in legal existence during the whole of such five years next preceding the date of investment by such insurer, which has at any time or times during such five year period acquired the assets of any other institution or institutions by purchase, merger, consolidation or otherwise, substantially as an entirety, or has been reorganized pursuant to the bankruptcy law, the earnings of such other predecessor or constituent institutions, or of the institution so reorganized, available for interest and dividends for such portion of such period as shall have preceded such acquisition, or such reorganization may be included in the earnings of such issuing, assuming or guaranteeing institution for such portion of such period as may be determined in accordance with adjusted or pro forma consolidated earnings statements covering such portion of such period and giving effect to all stocks or shares outstanding and all fixed charges existing, immediately after such acquisition, or such reorganization.

3. Preferred or guaranteed stocks or shares of any solvent institution, created or existing under the laws of the United States or of any state, district or territory thereof, if all of the prior obligations, and prior preferred stocks, if any, of such institution at the date of acquisition by such insurer are eligible as investments under this section; and if qualified under paragraph (a) or paragraph (b) following:

(a) Preferred stocks or shares shall be deemed qualified if both of the following requirements are met: (a-1) the net earnings of such institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times the sum of its average annual fixed charges, if any, its average annual maximum contingent interest if any, and its average annual preferred dividend requirements applicable to such period; and (a-2) during each of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges, contingent interest and preferred dividend requirements for such year. The term "preferred dividend requirements" shall be deemed to mean cumulative or noncumulative dividends whether paid or not.

(b) Guaranteed stocks or shares shall be deemed qualified if the assuming

or guaranteeing institution meets the requirements of paragraph (b) of subdivision 2 of subsection III construed so as to include as a fixed charge the amount of guaranteed dividends of such issue or the rental covering the guarantee of such dividends.

(4) (a) Certificates, notes or other obligations issued by trustees or receivers of any institution created or existing under the laws of the United States or of any state, district or territory thereof, which, or the assets of which, are being administered under the direction of any court having jurisdiction, if such obligation is adequately secured as to principal and interest.

(b) Equipment trust obligations or certificates which are adequately secured or other adequately secured instruments evidencing an interest in transportation equipment wholly or in part within the United States and a right to receive determined portions of rental, purchase or other fixed obligatory payments for the use or purchase of such transportation equipment.

5. Bank and bankers' acceptances and other bills of exchange of the kind and maturities made eligible, pursuant to law, for purchase in the open market by federal reserve banks.

6. (a) Bonds or evidences of indebtedness other than those described in subdivision 2 of subsection III which are secured by first mortgages or deeds of trust upon unencumbered fee simple or improved leasehold real property located in the United States. Real property shall not be deemed to be encumbered within the meaning of this section, by reason of the existence of instruments reserving mineral, oil or timber rights, rights of way, sewer rights, rights in walls, nor by reason of any liens for taxes or assessments not yet due, nor by reason of building restrictions or other restrictive covenants, nor when such real property is subject to lease under which rents or profits are reserved to the owner, if in any event the security for such loan is a first lien upon such real property and if there is no condition or right of re-entry or forfeiture, under which such lien can be cut off, subordinated or otherwise disturbed. No such mortgage loan or loans made or acquired by any insurer on any one property shall, at the time of investment by the insurer, exceed two-thirds of the value of the real property securing the same. No such mortgage loan or loans shall be made or acquired by an insurer except after an appraisal made by an appraiser for the purpose of such investment. No such mortgage loan made or acquired by an insurer which is a participation or a part of a series or issue secured by the same mortgage or deed of trust shall be a lawful investment under this paragraph unless the entire series or issue which is secured by the same mortgage or deed of trust is held by such insurer or unless the insurer holds a senior participation in such mortgage or deed of trust giving it substantially the rights of a first mortgagee. Except as otherwise provided in this section, no domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, shall invest in or loan upon the security of any one property more than twenty-five thousand dollars or more than two per centum of its total admitted assets, whichever is the greater. In no event shall the total investments of any such insurer in the kinds permitted under this subdivision exceed forty per centum of its total admitted assets.

(b) Purchase money mortgages or like securities received by it upon the sale or exchange of real property acquired pursuant to subdivision 8 of this subsection III.

(c) Bonds or notes secured by mortgage or trust deed guaranteed or insured by the Federal Housing Administration under the terms of an act of Congress of the United States of June twenty-seventh, nineteen hundred thirty-four, entitled the "National Housing Act," as heretofore or hereafter amended.

7. Ground rents in the District of Columbia or any state of the United States of America, provided, that in the case of unexpired redeemable ground rents the premium paid, if any, shall be amortized over the period between date of ac-

quisition and redemption date; and in the case of expired redeemable ground rents the premium paid, if any, shall be charged off at the time of acquisition. Redeemable ground rents purchased at a discount shall be carried at an amount not greater than the cost of acquisition.

8. Real estate only if acquired or used for the following purposes in the following manner:

(a) The land and the building thereon in which it has its principal office or offices.

(b) Such as shall be requisite for its convenient accommodation in the transaction of its business.

(c) Such as shall have been acquired in satisfaction of loans, mortgages, liens, judgments, decrees or other debts previously owing to such insurer in the course of its business.

(d) Such as shall have been acquired in part payment of the consideration on the sale of real property owned by it, if each such transaction shall have effected a net reduction in the company's investment in real property.

(e) Additional real property and equipment incident to real property, if necessary or convenient for the purpose of enhancing the sale value of real property previously acquired or held by it pursuant to the provisions of paragraph (c) or (d) of this subdivision 8.

All real property acquired pursuant to paragraphs (a) and (b) of this subdivision shall be disposed of within five years after it shall have ceased to be necessary for the convenient accommodation of such insurer in the transaction of its business, and all real property acquired pursuant to paragraphs (c), (d) and (e) of this subdivision shall be disposed of within five years after the date of acquisition, unless in either case the Commissioner shall certify that the interests of the insurer will suffer materially by the forced sale thereof, in which event the time for disposal of such real property may be extended for such time as the Commissioner shall prescribe in such certificate. No real property shall be acquired by any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, pursuant to paragraphs (a), (b), (d) or (e) of this subdivision 8, except with the approval of the Commissioner.

9. (a) Any domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, may invest in, or otherwise acquire or loan upon, bonds, notes or other evidences of indebtedness which are valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof and which are not in default as to principal or interest; but the aggregate amount of such investments which are held at any time by any such insurer, together with all Canadian investments held by it pursuant to the following paragraph (b) shall not exceed ten per cent of its total admitted assets, except where a greater amount is permitted pursuant to the following paragraph (b), in which case the provisions of this subdivision shall not be applicable.

(b) Any domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, which is authorized to do business in a foreign country or possession of the United States or which has outstanding insurance or reinsurance contracts on risks located in a foreign country or possession of the United States, may invest in, or otherwise acquire or loan upon securities and investments in such foreign country or possession which are substantially of the same kinds, classes and investment grades as those eligible for investment under the foregoing subdivisions of this subsection; but the aggregate amount of such investments in a foreign country or a possession of the United States and of cash in the currency of such country or possession which is at any time held by such insurer shall not, except as provided in the next preceding paragraph (a), exceed one and one-half times the amount of its

reserves and other obligations under such contracts or the amount which such insurer is required by law to invest in such country or possession, whichever shall be greater.

10. Stock and debentures, or either, of any housing company organized under the public housing law of this State, to the extent and upon such conditions as may be authorized by the Commissioner, provided all of the stock of such housing company has been or is to be originally issued to one or more insurance companies.

IV. Residue and Surplus Fund Investments.—After satisfying the requirements for minimum capital investments, any domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association, which has accumulated and maintains reserve investments as required in subsection II, may invest any portion of the remainder of its funds in, or otherwise acquire or loan upon, any of the classes of investments eligible under subsection III and any stock or shares, bonds or obligations, including voting trust certificates, certificates of deposit, interim receipts, and other similar instruments representing stock or shares, bonds or obligations eligible hereunder, or in investments in loans made by banks or trust companies secured by the assignment of cash surrender values of at least equal amount, in life insurance policies issued by life insurance companies licensed to do business in the State of North Carolina, except the following prohibited investments:

(1) Obligations, stock or other securities of any corporation, association or other business unit which is insolvent at the time of such acquisition or loan, except securities eligible for investment under subsection III.

(2) Any mortgage or deed of trust, or any real property or any interest therein, which does not come within the class of investments specified in subdivisions 6 and 7 of subsection III.

(3) Any capital stock of the investing insurer.

(4) Stocks, bonds or other securities issued by any corporation, if a majority of the outstanding stock of such corporation, or a majority of the stock having voting powers of such corporation is, or will be after such acquisition, directly or indirectly owned by such insurer or by or through one or more of its officers or directors holding the same, for the benefit of such insurer or of its stockholders, or owned by a parent corporation or subsidiary of such insurer, parent corporation or subsidiary thereof, or owned by any combination of the insurer, its parent corporation, its subsidiaries or its stockholders. Nothing contained in this paragraph shall be deemed to prevent any investment in the stock, bonds or other securities of a corporation organized exclusively to hold and operate real estate acquired by such insurer in accordance with and subject to the provisions of subsection III, nor an investment in the stock of another insurance corporation nor an investment in stocks, bonds or other securities of any corporation which is engaged exclusively in a kind of business properly incidental to the insurance business of such insurer, including an investment in securities of any corporation engaged in the financing of insurance premiums, or in such incidental business and the business of holding and operating real estate.

(5) Stocks, bonds or other securities issued by a corporation, other than an insurance corporation, having more than twenty per centum of its assets invested in insurance company stocks directly or indirectly, including proportionate equities or interest in insurance company stocks held through any intermediate subsidiary or subsidiaries of such issuing corporation.

(6) Stocks, bonds or other securities issued by a corporation, other than an insurance corporation, if a majority of the stock having voting powers of such issuing corporation is owned directly or indirectly by or for the benefit of one or more officers or directors of such insurer.

(7) Foreign investments, meaning stocks or shares, bonds or obligations of any person or governmental or business unit of or in a foreign country or any

subdivision thereof, except such as conform substantially with the limitations imposed by this subsection upon like domestic investments; but the aggregate amount of foreign investments held by such insurer under this subdivision of subsection IV and under subdivision 9 of subsection III shall not exceed ten per centum of its total admitted assets or one and one-half times the amount of its reserves and other obligations under such contracts or the amount necessary to enable it to establish and carry on an insurance business in such foreign country, directly or through a subsidiary corporation, whichever shall be greater.

(8) Any investment which is found by the Commissioner to be against public policy or designed to evade any prohibition of this section. Nothing contained herein shall be deemed to prohibit any such insurer from accepting securities, otherwise ineligible, which may be distributed pursuant to any plan of reorganization or dissolution.

V. Limitation of Investments.—Except as more specifically provided in this section, no domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association, shall have more than ten per cent of its total admitted assets invested in, or loaned upon the securities of any one institution; but this restriction shall not apply to the classes of governmental obligations (including those eligible under paragraph (c), subdivision 6 of subsection III) eligible for minimum capital investments of such insurer nor to investments in stocks of other insurance companies. No domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association shall hereafter acquire any real property of the kind or kinds specified in paragraphs (a) and (b) of subdivision 8 of subsection III, if the value of such real property, together with the value of all such real property then held by it, exceeds ten per centum of its total admitted assets.

VI. Disposal or Reduction of Investments Unlawfully Acquired.—Every domestic stock and mutual insurance company, other than a life insurance company or fraternal benefit association, shall dispose of any investments acquired in violation of the law in force at the date of such acquisition, and in any determination of the financial condition of any such insurer, the amount of the value of such investments, if wholly ineligible, or the amount of the value thereof in excess of any limitation prescribed in this section, shall be deducted as an unadmitted asset of such insurer.

VII. Investments of Foreign and Alien Insurers.—(1) The Commissioner may refuse a new or renewal license to any foreign insurer, if he finds that its investments do not comply in substance with the investment requirements and limitations imposed by this section upon like domestic insurers hereafter organized to do the same kind or kinds of insurance business. The Commissioner may recognize like securities of the home state of a foreign insurer as minimum capital investments in lieu of the securities specified in subparagraphs (b) and (d) of subsection I.

(2) No alien insurer shall be authorized to do business in this State unless its general State deposits and its trustee assets comply in substance with the requirements and limitations of this section applicable to like domestic insurers hereafter organized to do the same kind or kinds of insurance business, except that foreign investments shall be allowed to the following extent only:

(a) Bonds, notes or other evidences of indebtedness issued or guaranteed by the government of the country in which such alien insurer was organized or by any province or other major political subdivision thereof and not in default as to principal or interest, may be recognized as reserve investments under subsection III in an amount not exceeding the minimum capital required of a domestic stock insurer hereafter organized to do the same kind or kinds of insurance business.

(b) Bonds, notes or other valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof which

are not in default as to principal or interest may be included in the trustee assets of such alien insurer in an amount not exceeding ten per cent of the total admitted assets of the United States branch of such insurer.

VIII. Valuation of Investments.—(1) The investments of every stock and mutual insurance company, other than a life insurance company or a fraternal benefit association, authorized to do business in this State, except securities subject to amortization and except as otherwise provided in this section, shall be valued, in the discretion of the Commissioner, at their market value, or at their appraised value, or at prices determined by him as representing their fair market value. If the Commissioner finds that in view of the character of investments of any such insurer authorized to do business in this State it would be prudent for such insurer to establish a special reserve for possible losses or fluctuations in the values of its investments, he may require such insurer to establish such reserve, reasonable in amount, and may require that such reserve be maintained and reported in any statement or report of the financial condition of such insurer. The Commissioner may, in connection with any examination or required financial statement of an authorized insurer require such insurer to furnish him a complete financial statement and audited report of the financial condition of any corporation of which the securities are owned wholly or partly by such insurer and may cause an examination to be made of any subsidiary or affiliate of such insurer.

(2) The stock of an insurance company shall be valued at its book value as shown by its last annual statement or the last report on examination, whichever is more recent. The book value of a share of common stock of an insurance company shall be ascertained by dividing (a) the amount of its capital and surplus less the value of all of its preferred stock, if any, outstanding, by (b) the number of shares of its common stock issued and outstanding. Notwithstanding the foregoing provisions, an insurer may, at its option, value its holdings of stock in a subsidiary insurance company in an amount not less than acquisition cost if such acquisition cost is less than the value determined as hereinbefore provided.

(3) Real estate acquired by foreclosure or by deed in lieu thereof, in the absence of a recent appraisal deemed by the Commissioner to be reliable, shall not be valued at an amount greater than the unpaid principal of the defaulted loan at the date of such foreclosure or deed, together with any taxes and expenses paid or incurred by such insurer at such time in connection with such acquisition (but not including any uncollected interest on such loan), and the cost of additions or improvements thereafter made by such insurer and any amount or amounts thereafter paid by such insurer on any assessments levied for improvements in connection with the property.

(4) Purchase money mortgages shall be valued in an amount not exceeding the acquisition cost of such real property or ninety per cent of the value of such real property, whichever is less.

(5) The stock of a subsidiary of an insurer shall be valued on the basis of the value of only such of the assets of such subsidiary as would constitute lawful investments for the insurer if acquired or held directly by the insurer.

IX. Interest, Dividends and Rent.—In any determination of the financial condition of every stock and mutual insurance company, domestic or foreign, other than a life insurance company or a fraternal benefit association, authorized to do business in this State, amounts due to such insurer may be allowed as an admitted asset of such insurer as follows:

(1) Interest due or accrued on any bond or evidence of indebtedness qualifying as an admitted asset which is not in default and which is not valued on a basis including accrued interest.

(2) Declared and unpaid dividends on stocks and shares unless such amount has otherwise been allowed as an admitted asset.

(3) Interest due or accrued upon a collateral loan in an amount not to exceed one year's interest thereon.

(4) Interest due or accrued on deposits in solvent banks and trust companies, and interest due or accrued on other admitted assets if such interest is in the judgment of the Commissioner a collectible asset.

(5) Interest due or accrued on any real estate mortgage loan which is an admitted asset, in amount not exceeding in any event the amount, if any, obtained by subtracting the amount of the principal remaining unpaid from the value of the property less delinquent taxes thereon; but if any interest on such loan is in default more than eighteen months, or if any interest on such loan is in default and any taxes or any installment thereof on such property are and have been due and unpaid for more than eighteen months, no allowance shall be made for any interest on such loan.

(6) Rent due or accrued on real property if such rent is not in arrears for more than three months.

X. Application of § 58-79, Subdiv. II (c).—The provisions of subdivision II (c) of § 58-79 shall apply to all insurance companies doing business in this State. (1945, c. 386.)

§ 58-80. Valuation of bonds and other evidences of debt; discretion of Commissioner of Insurance.—All bonds or other evidences of debt having a fixed term and rate held by any life insurance company, assessment life association, or fraternal beneficiary association authorized to do business in this State may, if amply secured and not in default as to principal and interest, be valued as follows: If purchased at par, at the par value; if purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity, and so as to yield in the meantime the effective rate of interest at which the purchase was made: Provided, that the purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase; and provided further, that the Commissioner of Insurance shall have full discretion in determining the method of calculating values according to the foregoing rule. (1921, c. 220; C. S., s. 6334(a).)

§ 58-81. Authority to increase or reduce capital stock.—The Commissioner of Insurance shall, upon application, examine the proceedings of domestic companies to increase or reduce their capital stock, and when found conformable to law shall issue certificates of authority to such companies to transact business upon such increased or reduced capital: Provided, that in no event shall the said capital stock be reduced to an amount less than that required upon organization of such company in § 58-77. He shall not allow stockholders' obligations of any description as part of the assets or capital of any stock insurance company unless the same are secured by competent collateral. (1899, c. 54, s. 15; Rev., s. 4732; C. S., s. 6335; 1945, c. 386.)

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

§ 58-82. Assessment of shares; revocation of license.—When the net assets of a company organized under this article do not amount to more than the amount required in § 58-77 for its original capital, it may make good its capital to the original amount by assessment of its stock. Shares on which such an assessment is not paid within sixty days after demand shall be forfeitable and may be canceled by vote of the directors and new shares issued to make up the deficiency. If such company does not, within three months after notice from the Commissioner of Insurance to that effect, make good its capital or reduce the same, as allowed by this article, its authority to transact new business of insurance shall be revoked by the Commissioner. (1899, c. 54, s. 28; 1903, c. 438, s. 4; Rev., s. 4733; C. S., s. 6336; 1945, c. 386.)

Editor's Note.—The 1945 amendment "the amount required in § 58-77 for" for substituted in the first sentence the words the words "three-fourths of."

§ 58-83. Increase of capital stock.—Any company organized under the

provisions of this chapter may issue pro rata to its stockholders certificates of any portion of its actual net surplus over and above the minimum required by law it deems fit to divide, which shall be considered an increase of its capital to the amount of such certificates. The company may, at a meeting called for the purpose, vote to increase the amount and number of shares of its capital stock, and to issue certificates therefor when paid for in full. In whichever method the increase is made, the company shall, within thirty days after the issue of such certificates, submit to the Commissioner of Insurance a certificate setting forth the amount of the increase and the facts of the transaction, signed and sworn to by its president and secretary and a majority of its directors. If the Commissioner of Insurance finds that the facts conform to the law, he shall endorse his approval thereof; and upon filing such certificate so endorsed with the Secretary of State, and the payment of a fee of five dollars for filing the same, the company may transact business upon the capital as increased, and the Commissioner of Insurance shall issue his certificate to that effect. (1899, c. 54, s. 29; Rev., s. 4734; C. S., s. 6337; 1945, c. 386.)

Editor's Note.—The 1945 amendment struck out the words "this article" in the first sentence and inserted in lieu thereof the words "the provisions of this chapter."

It also inserted in the sentence the words "over and above the minimum required by law."

§ 58-84. Reduction of capital stock.—When the capital stock of a company organized under this article is impaired, the company may, upon a vote of the majority of the stock represented at a meeting legally called for that purpose, reduce its capital stock and the number of shares thereof to an amount not less than the minimum sum required by law, but no part of its assets and property shall be distributed to its stockholders. Within ten days after such meeting the company must submit to the Commissioner of Insurance a certificate setting forth the proceedings thereof and the amount of the reduction and the assets and liabilities of the company, signed and sworn to by its president, secretary, and a majority of its directors. The Commissioner of Insurance shall examine the facts in the case, and if they conform to law, and in his judgment the proposed reduction may be made without prejudice to the public, he shall endorse his approval upon the certificate. Upon filing the certificate so endorsed with the Secretary of State and paying a filing fee of five dollars, the company may transact business upon the basis of the reduced capital as though it were original capital, and its charter shall be deemed to be amended to conform thereto, and the Commissioner of Insurance shall issue his certificate to that effect. The company may, by a majority vote of its directors, after the reduction, require the return of the original certificates of stock held by each stockholder in exchange for new certificates it may issue in lieu thereof for such number of shares as each stockholder is entitled to in the proportion that the reduced capital bears to the original capital. (1899, c. 54, s. 30; Rev., s. 4735; C. S., s. 6338.)

§ 58-85. Dividends not payable when capital stock impaired; liability of stockholders for unlawful dividends.—No dividend shall be paid by any company incorporated in this State when its capital stock is impaired, or when such payment would have the effect of impairing its capital stock; and any dividend so paid subjects the stockholders receiving it to a joint and several liability to the creditors of said company to the extent of the dividend so paid. (1899, c. 54, s. 31; 1903, c. 536, s. 3; Rev., s. 4736; C. S., s. 6339; 1945, c. 386.)

Editor's Note.—The 1945 amendment struck out the former first sentence which read as follows: "No stock company organized under this article may pay a cash or stock dividend except from its actual net surplus computed as required

by law in its annual statements, nor may any such company which has ceased to do new business of insurance divide any portion of its assets, except surplus, to its stockholders, until it has performed or canceled its policy obligations."

§ 58-85.1. Payment of dividends impairing financial soundness of

company or detrimental to policyholders. — Each domestic insurance company in North Carolina shall be restricted by the Commissioner from the payment of any dividends to its stockholders whenever the Commissioner determines from examination of such company's financial condition that the payment of future dividends would impair the financial soundness of the company or be detrimental to its policyholders, and such restrictions shall continue in force until such future date when the Commissioner may specifically permit the payment of dividends to stockholders by the company through a written authorization. Nothing contained in this section and no action taken by the Commissioner shall in any way restrict the liability of stockholders under the preceding section. (1945, c. 386.)

§ 58-86. Loans insufficiently secured.—Whenever it appears by examination, as authorized by law, that an insurance company, organized under the laws of this State, holds, as collateral security for the payment of any loan, any stock, bond, or security of whatever description, which has not a cash market value of at least twenty-five per centum more than the amount of such loan, the Commissioner of Insurance may require the reduction of the loan or an increase of the collateral security, so that the security shall be at least twenty-five per centum in excess of the amount loaned. If the company fail to comply with this requirement within ten days after receiving written notice thereof from the Commissioner, it is the duty of the Commissioner to disallow the loan and to deduct the amount thereof from the assets of the company. If it appears, upon examination, that any such insurance company holds, as security for any loan, a mortgage upon real estate which is not a first lien, or that the value of the real estate is less than fifty per centum in excess of the loan which it is mortgaged to secure, the Commissioner of Insurance may disallow the loan and deduct the amount thereof from the assets of the company holding it, after having given the company at least twenty days' notice, in writing, to change or conform the loan to the requirements of this section. (1903, c. 536, ss. 6, 7, 8; Rev., s. 4737; C. S., s. 6340.)

§ 58-86.1. Certain officers debarred from commissions. — No officer or other person whose duty it is to determine the character of the risk, and upon whose decision the application shall be accepted or rejected by an insurance company, shall receive as any part of his compensation a commission upon the premiums, but his compensation shall be a fixed salary and such share in the net profits as the directors may determine. Nor shall such officer or person be an employee of any officer or agent of the company. (1899, c. 54, s. 32; 1903, c. 438, s. 4; Rev., s. 4738; C. S., s. 6347; 1945, c. 386.)

Editor's Note.—This section was transferred from § 58-93.

ARTICLE 7.

Guaranty Fund for Domestic Companies.

§ 58-87. Guaranty fund established. — Any insurance company formed as provided in the preceding article, or now existing by virtue of any of the laws of North Carolina, may establish a guaranty fund of not less than twenty-five thousand dollars nor more than two hundred thousand dollars, in the following manner: The company may receive from any person, firm, or corporation, money, bonds, or other securities, in such amount as may be agreed upon, for the purpose of providing a guaranty fund, to be used as hereinafter provided, for payment of the claims of policyholders. Upon the receipt of such bonds, money, or other securities by an insurance company, it shall issue its certificate, in writing, authenticated as required by law for certificates of stock, stating the amount, terms, and conditions of repayment of such money or the return of such bonds or other securities, the name of the payee or depositor, and the certificate shall also state upon its face that it is issued under the provisions of this section. The money, bonds, or other securities, when so paid to or deposited with such insur-

ance company, become a part of the guaranty fund of the company, and are liable for all the claims of policyholders after the general assets of the company have been exhausted. This guaranty fund is not liable for the claims or debts due to stockholders or the general creditors of such insurance company. No insurance company shall create a guaranty fund, as provided in this article, except upon the approval of a majority of its stockholders authorized at any regular or special meeting called for the purpose. (1909, c. 922, s. 1; C. S., s. 6341.)

§ 58-88. Separate accounts; application of fund.—Every insurance company which establishes a guaranty fund under the provisions of this article must keep a separate account of the same on its books, together with a full and true list of any securities held therefor. The money and securities belonging to the guaranty fund must be invested in the same manner as is now provided by law for the investment of other assets of insurance companies; but any bond or other securities received by any such insurance company as a part of its guaranty fund may be deposited with the Commissioner of Insurance, as is now allowed by law, subject to the further provisions of this article. An insurance company receiving said money or securities as a part of its guaranty fund, as herein provided, may pay to the person, firm, or corporation from whom the same is received an annual dividend of not more than eight per cent on the amount of said money or securities. The guaranty fund herein provided for shall be applied to the payment of claims of policyholders only when the insurance company has exhausted its cash on hand and the invested assets, exclusive of uncollected premium; and when the guarantee is in any way impaired the directors may make good the whole or any part of such impairment, by assessment upon the contingent funds of the company at the date of such impairment, if any are available. (1909, c. 922, s. 1; C. S., s. 6342; 1945, c. 386.)

Editor's Note.—The 1945 amendment substituted in the third sentence "an annual dividend" for "a semiannual dividend" and "eight per cent" for "three and one-half per cent."

§ 58-89. Reduction or retirement of fund.—The guaranty fund shall be retired when the permanent fund of the company equals two per centum of the amount insured upon all policies in force; and such guaranty fund may be reduced or retired by vote of the directors of the company and the assent of the Commissioner of Insurance, if the net assets of the company above the reinsurance reserve and all other claims and obligations, exclusive of the guaranty fund, for two years immediately preceding and including the date of its last annual statement, are not less than twenty-five per centum of the fund. Due notice of this proposed action on the part of the directors of the company must be mailed to each director of the company not less than thirty days before the meeting when such action may be taken, and must also be advertised in two newspapers of general circulation, to be approved by the Commissioner of Insurance, not less than twice a week for a period of not less than four weeks before the meeting. No insurance company with a guaranty fund, as hereinbefore provided, which has ceased to do new business, may return or retire any part of the guaranty fund or divide to its stockholders any part of its general assets, except incomes from its investments, until it shall have performed, reinsured, or canceled its policy obligations. (1909, c. 922, s. 1; C. S., s. 6343.)

§ 58-90. Insolvency; return of fund.—In the event of insolvency or voluntary liquidation of any such insurance company, the amount of the guaranty fund shall be returned to the persons, firms, or corporations, their heirs, executors, administrators, successors, or assigns, from which the same was received, in full or pro rata, as the case may be, before any amount shall be paid from the assets of said company to its stockholders. The intention of this section is that the liability of the company for the repayment or the return of its guaranty fund, as evidenced by its certificates therefor, as hereinbefore provided, shall be preferred in

the distribution of its assets to the stockholders and general creditors of the company, other than its policy obligations. (1909, c. 922, s. 1; C. S., s. 6344.)

§ 58-91. Conversion to guaranty fund.—Any insurance company now doing business as a domestic insurance company under the laws of this State which has received any money or securities to be held as a guaranty capital, guaranty surplus, or guaranty fund, may convert the same into a guaranty fund, as hereinbefore provided, by mutual agreement between the board of directors of the insurance company and the parties from whom the money or securities have been received, subject, however, to the approval of the Commissioner of Insurance, and thereupon certificates shall be issued therefor, as hereinbefore provided, and the same shall thereafter be held subject to the rights and liabilities provided in this article. (1909, c. 922, s. 2; C. S., s. 6345.)

ARTICLE 8.

Mutual Insurance Companies.

§ 58-92. Mutual insurance companies organized; requisites for doing business.—No policy may be issued by a mutual company until the president and the secretary of the company have certified under oath that every subscription for insurance in the list presented to the Commissioner for approval is genuine, and made with an agreement with every subscriber for insurance that he will take the policies subscribed for by him within thirty days after the granting of a license to the company by the Commissioner to issue policies. (1899, c. 54, ss. 25, 32, 34; 1901, c. 391, s. 3; 1903, c. 438, s. 4; Rev., s. 4738; 1911, c. 93; C. S., s. 6346; 1945, c. 386.)

Editor's Note.—The 1945 amendment struck out the former first sentence and made changes in the second sentence.

§ 58-92.1. Manner of amending charter.—1. A domestic mutual insurance company may hereafter amend its charter in the following manner only:

(a) A meeting of the board of directors shall be called in accordance with the bylaws, specifying the amendment to be voted upon at such meeting;

(b) If at such meeting two-thirds of the directors present vote in favor of the proposed amendment, then the president and secretary shall under oath make a certificate to this effect, which certificate shall set forth the call for such meeting, the service of such call upon all directors, and the minutes of the meeting relating to the adoption of the proposed amendment;

(c) Said officers shall cause said certificate to be published once a week for two consecutive weeks in a newspaper in Raleigh and in the county where the company's principal office is located, or posted at the courthouse door if no newspaper be published within the county. Said printed or posted notices shall be in such form and of such size as the Commissioner may approve, and in addition to setting forth in full the certificate required in paragraph (b) shall state that application for amending the company's charter in the manner specified has been proposed by the board of directors, and shall also state the time set for a meeting of policyholders thereby called to be held at the principal office of the company to take action on the proposed amendment. A true copy of such notice shall be filed with the Commissioner, and also with that official who performs the functions of Insurance Commissioner in each state where the company is licensed to do business. Such publication and filing of notices shall be completed at least thirty days prior to the date set therein for the meeting of policyholders and due proof thereof shall be filed with the Commissioner at least fifteen days prior to the date of such meeting. If the meeting at which the proposed amendment is to be considered is a special meeting, rather than a regular annual meeting of policyhold-

ers, such special meeting can be called only after the Commissioner has given his approval in writing, and the published notice shall show the fact of such approval;

(d) If at such policyholders' meeting two-thirds of those voting in person or by proxy shall vote in favor of any proposed amendment, the president and secretary shall make a certificate under oath setting forth such fact together with the full text of the amendment thus approved. Said certificate shall, within thirty days after such meeting, be submitted to the Commissioner for his approval as conforming to the requirements of law, and it shall be the duty of the Commissioner to act upon all proposed amendments within ten days after the filing of such certificate with him.

2. All charter amendments heretofore issued upon application of the board of directors of any domestic mutual insurance company are hereby validated, if otherwise legally adopted. (1947, c. 721.)

Editor's Note.—For comment on this section, see 25 N. C. Law Rev. 441.

§ 58-93: Transferred to § 58-86.1 by Session Laws 1945, c. 386.

Editor's Note.—This section was repealed but a part of it was rewritten and transferred as stated above.

§ 58-94. **Policyholders are members of mutual companies.**—Every person insured by a mutual insurance company is a member while his policy is in force, entitled to one vote for each policy he holds, and must be notified of the time and place of holding its meetings by a written notice or by an imprint upon the back of each policy, receipt, or certificate of renewal, as follows:

The insured is hereby notified that by virtue of this policy he is a member of the insurance company, and that the annual meetings of the company are held at its home office on the day of, in each year, at o'clock.

The blanks shall be duly filled in print and are a sufficient notice. A corporation which becomes a member of such company may authorize any person to represent it, and this representative has all the rights of an individual member. A person holding property in trust may insure it in such company, and as trustee assume the liability and be entitled to the rights of a member, but is not personally liable upon the contract of insurance. Members may vote by proxies, dated and executed within three months, and returned and recorded on the books of the company three days or more before the meeting at which they are to be used; but no person as proxy or otherwise may cast more than twenty votes. (1899, c. 54, s. 33; Rev., s. 4739; C. S., s. 6348; 1945, c. 386; 1947, c. 721.)

Editor's Note.—The 1945 amendment struck out the word "fire" formerly appearing before "companies" in the caption of the section. And the 1947 amendment struck out the word "fire" formerly appearing before the word "insurance" near the beginning of the section.

Protection of Trustee.—This section is an enabling statute to protect a trustee from liability. Fuller v. Lockhart, 209 N.

C. 61, 182 S. E. 733 (1935).

Policyholders in a mutual fire insurance company are not liable for its debts beyond the contingent liability fixed in the policy. Fuller v. Lockhart, 209 N. C. 61, 182 S. E. 733 (1935). See §§ 58-97.1 to 58-97.3.

As to county boards of education as policyholders, see Fuller v. Lockhart, 209 N. C. 61, 182 S. E. 733 (1935).

§ 58-95. **Directors in mutual companies.**—Every mutual insurance company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business and hold office for one year or for such term as the bylaws provide and until their successors are qualified. Two-thirds at least of the directors must be citizens of the State, and after the first election members only are eligible, but no director is disqualified from serving the term he was chosen for by reason of the expiration or cancellation of his policy. In companies with a

guaranty capital, one-half of the directors shall be chosen by and from the stockholders. (1899, c. 54, s. 33; Rev., s. 4739; C. S., s. 6349; 1945, c. 386.)

Editor's Note.—The 1945 amendment struck out the word “fire” formerly appearing after the word “mutual” in the caption and also near the beginning of the section.

§ 58-96. Mutual companies with a guaranty capital.—A mutual insurance company formed as provided in this chapter, in lieu of the contributed surplus required for the organization of mutual companies under the provisions of § 58-77, or a mutual insurance company now existing, may establish a guaranty capital or surplus of not less than twenty-five thousand dollars nor more than three hundred thousand dollars, divided into shares of one hundred dollars each, which shall be invested in the same manner as is provided in this subchapter for the investment of the capital stock of insurance companies. The stockholders of the guaranty capital of a company or owners of guaranty surplus are entitled to an annual dividend of not more than eight per centum on their respective shares, if the net profits or unused premiums left after all expenses, losses, and liabilities then incurred, together with the reserve as provided for, are sufficient to pay the same. The guaranty capital or surplus shall be applied to the payment of losses only when the company has exhausted its cash in hand and the invested assets, exclusive of uncollected premiums, and when thus impaired, the directors may make good the whole or any part of it by assessments upon the contingent funds of the company at the date of such impairment. Shareholders and members of such companies are subject to the same provisions of law in respect to their right to vote as apply respectively to shareholders in stock companies and policyholders in purely mutual companies. This guaranty capital or surplus may be reduced or retired by vote of the policyholders of the company and the assent of the Commissioner of Insurance, if the net assets of the company above its reserve and all other claims and obligations, exclusive of guaranty capital or surplus, for two years immediately preceding and including the date of its last annual statement, is not less than twenty-five per centum of the guaranty capital or surplus. Due notice of such proposed action on the part of the company must be mailed to each policyholder of the company not less than thirty days before the meeting when the action may be taken, and must also be advertised in two papers of general circulation, approved by the Commissioner of Insurance, not less than three times a week for a period of not less than four weeks before such meeting. No insurance company with a guaranty capital or surplus, which has ceased to do new business, shall divide to its stockholders any part of its assets or guaranty capital or surplus, except income from investments, until it has performed or canceled its policy obligations. (1899, c. 54, s. 34; Rev., s. 4740; 1911, c. 196, s. 3; C. S., s. 6350; 1945, c. 386.)

Editor's Note.—The 1945 amendment struck out the word “fire” formerly appearing after the word “mutual” in the caption and in the first sentence. It also struck out the words “article, or a mutual fire” formerly appearing near the beginning of the sentence and inserted in lieu thereof the words “chapter, in lieu of the contributed surplus required for the organization of mutual companies under the provisions of § 58-77, or a mutual.” And the amendment made other changes in the first sentence. In the second sentence the amendment changed the dividend from

“a semiannual” to “an annual” one and the “per centum” from “three and one-half” to “eight,” and struck out the words “for reinsurance” formerly appearing after the word “reserve” near the end of the sentence. The amendment struck out after the word “surplus” near the beginning of the fifth sentence the words “shall be retired when the permanent fund of the company equals two per centum of the amount insured upon all policies in force, and.” It also struck out the word “reinsurance” formerly appearing before the word “reserve” in the said sentence.

§ 58-97. Dividends to policyholders.—Any participating or dividend paying company, stock or mutual, other than life, may declare and pay a dividend to policyholders from its surplus which shall include only its surplus in excess of any

required minimum surplus. No such dividend shall be paid unless fair and equitable and for the best interest of the company and its policyholders. In declaring any dividend to its policyholders, any such company may make reasonable classifications of policies expiring during a fixed period, upon the basis of each general kind of insurance covered by such policies and by territorial divisions of the location of risks by states, except that in fixing the amount of dividends to be paid on each general kind of insurance, which dividends shall be uniform in rate and applicable to the majority of risks within such general kind of insurance, exceptions may be made as to any class or classes of risk and a different rate or amount of dividends paid on such class or classes if the conditions applicable to such class or classes differ substantially from the condition applicable to the kind of insurance as a whole. Every such company shall have an equal rate of dividend for the same term on all policies insuring risks in the same classification. The payment of dividends to policyholders shall not be contingent upon the maintenance or renewal of the policy. All dividends shall be paid to the policyholder unless a written assignment thereof be executed. Neither the payment of dividends nor the rate thereof may be guaranteed by any company, or its agent, prior to the declaration of the dividend by the board of directors of such company. The holders of policies of insurance issued by a company in compliance with the orders of any public official, bureau or committee, in conformity with any statutory requirement or voluntary arrangement, for the issuance of insurance to risks not otherwise acceptable to the company shall be entitled to dividends at the same rate as other policyholders of the company. (1899, c. 54, s. 35; Rev., s. 4741; C. S., s. 6351; 1935, c. 89; 1945, c. 386; 1947, c. 721.)

Editor's Note.—The 1945 amendment rewrote this section which formerly also applied to assessments and contingent liability of policyholders. Now see §§ 58-97.1 to 58-97.3.

The 1947 amendment inserted near the beginning of the section the words "stock or mutual."

Applied, under former statute and as to county boards of education, in *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733 (1935).

Cited in *Paramore v. Farmers' Mut. Fire Ins. Ass'n*, 207 N. C. 300, 176 S. E. 585 (1934).

§ 58-97.1. Contingent liability of policyholders.—Every insurance company shall in its bylaws and policies prescribe the contingent liability, if any, of its members for the payment of losses, reserves and expenses not provided for by its assets, which contingent liability shall be in accordance with the provisions of § 58-77. Each member is liable for the payment of his proportionate share of any assessments made by the company in accordance with the law, his contract and the bylaws of the company on account of losses incurred while he was a member, if he is notified of such assessment within one year after the expiration of his policy. When any reduction is made in the contingent liability of members, it shall apply proportionately to all policies in force. (1945, c. 386.)

As to county boards of education as policyholders under former statute, see *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733 (1935).

§ 58-97.2. Contingent liability printed on policy.—Every insurance company licensed to do business in this State shall print upon the filing face of its policies in clear and explicit language the full contingent liability of its members. (1945, c. 386.)

§ 58-97.3. Nonassessable policies; foreign or alien companies.—No foreign or alien insurance company shall be licensed to issue in this State nonassessable policies unless it has a free surplus equal in amount to that required of a domestic insurance company, writing the same kind or kinds of insurance, and in addition thereto has fully complied with the requirements of the government under which it was organized; and no foreign or alien insurance company may be licensed to do business in this State to issue assessable policies if it issues nonassessable policies in any other state or country unless all policies shall state that any

assessment shall be for the exclusive benefit of holders of policies which provide for such contingent liability and the holders of policies subject to assessment shall not be liable to assessment in an amount greater in proportion to the total deficiency than the ratio that the deficiency attributable to the assessable business bears to the total deficiency. (1945, c. 386.)

§ 58-98. Waiver of forfeiture in policies assigned or pledged; notice of assignment; payment of assessment or premium by assignee or mortgagee.—When any policy of insurance is issued by any mutual insurance company or association other than life, organized under the laws of this State and such policy is assigned or pledged as collateral security for the payment of a debt, such company or association, by its president and secretary or other managing officers, may insert in such policy so assigned or pledged, or attach thereto as a rider thereon, a provision or provisions to be approved by the Commissioner of Insurance, whereby any or all conditions of the policy which work a suspension or forfeiture and especially the provisions of the statute which limits such corporation to insure only property of its members, may be waived in such case for the benefit of the assignee or mortgagee. In case any such company or association shall consent to such assignment of any policy or policies, or the proceeds thereof, it may nevertheless at any time thereafter, by its president and secretary or such other officer as may be authorized by the board of directors, cancel such policy by giving the assignee or mortgagee not less than ten days' notice in writing: Provided, however, a longer period may be agreed upon by the company or association and such assignee or mortgagee. And the president and secretary of such company or association, with the approval of the Commissioner of Insurance, may agree with the assignee or mortgagee upon an assessment or premium to be paid to the insurer in case the insured shall not pay the same, which shall not be less than such a rate or sum of money as may be produced by the average assessments or premiums made or charged by like company or association during a period of five years next preceding the year of such agreement and assignment. When an assignment is made as herein provided the policy or policies so assigned or pledged, subject to the conditions herein, shall remain in full force and effect for the benefit of the assignee or mortgagee, notwithstanding the title or ownership of the assured to the property insured, or to any interest therein, shall be in any manner changed, transferred or encumbered. (Ex. Sess., 1920, c. 79; C. S., s. 6351(a); 1945, c. 386.)

Editor's Note.—The 1945 amendment inserted near the beginning of the section the words "other than life."

§ 58-99. Guaranty against assessments prohibited.—If any director, officer, or agent of a mutual insurance company, either officially or privately, shall give a guarantee to a policyholder thereof against an assessment to which such policyholder would otherwise be liable, he shall be punished by a fine not exceeding one hundred dollars for each offense. (1899, c. 54, s. 100; Rev., s. 3496; C. S., s. 6352; 1945, c. 386.)

Editor's Note.—The 1945 amendment made this section applicable to agents and struck out the word "fire" formerly appearing before the word "insurance"

near the beginning of the section.

Cited in *Paramore v. Farmers' Mut. Fire Ins. Ass'n*, 207 N. C. 300, 176 S. E. 585 (1934).

§ 58-100. Manner of making assessments; rights and liabilities of policyholders.—When a mutual insurance company is not possessed of cash funds above its reserve sufficient for the payment of insured losses and expenses, it must make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liabilities. The company shall cause to be recorded in a book kept for that purpose the order for the assessment, together with a statement which must set forth the condition of the company at the date of the order, the amount of its cash

assets and deposits, notes, or other contingent funds liable to the assessment, the amount the assessment calls for, and the particular losses or liabilities it is made to provide for. This record must be made and signed by the directors who voted for the order before any part of the assessment is collected, and any person liable to the assessment may inspect and take a copy of the same. When, by reason of depreciation or loss of its funds or otherwise, the cash assets of such company, after providing for its other debts, are less than the required premium reserve upon its policies, it must make good the deficiency by assessment in the manner above provided. If the directors are of the opinion that the company is liable to become insolvent they may, instead of such assessment, make two assessments, the first determining what each policyholder must equitably pay or receive in case of withdrawal from the company and having his policy canceled; the second, what further sum each must pay in order to reinsure the unexpired term of his policy at the same rate as the whole was insured at first. Each policyholder must pay or receive according to the first assessment, and his policy shall be canceled unless he pays the sum further determined by the second assessment, in which case his policy continues in force; but in neither case may a policyholder receive or have credited to him more than he would have received on having his policy canceled by a vote of the directors under the bylaws. (1899, c. 54, ss. 36, 37; Rev., s. 4742; C. S., s. 6353; 1945, c. 386.)

Editor's Note.—The 1945 amendment struck out, in the first sentence, the word "fire" formerly appearing before the word "insurance" and the word "reinsurance" formerly appearing before the word "reserve."

Forfeiture and Waiver.—Failure to pay assessments, in accordance with the terms of a contract of insurance works a forfeiture of the policy, but the insurance company may by acts of unequivocal character waive such forfeiture. *Perry v. Farmers Mut. Life Ins. Co.*, 132 N. C. 283, 43 S. E. 837 (1903).

An acceptance of an overdue assessment by a fire insurance company, after the property is burned, the company having notice thereof, is a waiver of the forfeiture of the policy. *Perry v. Farmers Mut. Life Ins. Co.*, 132 N. C. 283, 43 S. E. 837 (1903).

Where mutual fire insurance company relies on failure to pay assessment in order to defeat recovery on policy, it must show that the assessment was legally

made in conformity with the provisions of this section, and where it fails to so show and plaintiff insurer testifies that she did not get notice of the assessment or of the cancellation of the policy, peremptory instructions against insurer on the affirmative defense are without error. *Abernethy v. Mecklenburg Farmers' Mut. Fire Ins. Co.*, 213 N. C. 23, 195 S. E. 30 (1938).

Right of Insured to Withdraw.—Where the members of mutual insurance companies have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion of the loss. *Perry v. Farmers Mut. Fire Ass'n*, 139 N. C. 374, 51 S. E. 1025 (1905).

Payments of Claims.—The right of each policyholder in the defendant company is to have an assessment made to pay his loss, and he has no claim upon an amount paid to another policyholder. *Perry v. Farmers Mut. Fire Ass'n*, 139 N. C. 374, 51 S. E. 1025 (1905).

§§ 58-101, 58-102: Repealed by Session Laws 1945, c. 386.

ARTICLE 9.

Conversion of Stock Corporations into Mutual Corporations.

§ 58-103. **Domestic stock life insurance corporations authorized to convert into mutual corporations; procedure.**—Any domestic stock life insurance corporation may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock: Provided, however, that such plan (first) shall have been adopted by a vote of a majority of the directors of such corporation; (second) shall have been approved by a vote of the holders of two-thirds of the stock outstanding at the time of issuing the call for a meeting for that purpose; (third) shall have been submitted to the Commissioner of Insurance and shall have been approved by him in writing, and

(fourth) shall have been approved by a majority vote of the policyholders (including, for the purpose of this article, the employer or the president, secretary or other executive officer of any corporation or association to which a master group policy has been issued, but excluding the holders of certificates or policies issued under or in connection with a master group policy) voting at said meeting, called for that purpose, at which meeting only such policyholders whose insurance shall then be in force and shall have been in force for at least one year prior to such a meeting shall be entitled to vote; notice of such a meeting shall be given by mailing such notice, postage prepaid, from the home office of such corporation at least thirty days prior to such meeting to such policyholders at their last known post-office addresses: Provided, that personal delivery of such written notice to any policyholder may be in lieu of mailing the same; and such meeting shall be otherwise provided for and conducted in such manner as shall be provided in such plan: Provided, however, that policyholders may vote in person, by proxy, or by mail; that all such votes shall be cast by ballot, and a representative of the Commissioner of Insurance shall supervise and direct the methods and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the said representative and to the corporation the results thereof, and with respect thereto shall act under such rules and regulations as shall be prescribed by the Commissioner of Insurance: that all necessary expenses incurred by the Commissioner of Insurance or his representative shall be paid by the corporation as certified to by said Commissioner. Every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the Commissioner: Provided, that neither such plan, nor any payment thereunder, nor any payment not fixed by such plan, shall be approved by the Commissioner, if the making of such payment shall reduce the assets of the corporation to an amount less than the entire liabilities of the corporation, including therein the net values of its outstanding contracts according to the standard adopted by the Commissioner of Insurance, and also all other funds, contingent reserves and surplus which the corporation is required by order or direction of the Commissioner of Insurance to maintain, save so much of the surplus as shall have been appropriated or paid under such plan. (1937, c. 231, s. 1.)

Editor's Note.—For discussion of act from which this article is codified, see 15 N. C. Law Rev. 359.

§ 58-104. Stock acquired to be turned over to voting trust until all stock acquired; dividends repaid to corporation for beneficiaries.—If a domestic stock life insurance corporation shall determine to become a mutual life insurance corporation it may, in carrying out any plan to that end under the provisions of § 58-103, acquire any shares of its own stock by gift, bequest or purchase. And until all such shares are acquired, any shares so acquired shall be acquired in trust for the policyholders of the corporation as hereinafter provided, and shall be assigned and transferred on the books of the corporation to not less than three nor more than five trustees, and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote until all of the capital stock of such corporation is acquired, when the entire capital stock shall be retired and canceled; and thereupon, unless sooner incorporated as such, the corporation shall be and become a mutual life insurance corporation without capital stock. Said trustees shall be appointed and vacancies shall be filled as provided in the plan adopted under § 58-103. Said trustees shall file with the corporation and with the Commissioner of Insurance a verified acceptance of their appointments and declaration that they will faithfully discharge their duties as such trustees. After the payment of such dividends to stockholders or former stockholders as may have been provided in the plan adopted under § 58-

103, all dividends and other sums received by said trustees on said shares of stock so acquired, after paying the necessary expenses of executing said trust, shall be immediately repaid to said corporation for the benefit of all who are or may become policyholders of said corporation and entitled to participate in the profits thereof, and shall be added to and become a part of the surplus earned by said corporation, and be apportionable accordingly as a part of said surplus among said policyholders. (1937, c. 231, s. 2.)

ARTICLE 10.

Assessment Companies.

§ 58-105. **Copies of charter and bylaws filed.**—Every corporation, society, or organization of this or any other state or country, transacting business under this department upon the co-operative or assessment plan, must file with the Commissioner of Insurance, before beginning to do business in this State, a copy of its charter or articles of association, and the bylaws, rules, or regulations referred to in its policies or certificates and made a part of such contract. Bylaws or regulations not so filed with the Commissioner of Insurance will not avoid or affect any policy or certificate issued by such company or association. (1899, c. 54, s. 86; Rev., s. 4790; C. S., s. 6356.)

Cross References.—As to mutual insurance companies generally, see §§ 58-92 to 58-100. As to fraternal orders and societies, see § 58-263 et seq.

§ 58-106. **Contracts must accord with charter and bylaws.**—Every policy or certificate or renewal receipt issued to a resident of this State by any corporation, association, or order transacting therein the business of insurance upon the assessment plan must be in accord with the provisions of the charter and bylaws of such corporation, association, or order, as filed with the Commissioner of Insurance. It is unlawful for any such domestic or foreign insurance company or fraternal order to transact or offer to transact any business not authorized by the provisions of its charter and the terms of its bylaws, or, through an agent or otherwise, to offer or issue any policy, renewal certificate, or other contract whose terms are not in clear accord with the powers, terms, and stipulations of its charter and bylaws. (1899, c. 54, s. 84; 1903, c. 438, s. 9; Rev., s. 4791; C. S., s. 6357.)

The contract of insurance must conform to the charter and bylaws, and these are as authorized by the state of its origin. *Hollingsworth v. Supreme Council*, 175 N. C. 615, 96 S. E. 81 (1918), distinguishing *Caldwell Land, etc., Co. v. Board*, 174 N. C. 634, 94 S. E. 406 (1917).

Assessment companies are prohibited from issuing policies or transacting business not authorized by their charters. *Brenizer v. Royal Arcanum*, 141 N. C.

409, 53 S. E. 835 (1906).

Duty and Liability under Bylaws.—The bylaws of an assessment association when assented to by the members, as provided in the statute, constitute the measure of duty and liability of the parties, provided they are reasonable and not in violation of any principle of public law. *Duffy v. Fidelity Mut. Life Ins. Co.*, 142 N. C. 103, 55 S. E. 79 (1906).

§ 58-107. **“Assessment plan” printed on application and policy.**—Every policy or certificate issued to a resident of the State by any corporation transacting in the State the business of life insurance upon the assessment plan, or admitted to do business in this State on the assessment plan, shall print in bold type near the top of the front page of the policy, upon every policy or certificate issued upon the life of any such resident of the State, the words “issued upon the assessment plan:” and the words “assessment plan” shall be printed conspicuously upon every application, circular, card, and any and all printed documents issued, circulated, or caused to be circulated by such corporation within the State. (1913, c. 159, s. 1; C. S., s. 6358; 1929, c. 93, s. 1; 1933, c. 34; 1945, c. 386.)

Editor’s Note.—The 1929 amendment the waiver of the requirements of the section added to the former provisions relating to by the Commissioner of Insurance.

The 1933 amendment changed these provisions. Such provisions were omitted by the 1945 amendment which also omitted the former requirement of printing in red ink.

§ 58-108. Revocation for noncompliance.—If any corporation or association transacting insurance business in this State on the assessment plan or issuing any policy upon the life of a resident of North Carolina upon the assessment plan shall fail or refuse to comply with the foregoing section, the Commissioner of Insurance shall forthwith suspend or revoke all authority of such corporation or association and of its agents to do business in this State. (1913, c. 159, s. 2; C. S., s. 6359.)

§ 58-109. Deposits and advance assessments required.—Every domestic insurance company, association, order, or fraternal benefit society doing business on the assessment plan shall collect and keep at all times in its treasury one regular loss assessment sufficient to pay one regular average loss; and no such company, association, order, or fraternal benefit society shall be licensed by the Commissioner of Insurance unless it makes and maintains with him for the protection of its obligations at least five thousand dollars in United States or North Carolina bonds, in farm loan bonds issued by federal loan banks, or in the bonds of some city, county, or town of North Carolina to be approved by the Commissioner of Insurance, or deposit with him a good and sufficient bond, secured by a deed of trust on real estate situated in North Carolina and approved by him, or by depositing with the Commissioner of Insurance a bond in an amount of not less than five thousand (\$5,000) dollars, issued by any corporate surety company authorized to do business in this State. The Commissioner of Insurance may increase the amount of deposit to the amount of reserve on the contracts of the association or society. The provisions of this section shall not apply to the farmers mutual fire insurance associations now doing business in the State and restricting their activities to not more than three adjacent counties. (Rev., s. 4792; 1913, c. 119, s. 1; 1917, c. 191, s. 2; C. S., s. 6360; 1933, c. 47; 1945, c. 386.)

Editor's Note.—The 1933 amendment inserted the clause at the end of the first sentence and added the last sentence. The 1945 amendment struck out the former provision permitting deposits with Commissioner of Insurance to be made in installments, and substituted at the end of the section the words "three adjacent counties" for "two adjacent counties."

§ 58-110. Deposits by foreign assessment companies or orders.—Each foreign insurance company, association, order, or fraternal benefit society doing business in this State on the assessment plan shall keep at all times deposited with the Commissioner of Insurance or in its head office in this State, or in some responsible banking or trust company, one regular assessment sufficient to pay the average loss or losses occurring among its members in this State during the time allowed by it for the collection of assessments and payment of losses. It shall notify the Commissioner of Insurance of the place of deposit and furnish him at all times such information as he requires in regard thereto; and no such company, association, order, or fraternal benefit society shall be licensed by the Commissioner unless it makes and maintains with him for the protection of its obligations at least five thousand dollars in United States or North Carolina bonds, in farm loan bonds issued by federal land banks, or in the bonds of some county, city, or town in North Carolina to be approved by the Commissioner of Insurance, or a good and sufficient bond or note, secured by deed of trust on real estate situate in North Carolina, and approved by the Commissioner. (1899, c. 54, s. 84; 1903, c. 438, s. 9; Rev., s. 4713; 1913, c. 119, ss. 2, 3; 1917, c. 191, s. 2; C. S., s. 6361; 1945, c. 386.)

Editor's Note.—The 1945 amendment struck out the former last sentence of this section stating when its provisions should not apply.

§ 58-111: Repealed by Session Laws 1945, c. 377.

§ 58-112. **Revocation of license.**—If any such corporation, association, or order at any time fails to comply with the provisions of §§ 58-109 and 58-110 or shall issue policies or certificates not in accord with its charter and bylaws, as provided in this article, the Commissioner of Insurance shall forthwith suspend or revoke all authority to it, and of all its agents or officers, to do business in this State, and shall publish such revocation in some newspaper published in this State. (1899, c. 54, s. 85; Rev., s. 4793; C. S., s. 6362.)

§ 58-112.1. **Mutual life insurance companies; assessments prohibited.**—No domestic mutual life insurance company shall, after the effective date of this article, be organized to issue any policy of life insurance or any annuity contract which provides for the payment of any assessment by any policyholder or member in addition to the regular premium charged for such insurance; nor shall any such company have power to levy or collect any such assessment. No foreign or alien life insurance company shall be permitted to do business in this State if it does business, in this State or elsewhere, on such or any other assessment plan. (1945, c. 386.)

ARTICLE 11.

Fidelity Insurance Companies.

§§ 58-113 to 58-118: Repealed by Session Laws 1945, c. 743, s. 2.

§ 58-119: Repealed by Session Laws 1945, c. 377.

Editor's Note.—The repealed section was rewritten as § 58-39.2.

ARTICLE 12.

Promoting and Holding Companies.

§ 58-120. **Terms defined.**—As the terms are used in this article, “promoting corporation” means a corporation or joint-stock association, engaged in the business of organizing or promoting or endeavoring to organize or promote the organization of an insurance corporation or corporations, or in any way assisting therein; “holding corporation” means a corporation or joint-stock association, which holds or is engaged in the acquisition of the capital stock or a major portion thereof of one or more insurance corporations for the purpose of controlling the management thereof, as voting trustee or otherwise; and “securities” means the shares of capital stock, subscription, certificates, debenture bonds, and any and all other contracts or evidences of ownership of or interest in insurance corporations, or in promoting or holding corporations. (1913, c. 182, s. 1; C. S., s. 6383.)

§ 58-121. **Certificate of authority to sell securities required.**—No individual, partnership, association, or corporation, as the agent of another or as a broker, shall sell or offer for sale, or in any way assist in the sale in this State of the securities of any promoting or holding corporation, or of any insurance corporation, which is not at that time lawfully engaged or authorized to engage in the transaction of the business of insurance in this State, without first procuring, as hereinafter provided, a certificate of authority from the insurance department to sell such securities; nor shall any individual, partnership, association, or corporation sell or offer for sale in this State the securities of any promoting or holding corporation, or of any insurance corporation which is not at the time of such sale or offer of sale lawfully engaged or authorized to engage in the transaction of the business of insurance in the State, unless such corporation has first procured from the Commissioner of Insurance, as hereinafter provided, a certificate that the corporation has fully complied with the provisions of this article, and is authorized to sell the securities. Every certificate issued by the Commissioner of Insurance

pursuant to the provisions of this article shall state in bold type that the Commissioner in no way recommends the securities thereby authorized to be sold, and shall be renewable annually, upon written application, filed on or before the first day of April of each year, and may be revoked for cause at any time by the Commissioner. The Commissioner shall prepare and furnish upon request suitable blank forms of application for the certificates required by this article. (1913, c. 182, s. 2; C. S., s. 6384.)

§ 58-122. Application for certificate by agent.—Every individual, partnership, association, or corporation desiring or intending to sell or to offer for sale in this State the securities of insurance corporations or of any holding or promoting corporation shall file with the Commissioner of Insurance an application for a certificate of such authority. This application must contain a statement, verified by oath, setting forth the name and address of the applicants' previous business experience, date and place of birth or organization, and such other information as the Commissioner requires. It is the duty of the Commissioner to examine the application and to make any further inquiry or examination of the applicant as he deems advisable. If upon examination the Commissioner finds the applicant, or if a corporation, the officers and directors thereof, to be trustworthy persons of good business credit, he may issue to the applicant a certificate of authority to sell or offer for sale in this State the securities of any insurance corporation, and of any promoting or holding corporation previously authorized under this article, which shall be mentioned therein. (1913, c. 182, s. 3; C. S., s. 6385.)

§ 58-123. Application for certificate by corporation.—Every such unauthorized insurance corporation, and every promoting or holding corporation, whose securities are offered for sale in this State, must file with the Commissioner of Insurance copies of all securities to be offered for sale, and an application for certificate of authority under this article which shall contain a statement in detail of the plans and purposes of such corporation, the amount and par value of the securities to be offered for sale, and the selling price thereof, the manner in which the money paid in therefor is to be spent or employed, the rate of commission to be paid for the sale of such securities, the salaries to be paid to the officers of such corporation, and such other information as the Commissioner of Insurance requires. No change shall thereafter be made in the form or character of the securities to be offered for sale, or in the plans or purposes of any such corporation, without the approval thereof in writing by the Commissioner. It is the duty of the Commissioner to examine the application and other documents filed, and to make any further inquiry or examination of the corporation as he deems advisable. If upon examination the Commissioner finds that the plans and purposes of the corporation are proper, that its condition is satisfactory, that the amount of its securities is reasonable, that the price at which such securities are to be sold is adequate, and that the manner in which the money is paid in therefor, the rate of commissions to be paid and the salaries of officers are fair, he may issue a certificate that the corporation has complied with all the provisions of this article, and is authorized to sell or offer its securities for sale in this State. (1913, c. 182, s. 4; C. S., s. 6386.)

§ 58-124. Approval of advertising matter; misrepresentation.—No printed matter may be used in connection with the sale of securities of any such promoting, holding, or insurance corporation, for advertising purposes, or in the dissemination of information with reference thereto, unless it is first submitted to the Commissioner of Insurance and approved by him in writing. No such corporation, and no officer, director, or agent thereof, or any other person, copartnership, association, or corporation may issue, circulate, or employ or cause or permit to be used, issued, circulated, or employed any circular or statement, whether printed or oral, misrepresenting or exaggerating the earnings of insurance corporations or the value of their corporate stock or other securities, or the profits to be derived either directly or indirectly from the organization and manage-

ment of insurance corporations, or of organizing or holding corporations. No insurance or other corporation, and no individual, copartnership, or association transacting business in this State shall place or offer to place insurance in any corporation in connection with the sale or purchase of the securities of any insurance corporation or of any promoting or holding corporation. (1913, c. 182, s. 5; C. S., s. 6387.)

ARTICLE 13.

Fire Insurance Rating Bureau.

§ 58-125. **North Carolina fire insurance rating bureau created.**—There is hereby created a bureau to be known as the "North Carolina Fire Insurance Rating Bureau." (1945, c. 380.)

Editor's Note.—The 1945 amendment, effective July 1, 1945, rewrote this article which formerly related to rate-making companies. The old article consisted of former §§ 58-125 to 58-131, which had

been derived from Public Laws 1913, c. 145, Public Laws 1915, c. 166, and Public Laws 1935, c. 152, codified as C. S. §§ 6388-6394.

§ 58-126. **Scope of article.**—The provisions of this article shall apply to insurance against loss to property located in this State, or to any valuable interest therein, by fire, lightning, windstorm, explosion, theft of or physical damage to motor vehicles, and all other kinds of insurance which fire insurance companies are authorized to write in this State except (a) marine; (b) transportation risks and such kinds of insurance as are designated by the Commissioner as inland marine insurance; (c) aircraft risks; (d) rolling stock of railroad corporations and property of interstate common carriers used or employed by them in their business of carrying freight, merchandise or passengers in interstate commerce; (e) reinsurance. (1945, c. 380.)

§ 58-127. **Rating bureau.**—Under the supervision of the Commissioner of Insurance who shall call a meeting for that purpose and within six months after the effective date of this act, insurance companies authorized to effect insurance in this State against the risk of loss by perils within the scope of this act, shall organize a rating bureau for the purpose of making rates and rules and regulations which affect or determine the price which policyholders shall pay for insurance covered by this article, on property or risks located in this State; and all companies now or hereafter authorized to transact such business in this State shall become members of such bureau.

The government of the rating bureau shall be vested in its members, and it shall not be subject to the direction or control of any other bureau, association, corporation, company, individual or group of individuals. Each member shall have one vote.

The governing board, executive committee or other governing body of the rating bureau shall be provided for in the bylaws which shall provide also that at least one member of such governing body shall be an official of a domestic company and shall be a bona fide resident of the State of North Carolina.

The rating bureau shall have power to adopt a constitution and bylaws for its government and to adopt reasonable rules and regulations necessary to carry out its functions, but such constitution, bylaws, rules and regulations shall not be inconsistent with the provisions of this article, and together with any amendments thereto shall be approved by the Commissioner before becoming effective. No such constitution, bylaws, rules and regulations shall discriminate against any type of insurer because of its plan of operation or otherwise, nor shall any insurer be prevented from returning any unused or unabsorbed premium deposit, savings or earnings to its policyholders or subscribers.

The rating bureau shall be empowered to subscribe for or purchase any necessary service. Subject to the approval of the Commissioner it shall apportion the expenses of its operation among its members equitably in proportion to services

rendered by the bureau; provided, however, the bureau may fix a minimum annual charge to be paid by each member, not exceeding fifty dollars, and a reasonable admission fee, not exceeding fifty dollars.

The principal office of the bureau shall be located in the City of Raleigh, North Carolina, where all records shall be kept and all business of the bureau transacted; provided that with the approval of the Commissioner branch offices of the bureau may be established within the State. The bureau shall furnish without discrimination its service to its members, and any rating schedule, forms or plans of operation which have been approved by the Commissioner and filed with the rating bureau shall be available for inspection at any reasonable time by all members of said bureau.

Any member of the rating bureau may appeal to the Commissioner from any decision of such bureau and the Commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 380.)

§ 58-128. Power to secure information.—The Commissioner, his deputy, or duly authorized examiner is authorized and empowered at all reasonable times and on reasonable notice to examine all records of the said rating bureau covering its operations, including its constitution, bylaws, rating schedules, rules, regulations and amendments thereto. (1945, c. 380.)

§ 58-129. Rate information.—Every risk specifically rated in this State shall be rated upon schedule after inspection and a survey of such risk shall be made and filed in the rating bureau office. A copy of such survey shall be furnished upon request to the insured or his duly authorized representative without charge. (1945, c. 380.)

§ 58-130. Statistical reports.—Every insurer shall file annually with the rating bureau or at its option, with a common agency approved by the Commissioner and representative of either stock or nonstock insurers, its underwriting experience in this State in accordance with classifications approved by the Commissioner. The experience filed with the common agency selected shall be consolidated by such agency and a copy of the consolidated result shall be filed with the rating bureau; provided such insurers shall, if directed by the Commissioner, file their individual underwriting experience with such rating bureau. Such data shall be kept and reports made in such manner and on such forms as may be prescribed by the Commissioner. (1945, c. 380.)

§ 58-131. Reasonableness of rates.—The rating bureau in making rates shall not unfairly discriminate between risks involving essentially the same construction and hazards, and having substantially the same degree of protection. (1945, c. 380.)

§ 58-131.1. Approval of rates.—No rating method, schedule, classification, underwriting rule, bylaw, or regulation shall become effective or be applied by the rating bureau until it shall have been first submitted to and approved by the Commissioner. Provided, that a rate or premium used or charged in accordance with a schedule, classification, or rating method or underwriting rule or bylaw or regulation previously approved by the Commissioner need not be specifically approved by the Commissioner. Every rating method, schedule, classification, underwriting rule, bylaw or regulation submitted to the Commissioner for approval shall be deemed approved, if not disapproved by him in writing within sixty (60) days after submission. (1945, c. 380.)

§ 58-131.2. Reduction or increase of rates.—The Commissioner is hereby empowered to investigate at any time the necessity for a reduction or increase in rates. If upon such investigation it appears that the rates charged

are producing a profit in excess of what is fair and reasonable, he shall order such reduction of rates as will produce a fair and reasonable profit only.

If upon such investigation it appears that the rates charged are inadequate and are not producing a profit which is fair and reasonable, he shall order such increase of rates as will produce a fair and reasonable profit.

In determining the necessity for an adjustment of rates, the Commissioner shall give consideration to all reasonable and related factors, to the conflagration and catastrophe hazard, both within and without the State, to the past and prospective loss experience, including the loss trend at the time the investigation is being made, and in the case of fire insurance rates, to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made.

Any reduction or increase of rates ordered by the Commissioner shall be applied by the rating bureau subject to his approval within sixty (60) days and shall become effective solely to such insurance as is written having an inception date on and after the date of such approval.

Whenever the Commissioner finds, after notice and hearing, that the bureau's application of an approved rating method, schedule, classification, underwriting rule, bylaw or regulation is unwarranted, unreasonable, improper or unfairly discriminatory he shall order the bureau to revise or alter the application of such rating method, schedule, classification, underwriting rule, bylaw or regulation in the manner and to the extent set out in the order. (1945, c. 380.)

§ 58-131.3. Deviations.—No insurer, officer, agent or representative thereof shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this State which does not conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the rating bureau. However, an insurer may deviate from the rates promulgated by the rating bureau provided the insurer has filed the deviation to be applied both with the rating bureau and the Commissioner, and provided the said deviation is uniform in its application to all risks in the State of the class to which such deviation is to apply; and provided such deviation is approved by the Commissioner as being reasonable under all the circumstances. If approved the deviation shall remain in force for a period of one year from the date of approval by the Commissioner. Such deviation may be renewed annually subject to all of the foregoing provisions. A rate in excess of that promulgated by the rating bureau may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the Commissioner. (1945, c. 380.)

§ 58-131.4. Pools, groups or associations.—Any insurer individually or as a member of a pool, group, or association engaged in the business of insuring special types or classes of risks in connection with which a particular inspection or engineering service and set of standards has been maintained to the satisfaction of the Commissioner, and with respect only to such types or classes of risks, shall submit loss experience data to the Commissioner for approval of its schedule of rates or deposits, forms and plans of operation either directly in its own behalf or through a unified facility of the group created and licensed by the Commissioner for that purpose and maintained entirely or in part for such a purpose. In evaluating the forms, schedule of rates or deposits and plan of operation of such an insurer or pool or association of insurers the Commissioner shall act with due regard for the previous record of such insurer or group of insurers, and with due appreciation of previous and prospective loss trends in this State and outside of this State, and to any other factors reasonably related to the classes or types of insurance written by such insurer or group of insurers. When so approved such forms, schedule of rates or deposits and plan of operation shall be filed with the bureau.

Nothing contained in this section shall be construed as exempting any insurer,

pool, group or association of insurers from all other provisions of this article and the provisions of Article 13B with respect to licensing. (1945, c. 380.)

§ 58-131.5. **Hearing.**—The Commissioner shall not make any rule, regulation or order under the provisions of this article without giving the rating bureau and insurers who may be affected thereby reasonable notice and a hearing if hearing is requested. All hearings provided for in this article shall be held at such time and place as shall be designated in a notice which shall be given by the Commissioner in writing to the rating bureau and insurer or the officers and agents and representatives thereof which may be affected thereby, at least thirty (30) days before the date designated therein. The notice shall state the subject of the inquiry.

At the conclusion of such hearing, or within thirty (30) days thereafter, the Commissioner shall make such order or orders as he may deem necessary in accordance with his finding. Within thirty (30) days after receiving written notice of any such order or finding any person affected thereby may request a rehearing or review thereof before the Commissioner by filing a written request setting forth a summary of the reasons therefor. Upon receipt of such request, the Commissioner shall set a date for rehearing. Such application for rehearing shall act as a stay of the provisions of such order. The Commissioner may modify, change or rescind such order if he finds that the facts shown at the rehearing warrant such modification, change or rescission.

In the conduct of such hearing the Commissioner, his deputy or the duly authorized examiner specifically designated by him for such purpose shall have power to administer oaths and to examine any person under oath and in connection therewith to require the production of any books, records, or papers relative to the inquiry. (1945, c. 380.)

§ 58-131.6. **Revocation or suspension of license.**—If the Commissioner shall find, after due notice and hearing, that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 380.)

§ 58-131.7. **Penalties.**—Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars. (1945, c. 380.)

§ 58-131.8. **Review of order of Commissioner.**—A review of any order made by the Commissioner in accordance with the provisions of this article, shall be by appeal to the superior court of Wake County in accordance with the provisions of § 58-9.3. (1945, c. 380.)

§ 58-131.9. **Limitation.**—Nothing in this article shall apply to any town or county farmers mutual fire insurance association restricting their operations to not more than three (3) adjacent counties, or to domestic insurance companies, associations, orders or fraternal benefit societies now doing business in this State on the assessment plan. (1945, c. 380.)

ARTICLE 13A.

Casualty Insurance Rating Regulations.

§ 58-131.10. **Scope of article.**—Every insurer authorized to do the business of casualty insurance in this State, including fidelity and surety business, shall be either a member or a subscriber of a rating bureau licensed under this article by the Commissioner or shall for itself make its own rates. No insurer shall be a member of more than one rating bureau for the purpose of rating the same

risk. A rating bureau may be a person or persons, corporation, partnership, company, society or association, domestic or foreign, which makes rates for casualty insurance. (1945, c. 380.)

Editor's Note.—The act inserting this rating bureau for workmen's compensation article made it effective Jan. 1, 1946. As to insurance, see §§ 97-102 to 97-104.

§ 58-131.11. **License.**—No rating bureau shall do business or furnish its services for use in this State until it shall have been licensed by the Commissioner and has designated a resident of North Carolina as its agent for service of notices and orders. Application for license shall be accompanied by a fee as prescribed in the Revenue Act and shall be in the form the Commissioner shall prescribe and shall include the name and address of the applicant; a copy of its constitution, its articles of agreement or association or incorporation, its bylaws or rules governing its business, or such of the foregoing, if any, as the bureau may have; a list of insurers licensed to do business in North Carolina who are or who have agreed to become members or subscribers; the names and addresses of all officers and managers; and such other information as the Commissioner may require. If the Commissioner finds that the applicant has complied with the provisions of this article, he shall issue to it a license authorizing it to engage in rate making or the furnishing of its services for use in this State. Licenses shall remain in effect until suspended or revoked in the manner prescribed in this article. The license of every rating bureau doing business or furnishing its services for use in this State on the effective date of this act may continue in force, subject to the provisions of this article, pending its application for license hereunder, which application shall be made within six months after the effective date of this act. (1945, c. 380.)

§ 58-131.12. **Organization.**—The government of a rating bureau shall be vested in its members, or, in the case of a corporation, in its board of directors, and it shall not be subject to the direction or control of any other bureau, association, corporation, company, individual or group of individuals. The bureau shall have power to establish reasonable agreements and bylaws for its government, and to adopt reasonable rules and regulations necessary to carry out its functions; such reasonable agreements, bylaws, rules and regulations shall not be inconsistent with the provisions of this article and shall be first approved by the Commissioner. All amendments to such agreements, bylaws, rule and regulations shall before becoming effective, be submitted to and approved by the Commissioner. No such agreements, bylaws, rules and regulations shall discriminate against any type of insurer because of its plan of operation or otherwise, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. Every such rating bureau shall furnish its services without discrimination to any licensed insurer applying therefor. Any insurer admitted to membership or furnished service as a subscriber shall pay its reasonable share of the expense of operation of such bureau and shall observe all reasonable rules and regulations of the bureau.

Every rating bureau or insurer which makes its own rates shall, within ten days after written request therefor, and upon payment of such reasonable charges as may be approved by the Commissioner, furnish to any person affected by any rate made by it, or to the authorized representative of such person, full information regarding such rate, including the schedule or schedules, if any, pursuant to which such rate was made. Every rating bureau, and every insurer which makes its own rates, shall provide reasonable means within this State, to be approved by the Commissioner, whereby any person or persons affected by a rate made by it may be heard.

Any member or subscriber of a rating bureau may appeal to the Commissioner from any decision of such bureau and the Commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and to the bureau,

issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 380.)

§ 58-131.13. **Filing of rates; approval.**—Every rating bureau or insurer which makes its own rates shall file with the Commissioner every rate manual, classification of risks, rating plan, rating schedule, and every other rating rule which is made or used by it, and upon his request, all other information concerning the application and calculation of rates made or used by it. No rate, rate manual, classification of risks, rating plan, rating schedule, or other rating rule shall be effective until approved by the Commissioner. The Commissioner shall not approve any rate, rate manual, classification of risks, rating plan, rating schedule or other rating rule which is excessive, inadequate, unreasonable or unfairly discriminatory. (1945, c. 380.)

§ 58-131.14. **Statistical reports.**—Every insurer shall annually on or before October 1, file with the rating bureau of which it is a member or subscriber, or with such other agency as the Commissioner of Insurance may approve or designate, a statistical report showing a classification schedule of its premiums and losses on all classes of insurance to which this article is applicable, and such other information as the Commissioner may deem necessary or expedient for the administration of the provisions of this article. (1945, c. 380.)

§ 58-131.15. **Deviation.**—Any insurer may make written request to the Commissioner for approval of a deviation from a filing approved by him and made by a rating organization of which it is a member or subscriber. The basis for the deviation shall be specified in the request. The Commissioner shall hear the insurer and the rating organization and shall give them reasonable notice of the time and place of the hearing. The Commissioner shall approve a deviation if he finds it to be justified. He shall not approve a deviation if he finds that the resulting rates would be unreasonable, inadequate or unfairly discriminatory. (1945, c. 380.)

§ 58-131.16. **Discrimination; revision of rates.**—Whenever the Commissioner finds, after notice and hearing, that discrimination exists in the making or application of rates made or used by any rating bureau or insurer, he may order that such discrimination be removed. Such discrimination shall not be removed by increasing the rate on any risk affected by the order unless such increase is approved by the Commissioner as reasonable. Before making such order the Commissioner shall give notice to the bureau or insurer which made such rate or rates and to all other persons whom he may deem directly affected thereby. Every bureau receiving any such notice shall promptly notify all of its members or subscribers who would be affected by such order and notice to such rating organization shall be deemed notice to such members or subscribers.

Whenever the Commissioner shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable or unfairly discriminatory, he shall issue an order to the rating bureau or insurer making such rates, directing that such rates be altered or revised in the manner and to the extent stated in such order to produce rates which are reasonable, adequate and not unfairly discriminatory.

Whenever the Commissioner finds, after notice and hearing, that a bureau or insurer's application of an approved classification, rating plan, rating schedule or other rating rule is unwarranted, unreasonable, improper or unfairly discriminatory, he shall order the bureau or insurer to revise or alter the application of such classification, rating plan, rating schedule, or other rating rule in the manner and to the extent set out in the order. (1945, c. 380.)

§ 58-131.17. **Filing rate amendments.**—Every rating bureau or insurer which makes its own rates may, from time to time, alter, supplement or

amend its rates, rate manuals, schedules of rates, classifications of risks, rating plans and every other rating rule, or any part thereof, by filing with the Commissioner copies of such alteration, or amendment, together with a statement of the reason or reasons therefor, none of which shall take effect until approved by the Commissioner. (1945, c. 380.)

§ 58-131.18. **Restriction on use of rates.**—No insurer subject to this article shall enter into any agreement for the purpose of making or establishing rates except in accordance with the provisions hereof. No member or subscriber of any rating bureau or insurer shall charge or receive any rate which deviates from the rates, rating plans, classifications, schedules, rules and standards made and filed by such rating bureau or insurer except as provided in this article. No insurer and no agent or other representative of any insurer and no insurance broker shall knowingly charge, demand or receive a rate or premium which deviates from the rates, rating plans, classifications, schedules, rules and standards, made and last filed by or on behalf of the insurer, or issue or make any policy or contract involving a violation of such rate filings. A rate in excess of that promulgated by the rating bureau or filed by a company on its own behalf may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the Commissioner. (1945, c. 380.)

§ 58-131.19. **Examinations.**—The Commissioner may, whenever he deems it expedient, but shall at least once in every five years, make or cause to be made an examination of the business, affairs and method of operation of every rating bureau doing business or furnishing its services for use in this State. The reasonable costs of such examination shall be determined and fixed by the Commissioner and shall be paid by the rating bureau examined upon presentation to it of a detailed account of such cost. The Commissioner may, in his discretion, waive such examination upon proof that such rating bureau has, within a reasonably recent period, been examined by a public official or department of another state, pursuant to the laws of such state, and upon the filing with the Commissioner of a copy of the report of such examination. The officers, managers, agents, and employees of such rating bureau shall exhibit all its books, records, documents or agreements governing its method of operation, its rating system, and its accounts for the purpose of such examination. The Commissioner may, for the purpose of facilitating and furthering such examination, examine under oath the officers, managers, agents and employees of such rating bureau. (1945, c. 380.)

§ 58-131.20. **False information.**—No person shall give false or misleading information to any rating bureau of which it is a member or subscriber, to the Commissioner or to any person, which will in any manner affect the proper determination of reasonable, adequate and nondiscriminatory rates. (1945, c. 380.)

§ 58-131.21. **Suspension of license; hearing.**—Any rating bureau or insurer which violates any provision of this article shall be subject to suspension of its license. Failure of any rating bureau or insurer to comply with the provisions of any order of the Commissioner within the time limited by such order, or any extension thereof as the Commissioner may, in his discretion, grant, shall, if no appeal has been taken from such order, automatically suspend its license. No order suspending a license shall be made by the Commissioner except upon ten days' notice, specifying the particular violation. If such rating bureau or insurer shall make a request therefor in writing within the ten-day period, the Commissioner shall name a time and place for a hearing, at which it shall be given opportunity to make its defense. At the conclusion of such hearing or within thirty days thereafter the Commissioner shall make such order as

in his judgment the evidence shall warrant. A suspension of license shall be effective until modified or rescinded by order of the Commissioner upon proof that the violation of the provisions of this article no longer continues, or upon proof that the rating bureau or insurer has complied with the terms of any prior order made by the Commissioner, or until the order of the Commissioner upon which such suspension is based is reversed or modified upon an appeal therefrom. (1945, c. 380.)

§ 58-131.22. Revocation or suspension of license.—If the Commissioner shall find, after due notice and hearing, that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 380.)

§ 58-131.23. Penalties.—Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00). (1945, c. 380.)

§ 58-131.24. Review of order of Commissioner.—A review of any order made by the Commissioner, in accordance with the provisions of this article, shall be by appeal to the superior court of Wake County in accordance with the provisions of § 58-9.3. (1945, c. 380.)

§ 58-131.25. Exceptions.—The provisions of this article shall not apply to any policy or contract of reinsurance; any policy of insurance against loss or damage to or legal liability in connection with property permanently located outside of this State, or any activity wholly carried on outside this State; insurance against loss of or damage to, or against liability arising out of the ownership, maintenance or use of any aircraft; marine insurance, inland marine insurance, automobile insurance, life, health or accident insurance, workmen's compensation insurance, title insurance, credit insurance, or annuities. The provisions of this article shall not apply to nonprofit hospital service or nonprofit medical service organizations, mutual benefit associations, or fraternal beneficiary associations. (1945, c. 380.)

ARTICLE 13B.

Rate Regulation of Miscellaneous Lines.

§ 58-131.26. Information to be filed with Commissioner.—Every corporation, association, board, bureau or person maintaining a bureau or office for the purpose of suggesting, approving or making rates to be used by more than one insurer of property or risks of any kind located in this State other than those regulated under the provisions of Article 2 of Chapter 97, Articles 13, 13A and 25 of Chapter 58 shall be licensed and shall file with the Commissioner a copy of the articles of agreement, association or incorporation and the bylaws and all amendments thereto under which such person, association, or bureau operates or proposes to operate, together with his or its business address and a list of the members or insurers represented or to be represented by him or it, as well as such other information concerning such rating organization and its operations as may be required by the Commissioner. (1945, c. 380; 1947, c. 721.)

Cross Reference.—As to compensation rating and inspection bureau for workmen's compensation insurance, see §§ 97-102 to 97-104.

struck out, near the beginning of the section, the words "underwriter for insurance on" and inserted in lieu thereof the words "insurer of".

Editor's Note.—The 1947 amendment

§ 58-131.27. Examination by Commissioner; reports.—Every such person, corporation, association, or bureau, whether before or after the filing

of the information specified in § 58-131.26, shall be subject to the visitation, supervision, and examination of the Commissioner, who shall cause to be made an examination thereof as often as he deems it expedient, and at least once in three years, provided, the Commissioner may accept in lieu of such examination a report of examination of such bureau made by any other state department of insurance. For such purpose he may appoint as examiners one or more competent persons, and upon such examination he, his deputy, or any examiner authorized by him shall have all the powers given to the Commissioner, his deputy, or any examiner authorized by him by law, including the power to examine under oath the officers and agents and all persons deemed to have material information regarding the business or manner of operation by every such person, corporation, association, bureau, or board. The expense of any such examination shall be borne by the party examined. (1945, c. 380.)

§ 58-131.28. Schedule of rates filed.—Every such person, corporation, association, or bureau, as well as every insurance company doing business in the State, shall file with the Commissioner any and every schedule of rates or such other information concerning such rates as may be suggested, approved, or made by any such rating organization for the purposes specified in § 58-131.26 or by such company for its own use and such rates shall not become effective until and unless approved by him. (1945, c. 380.)

§ 58-131.29. Certain conditions forbidden; no discrimination.—No such person, corporation, association, or bureau shall fix or make any rate or schedule of rates which is to or may apply to any risk within this State, on the condition that the whole amount of insurance on such risk or any specified part thereof shall be placed at such rates, or with the members of or subscribers to such rating organization; nor shall any such person, association, or corporation authorized to transact the business of insurance within this State, fix or make any rate or schedule of rates or charge a rate which discriminates unfairly between risks within this State of essentially the same hazard. Whenever it is made to appear to the satisfaction of the Commissioner that such discrimination exists, he may, after a full hearing, either before himself or before any salaried employee of the insurance department whose report he may adopt, order such discrimination removed; and all such persons, corporations, associations, or bureaus affected thereby shall immediately comply therewith; nor shall such persons, corporations, associations, or bureaus remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the Commissioner that such increase is justifiable. (1945, c. 380.)

§ 58-131.30. Record to be kept; hearing on rates.—Every such rating organization shall keep a careful record of its proceedings and shall furnish upon demand to any person upon whose property or risk a rate has been made, or to his authorized agent, full information as to such rate, and, if such property or risk be rated by schedule, a copy of such schedule; it shall also provide such means as may be approved by the Commissioner whereby any person affected by such rate may be heard, either in person or by agent, before the governing or rating committee or other proper executive of such rating organization on an application for a change in such rate. (1945, c. 380.)

§ 58-131.31. Hearing on rates before the Commissioner.—Any person, firm, or corporation aggrieved by any rating or classification assignment by such company, bureau, or board, may file a complaint in writing with the Commissioner stating in detail the grounds upon which the complainant asks relief. The Commissioner shall set a time, not earlier than seven days after the date of the notice, and a place for a hearing upon the complaint. After due hearing the Commissioner shall make a finding as to whether the established rate or classifica-

tion assignment made is excessive or unfair and shall make such orders as he deems advisable.

Any member or subscriber of a rating bureau may appeal to the Commissioner from any decision of such bureau and the Commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 380.)

§ 58-131.32. Review of order of Commissioner.—A review of any order made by the Commissioner in accordance with the provisions of this article shall be by appeal to the superior court of Wake County in accordance with the provisions of § 58-9.3. (1945, c. 380.)

§ 58-131.33. Certain insurance contracts excepted.—This article shall not apply to any contract of life insurance, accident and health insurance or annuities, to any contract of reinsurance, to contracts of insurance upon property or risks permanently located without this State, nor to kinds of insurance for which the Commissioner finds in the practice of the industry there are no established rates. (1945, c. 380.)

ARTICLE 14.

Real Estate Title Insurance Companies.

§ 58-132. Purpose of organization.—Companies may be formed in the manner provided in this subchapter, with a capital of not less than fifty thousand dollars, for the purpose of examining titles to real estate, of furnishing information in relation thereto, and of insuring owners and others interested therein against loss by reason of encumbrances and defective title. Such companies shall not be subject to the provisions of this chapter except as regards the manner of their formation and as provided in this article. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C. S., s. 6395; 1923, c. 71.)

Notice to Agent.—Where the agent for the insurer was notified prior to the issuance of the renewal policy sued on that the property had been sold by the former owner to another and was requested to issue the renewal policy in the name of the new owner, the policy containing a standard loss payable clause in favor of the holder of the mortgage on the property,

the mortgagee was not required to notify the insurer of the change in ownership, it appearing to the mortgagee that such notice had been given the insurer's agent prior to the inception of the policy, the agent in such case being the insurer's alter ego. *Mahler v. Milwaukee Mechanics' Ins. Co.*, 205 N. C. 692, 172 S. E. 204 (1934).

§ 58-133. Certificate of authority to do business.—Before any such company may issue any policy or make any contract or guarantee of insurance, it shall file with the Commissioner of Insurance a certified copy of the record or the certificate of its organization in the office of the Secretary of State, and obtain from the Commissioner of Insurance his certificate that it has complied with the laws applicable to it and that it is authorized to do business. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C. S., s. 6396.)

§ 58-134. Annual statement and license required.—Every such corporation shall, on or before the thirtieth day of January of each year, file in the office of the Commissioner of Insurance a statement, such as he may require, showing its condition and its affairs for the year ending on the preceding thirty-first day of December, signed and sworn to by its president or secretary or treasurer and one of its directors. For neglect to file such annual statement or for making a wilfully false statement it shall be liable to the same penalties imposed upon other insurance companies. The Commissioner of Insurance shall annually license such companies and their agents, and have the same power and

authority to visit and examine such corporations as he has in the case of other domestic insurance companies; and the duties and liabilities of such corporations and their agents in reference to such examinations are the same as those of other domestic insurance companies. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C. S., s. 6397.)

Cross Reference.—As to examinations to be made by the commissioner, see § 58-16.

§ **58-134.1. Investment of capital.**—Any real estate title insurance company having a capital stock of more than fifty thousand dollars, may, with the consent of the Commissioner, after investing fifty thousand dollars of the capital, as provided in this chapter, invest not to exceed one-fourth of the total capital stock in abstract or title plants; and no such company shall guarantee or insure in any one risk more than forty per cent of its combined capital and surplus without first having the approval of the Commissioner of North Carolina, which approval shall be endorsed upon the policy. (1945, c. 386.)

ARTICLE 15.

Title Insurance Companies and Land Mortgage Companies Issuing Collateral Loan Certificates.

§ **58-135. Issuance of collateral loan certificates; security.**—Any domestic land mortgage company or title insurance company having a paid-in capital and surplus of at least two hundred thousand (\$200,000.00) dollars, may, under the supervision and control of the Commissioner of Insurance, issue collateral loan certificates, or other certificates of indebtedness secured by the deposit of first mortgages on real estate with the Commissioner, or under his direction, or secured by the deposit with the Commissioner, or under his direction, of collateral trust bonds secured by first mortgages, the principal and interest of which said mortgages is guaranteed by a surety company having assets of at least ten million (\$10,000,000.00) dollars, upon a basis not to exceed one hundred (\$100.00) dollars for each one hundred (\$100.00) dollars of liability under the collateral loan certificates or other certificates of indebtedness outstanding and secured by such first mortgages or collateral trust bonds. (1927, c. 204, s. 1.)

§ **58-136. Licenses.**—Any domestic land mortgage company, or title insurance company, wishing to do business under the provisions of this article upon making written application and submitting proof satisfactory to the Commissioner of Insurance that its business, capital and other qualifications comply with the provisions of this article, upon paying to the Commissioner of Insurance, the sum of two hundred dollars as a license fee and all other fees assessed against such company may be licensed to do business in this State under the provisions of this article until the first day of the following April, and may have its license renewed for each year thereafter so long as it complies with the provisions of this article and such rules and regulations as may be promulgated by the Commissioner of Insurance. For each such renewal such company shall pay to the Commissioner of Insurance the sum of two hundred dollars, and all other fees assessed against such company and such renewal shall continue in force and effect until a new license be issued or specifically refused, unless revoked for good cause. The Commissioner of Insurance, or any person appointed by him, shall have the power and authority to make such rules and regulations and examinations not inconsistent with the provisions of this article, as may be in his discretion necessary or proper to enforce the provisions hereof and secure compliance with the terms of this article. For any examination made hereunder the Commissioner of Insurance shall charge the land mortgage companies or title

insurance companies examined with the actual expense of such examination. (1927, c. 204, s. 2.)

§ 58-137. **Annual statements furnished.**—Every such domestic land mortgage company or title insurance company doing business in this State under this article shall annually file with the Commissioner of Insurance on or before the first day of March in each year a full and complete sworn statement of its financial condition on the thirty-first day of December next preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities and a complete account of its income and disbursements during the year, and shall also exhibit the amount of real estate mortgages deposited by such land mortgage company or title insurance company for the protection of the certificates issued under this article. The Commissioner of Insurance is hereby empowered to require such further information as may be reasonably necessary to satisfy him that the statements contained in the sworn statements are true and correct. (1927, c. 204, s. 3.)

ARTICLE 16.

Reciprocal or Inter-Insurance Exchanges.

§ 58-138. **Exchange of insurance contracts authorized; power of attorney.**—Individuals, partnerships, and corporations of this State hereby designated as subscribers, are authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships, and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance. Such contracts may be executed by an attorney, agent, or other representative, herein designated attorney, duly authorized and acting for such subscribers.

The attorney in fact for each of such exchanges shall be required to obtain a written power of attorney executed by each of the subscribers and have the same in his or its possession before any contracts of insurance of any kind or description shall be issued or renewed to subscribers, and a full copy of the provisions of the power of attorney used at the exchange and on file with the Commissioner of Insurance under the requirements of § 58-139, subsection four, shall be incorporated into and made a part of all contracts or policies issued to subscribers in this State. (1913, c. 183, ss. 1, 2; C. S., s. 6398; 1937, c. 130.)

Editor's Note.—The 1937 amendment added the second paragraph.

§ 58-139. **Statement to be filed with Commissioner of Insurance.**—The subscribers, so contracting among themselves, shall, through their attorney, file with the Commissioner of Insurance of this State a declaration verified by oath of such attorney, setting forth:

1. The name or title of the office at which such subscribers propose to exchange such indemnity contracts. This name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of the Commissioner of Insurance is calculated to result in confusion or deception. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or inter-insurance exchanges.

2. The kind or kinds of insurance to be effected or exchanged.

3. A copy of the form of policy, contract, or agreement under or by which the insurance is to be effected or exchanged.

4. A copy of the form of power of attorney or other authority of such attorney under which the insurance is to be effected or exchanged.

5. The location of the office or offices from which such contracts or agreements are to be issued.

6. That applications have been made for indemnity upon at least one hundred separate risks, aggregating not less than one and one-half million dollars as represented by executed contracts or bona fide applications, to become concurrently effective, or, in case of liability or compensation insurance, covering a total pay roll of not less than one and one-half million dollars: Provided, that when the attorney maintains the central office in this State the Commissioner of Insurance may authorize an exchange with a less number of risks and a smaller amount of indemnity to be exchanged and an amount of cash deposits less than twenty-five thousand dollars.

7. That there is on deposit with such attorney and available for payment of losses a sum of not less than one hundred thousand dollars. (1913, c. 183, s. 3; C. S., s. 6399; 1945, c. 386.)

Editor's Note.—The 1945 amendment substituted in subsection 7 "one hundred" for "twenty-five."

§ 58-140. Agreement for service of process.—At the time of filing the declaration provided for by the preceding section, the attorney shall file with the Commissioner of Insurance an instrument in writing, executed by him for the subscribers, conditioned that upon the issuance of certificate of authority provided for in this article, service of process may be had upon the Commissioner of Insurance in all suits in this State arising out of such policies, contracts, or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the Commissioner of Insurance shall file one copy, forward one copy to the attorney, and return one copy with his admission of service. (1913, c. 183, s. 4; C. S., s. 6400.)

§ 58-141. Statement as to amount of risks.—There shall be filed with the Commissioner of Insurance of this State by such attorney a statement under his oath showing the maximum amount of indemnity upon any single risk, and the attorney shall, whenever and as often as the same shall be required, file with the Commissioner of Insurance a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount greater than ten per cent of the net worth of such subscriber. (1913, c. 183, s. 5; C. S., s. 6401.)

§ 58-142. Certificate issued by Commissioner.—Upon the filing of the foregoing papers, and upon the payment of fees as provided for in this article, the Commissioner of Insurance shall examine and pass upon the same, and if found correct, and in accordance with this article, issue a certificate of authority, which shall expire on the first day of April next succeeding. (1913, c. 183, s. 6; C. S., s. 6402.)

§ 58-143. Reserve fund.—There shall at all times be maintained as a reserve a sum in cash or convertible securities equal to fifty per centum of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements, for expenses. Said sum shall at no time be less than one hundred thousand dollars, and if at any time fifty per cent of the aggregate deposits so collected and credited shall

not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. (1913, c. 183, s. 7; C. S., s. 6403; 1945, c. 386.)

Editor's Note.—The 1945 amendment substituted "one hundred" for "twenty-five" in the last sentence.

§ 58-144. **Annual reports; examination by Commissioner.**—The attorney shall make an annual report to the Commissioner of Insurance for each calendar year, showing the financial condition of affairs at that office where such contracts are issued, and shall furnish such additional information and reports as may be required; but the attorney shall not be required to furnish the names and addresses of any subscribers. The business affairs and assets of the reciprocal or inter-insurance exchanges shall be subject to examination by the Commissioner of Insurance. (1913, c. 183, s. 8; C. S., s. 6404.)

§ 58-145. **Corporations empowered to exchange insurance.**—Any corporation now or hereafter organized under the laws of this State shall, in addition to the rights, powers, and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned through exchanges complying with this article. (1913, c. 183, s. 9; C. S., s. 6405.)

§ 58-146. **Punishment for failing to comply with law.**—Any attorney or representative who shall, except for the purpose of applying for certificate of authority as herein provided, exchange any contracts of indemnity of the kind and character specified in this article, or directly or indirectly solicit or negotiate any applications for same without first complying with the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars. (1913, c. 183, s. 10; C. S., s. 6406.)

§ 58-147. **Certificate to attorney; revocation.**—Each attorney by or through whom are issued any policies or contracts for indemnity of the character referred to in this article shall procure from the Commissioner of Insurance annually a certificate of authority, stating that all the requirements of this article have been complied with, and upon such compliance and the payment of the fees and taxes required by this article, the Commissioner of Insurance shall issue such certificate of authority. The Commissioner of Insurance may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by this article after reasonable notice has been given the attorney in writing so that he may appear and show cause why such action should not be taken. (1913, c. 183, s. 11; C. S., s. 6407.)

§ 58-148. **Application of other sections.**—Except as otherwise provided in this article, and except where the context otherwise requires, all of the provisions of this chapter relating to all insurers and those relating to insurers transacting the same kind or kinds of insurance which reciprocal insurers are permitted to transact, shall be applicable to reciprocal insurers authorized to do business in this State. Where any of such sections refer to a corporation, company or insurer, the same, when read in connection with and applicable to this article shall be deemed to mean a reciprocal insurer. (1913, c. 183, s. 13; C. S., s. 6409; 1945, c. 386.)

Editor's Note.—The 1945 amendment rewrote this section.

ARTICLE 17.

Foreign or Alien Insurance Companies.

§ 58-149. **Admitted to do business.**—Foreign or alien insurance companies, upon complying with the conditions of this chapter applicable to them,

may be admitted to transact in this State, by constituted agents resident herein, any class of insurance authorized by the laws in force relative to the duties, obligations, prohibitions, and penalties of insurance companies, and subject to all laws applicable to the transaction of such business by foreign or alien insurance companies and their agents. (1899, c. 54, s. 61; Rev., s. 4746; C. S., s. 6410; 1945, c. 384.)

Editor's Note.—The 1945 amendment, which made this section applicable to alien insurance companies, directed that the words "or alien" be inserted in the caption of the article.

Rights of Insurer after Admission.—When a foreign insurance company has

complied with all the laws of the State, the courts of this State are open to it for the purpose of enforcing liabilities of policyholders. *Commonwealth Mut. Fire Ins. Co. v. Edwards*, 124 N. C. 116, 32 S. E. 404 (1899).

§ 58-150. **Conditions of admission.**—A foreign or alien insurance company may be admitted and authorized to do business when it:

(1) Deposits with the Commissioner a certified copy of its charter or certificate of organization and a statement of its financial condition and business, in such form and detail as he requires, signed and sworn to by its president and secretary or other proper officer, and pays for the filing of this statement the sum required by law.

(2) Satisfies the Commissioner that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact, and that it has been successful in the conduct of such business; that it has, if a stock company, a fully paid-up and unimpaired capital, exclusive of stockholders' obligations of any description of an amount not less than that required for the organization of a domestic company writing the same kinds of business; and if a mutual company that its free surplus is not less than that required for the organization of a domestic company writing the same kind of business, and that such capital, surplus, and other funds are invested in substantial accordance with the requirements of this chapter.

(3) By a duly executed instrument filed in his office constitutes and appoints the Commissioner and his successor its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served, and therein agrees that any lawful process against it which may be served upon such attorney shall be of the same force and validity as if served on the company; and the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this State. Copies of this instrument, certified by the Commissioner, are sufficient evidence thereof, and service upon such attorney is sufficient service upon the principal.

(4) Appoints as its agent or agents in this State some resident or residents thereof.

(5) Files with the Commissioner a certificate that it has complied with the laws of the state or government under which it was organized and is authorized to make contracts of insurance. (1899, c. 54, s. 62; 1901, c. 391, s. 5; 1903, c. 438, s. 6; Rev., s. 4747; C. S., s. 6411; 1945, c. 384.)

Cross Reference.—As to deposits required of foreign companies, see §§ 58-110, 58-182 to 58-188.8.

Editor's Note.—The 1945 amendment made changes in subsections (2) and (5).

Power of Attorney for Service of Process.—The statute requires the power of attorney executed to the Commissioner of Insurance to be irrevocable as long as "any liability of the company remains outstanding" in this State, and no amount of

authorities having a more or less fancied analogy can overcome these plain words of the statute and of a power of attorney drawn and filed in conformity thereto. *Biggs v. Life Ass'n*, 128 N. C. 5, 37 S. E. 955 (1901); *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581 (1904).

Service of process upon the Commissioner of Insurance is valid notwithstanding the insurance company attempted to annul the power of attorney conferred

upon him under this section. *Biggs v. Life Ass'n*, 128 N. C. 5, 37 S. E. 955 (1901).

The section was intended to protect residents of this State and does not apply to policies issued before the statute and transferred to a resident of another state. The service on the Commissioner is not valid when the insurance company has ceased doing business in the State and has no further liabilities therein. *Williams v. Mutual Reserve Fund Life Ins. Ass'n*, 145 N. C. 128, 58 S. E. 802 (1907).

Broker as Agent.—Where a citizen of this State applies for a policy in a foreign company through a broker here, and the application is accepted and the policy is delivered, the broker will be deemed to

be the agent of the company, and the contract to be made here, subject to the laws of this State. *Commonwealth Mut. Fire Ins. Co. v. Edwards*, 124 N. C. 116, 32 S. E. 404 (1899).

Power of Corporation to Sue and Be Sued.—Where a foreign insurance corporation has fully complied with the provisions of this section, and has moved its head office to this State and has domesticated here, it acquires the right to sue and be sued in the courts of this State as a domestic corporation. *Occidental Life Ins. Co. v. Lawrence*, 204 N. C. 707, 169 S. E. 636 (1933).

Cited in *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733 (1935).

§ 58-151. Limitation as to kinds of insurance.—Any foreign or alien company admitted to do business in this State shall be limited with respect to doing kinds of insurance in this State in the same manner and to the same extent as are domestic companies, provided that any foreign insurance company which has been licensed to do the business of life insurance in this State continuously during a period of twenty years next preceding March 6, 1945, may continue to be licensed, in the discretion of the Commissioner, to do the kind or kinds of insurance business which it was authorized to do immediately prior to March 6, 1945. (1899, c. 44, s. 65; 1901, c. 391, s. 5; 1903, c. 438, s. 6; Rev., s. 4748; 1911, c. 111, s. 2; C. S., s. 6412; 1945, c. 384.)

Editor's Note.—The 1945 amendment, effective March 6, 1945, rewrote this section.

§ 58-151.1. Foreign companies; requirements for admission.—A company organized under the laws of any other of these United States for the transaction of life insurance may be admitted to do business in this State if it complies with the other provisions of this chapter regulating the terms and conditions upon which foreign life insurance companies may be admitted and authorized to do business in this State, and, in the opinion of the Commissioner of Insurance, is in sound financial condition and has policies in force upon not less than five hundred lives for an aggregate amount of not less than five hundred thousand dollars. Any life company organized under the laws of any other country than the United States, in addition to the above requirements, must make and maintain the deposit required of such companies by article four of this chapter. (1899, c. 54, s. 56; Rev., s. 4774; C. S., s. 6456; 1945, c. 379.)

Editor's Note.—The 1945 amendment transferred this section from § 58-196.

§ 58-152. Retaliatory laws.—When, by the laws of any other state or nation, any taxes, fines, penalties, licenses, fees, deposits of money or of securities, or other obligations or prohibitions are imposed upon insurance companies of this State doing business in such other state or nation or upon their agents therein greater than those imposed by this State upon insurance companies of such other state, then, so long as such laws continue in force, the same taxes, fines, penalties, licenses, fees, deposits, obligations and prohibitions, of whatever kind, may in the discretion of the Commissioner be imposed upon all such insurance companies of such other state or nation doing business within this State and upon their agents here. Nothing herein repeals or reduces the license, fees, taxes, and other obligations now imposed by the laws of this State or to go into effect with the companies of any other state or nation unless some company of this State is actually

doing or seeking to do business in such state or nation. When an insurance company organized under the laws of any state or country is prohibited by the laws of such state or country or by its charter from investing its assets other than capital stock in the bonds of this State, then and in such case the Commissioner of Insurance is authorized and directed to refuse to grant a license to transact business in this State to such insurance company. (1899, c. 54, s. 71; 1903, c. 536, s. 11; Rev., s. 4749; C. S., s. 6413; 1927, c. 32; 1945, c. 384.)

Editor's Note.—The 1927 amendment inserted in the first sentence of this section the words "greater than those imposed by this State upon insurance companies of such other state." And the 1945 amendment substituted for the word "shall" in the first sentence the words "may in the discretion of the Commissioner."

Not Repealed by Implication.—This section was not impliedly repealed by the Revenue Acts of 1923 or 1925 (Public Laws 1923, c. 4, § 903; 1925, c. 101, § 903). The 1927 amendment was legislative recognition that it was still in force. *Atlantic Life Ins. Co. v. Wade*, 195 N. C. 424, 142 S. E. 474 (1928).

§ 58-153. Service of legal process upon Commissioner of Insurance.

—The service of legal process upon any insurance, bonding and/or surety company, admitted and authorized to do business in this State under the provisions of this chapter, shall be made by leaving the same in the hands or office of the Commissioner of Insurance, and no service upon a company that is licensed to do business in this State is valid unless made upon the Commissioner of Insurance, the general agent for service, or some officer of the company. As a condition precedent to a valid service of process and of the duty of the Commissioner in the premises, the plaintiff shall pay to the Commissioner of Insurance at the time of service the sum of one dollar, which the plaintiff shall recover as taxable costs if he prevails in his action. In any action of which a justice of the peace has jurisdiction, summons may be served on any licensed agent of such company, returnable in not less than ten days from date of service; if there is no such agent in the county, then the summons may be served as provided for in other actions against foreign corporations in a court of a justice of the peace. (1899, c. 54, ss. 16, 62; 1903, c. 438, s. 6; Rev., s. 4750; C. S., s. 6414; 1927, c. 167, s. 1; 1931, c. 287.)

Cross Reference.—As to other ways of serving a foreign insurance company with process, see §§ 1-97, 55-38.

Editor's Note.—Prior to the 1927 amendment this section applied only to foreign insurance companies. The 1931 amendment inserted the words "bonding and/or surety" near the beginning of the section.

Power of Attorney to Receive Process, Condition Precedent to Doing Business.—One of the conditions precedent upon which a foreign insurance company is authorized to do business in this State is that such company will file a duly executed instrument with the Commissioner of Insurance appointing him its attorney, upon whom all lawful process against said company can be served. *Biggs v. Life Ass'n*, 128 N. C. 5, 37 S. E. 955 (1901). See § 58-150.

Attempted Annulment of Power of Attorney.—The service of a licensed insurance company made upon the Commissioner is valid although the insurance company may have attempted to annul the

power of attorney, for the statute requires power of attorney to be irrevocable so long as the insurance company has any liabilities in the State. *Biggs v. Life Ass'n*, 128 N. C. 5, 37 S. E. 955 (1901); *Moore v. Mutual Reserve Fund Life Ass'n*, 129 N. C. 31, 39 S. E. 637 (1901); *Hinton v. Mutual Reserve Fund Life Ass'n*, 135 N. C. 314, 47 S. E. 474 (1904).

Section Provides Cumulative Method.—Service of summons on a foreign insurance company doing business in this State is not restricted to the method prescribed by this section but may be made in the manner stated in § 1-97 or § 55-38. *Fisher v. Traders Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667 (1904); *Pardue v. Absher*, 174 N. C. 676, 94 S. E. 414 (1917).

Unlicensed Companies.—Service can be made under this section only on licensed insurance companies. If it does not affirmatively appear that the insurance company is licensed, service under § 1-97 may be made. *Parker v. Insurance Co.*, 143 N. C. 339, 55 S. E. 717 (1906).

However, a foreign insurance company

that has no process agent in this State and is not licensed or transacting business here cannot be served with process either under this section or § 55-38. *Ivy River Land, etc., Co. v. National Fire, etc., Ins. Co.*, 192 N. C. 115, 133 S. E. 424 (1926).

Fraternal Society.—In an action against

a foreign fraternal insurance society doing business in this State, service of summons on the Commissioner of Insurance brings the corporation into court. *Brenizer v. Royal Arcanum*, 141 N. C. 409, 53 S. E. 835 (1906).

§ 58-154. Commissioner to notify company of service of process.

—When legal process is served upon the Commissioner of Insurance as attorney for an insurance company under the provisions of this chapter, he shall immediately notify the company of such service by registered letter directed to its secretary and shall state whether or not complaint was served with the process, or, in case of a foreign country, to its resident manager, if any in the United States; and must within two days after such service forward in the same manner a copy of the process, together with copy of complaint, if any, served on him to such secretary or manager designated by the company by written notice filed in the office of the Commissioner: Provided, that the thirty days fixed by statute within which to file answer when complaint is served with summons shall not begin to run until ten days after such service on the Commissioner of Insurance. The Commissioner must keep a record of all such proceedings which shall show the day and hour of such service of process on such Commissioner, and whether complaint was served with such process. (1899, c. 54, s. 16; Rev., s. 4751; C. S., s. 6415; 1927, c. 167, s. 2.)

Cited in *Ivy River Land, etc., Co. v. National Fire, etc., Ins. Co.*, 192 N. C. 115, 133 S. E. 424 (1926).

§ 58-155. Action to enforce compliance with this chapter.—Compliance with the provisions of this chapter as to deposits, obligations, and prohibitions, and the payment of taxes, fines, fees, and penalties by foreign or alien insurance companies, may be enforced in the ordinary course of legal procedure by action brought in the superior court of Wake County by the Attorney General in the name of the State upon the relation of the Commissioner of Insurance. (1899, c. 54, s. 102; 1903, c. 438, s. 10; Rev., s. 4752; C. S., s. 6416; 1945, c. 384.)

Editor's Note.—The 1945 amendment made this section applicable to alien insurance companies.

ARTICLE 17A.

Mergers, Rehabilitation and Liquidation of Insurance Companies.

§ 58-155.1. Merger or consolidation.—1. Subject to the provisions of §§ 58-103 and 58-104, relating to the mutualization of stock insurers, a domestic insurer may merge or consolidate with another insurer, subject to the following conditions:

(a) The plan of merger or consolidation must be submitted to and be approved by the Commissioner in advance of the merger or consolidation.

(b) The Commissioner shall not approve any such plan unless, after a hearing, he finds that it is fair, equitable to policyholders, consistent with law, and will not conflict with the public interest. If the Commissioner fails to approve the plan, he shall state his reasons for such failure in his order made on such hearing.

(c) No director, officer, member or subscriber of any such insurer, except as is expressly provided by the plan of merger or consolidation, shall receive any fee, commission, other compensation or valuable consideration whatever, for in any manner aiding, promoting or assisting in the merger or consolidation.

(d) Any merger or consolidation as to an incorporated domestic insurer shall in other respects be governed by the general laws of this State relating to business corporations, except that the merger or consolidation of a domestic mutual insurer may be effected by vote of two-thirds of the members voting thereon pursuant to such notice and procedure as the Commissioner may prescribe.

2. Reinsurance of all or substantially all of the insurance in force of a domestic insurer by another insurer under an agreement whereby the reinsuring company succeeds to all of the liabilities of and supplants the domestic insurance company thereon shall be deemed a consolidation for the purposes of this section. (1947, c. 923.)

Editor's Note.—For discussion of this article, see 25 N. C. Law Rev. 429.

§ 58-155.2. **Grounds for rehabilitation.**—The Commissioner may apply for an order directing him to rehabilitate a domestic insurer upon one or more of the following grounds: That the insurer

(a) Is insolvent; or

(b) Has refused to submit its books, records, accounts or affairs to examination by the Commissioner; or

(c) Has failed to comply with the Commissioner's order to make good an impairment of capital of a stock insurer or an impairment of surplus of a mutual or reciprocal insurer, within the time prescribed; or

(d) Has transferred or attempted to transfer substantially its entire property or business, or has entered into any transaction the effect of which is to merge substantially its entire property or business in that of any other insurer without first having obtained the written approval of the Commissioner; or

(e) Is found, after examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to its members, subscribers, or stockholders, or to the public; or

(f) Has willfully violated its charter; or

(g) Has an officer, director, or manager who has refused to be examined under oath, concerning its affairs; or

(h) Has been the subject of an application for the appointment of a receiver, trustee, custodian or sequestrator of the insurer or of its property, or if a receiver, trustee, custodian, or sequestrator is appointed by a federal court or if such appointment is imminent; or

(i) Has consented to such an order through a majority of its directors, stockholders, members, or subscribers; or

(j) Has failed to remove from office any officer or director whom the Commissioner has found, after notice to and hearing of such insurer and such officer or director, to be a dishonest or untrustworthy person; or

(k) Has failed to pay a final judgment rendered against it in any state upon any insurance contract issued or assumed by it, within thirty days after the judgment became final or within thirty days after time for taking an appeal has expired, or within thirty days after dismissal of an appeal before final determination, whichever date is the later. (1947, c. 923.)

§ 58-155.3. **Order of rehabilitation; termination.**—1. An order to rehabilitate a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.

2. If at any time the Commissioner deems that further efforts to rehabilitate the insurer would be useless, he may apply to the court for an order of liquidation.

3. The Commissioner, or any interested person upon due notice to the Commissioner, at any time may apply for an order terminating the rehabilitation proceeding and permitting the insurer to resume possession of its property and the

conduct of its business, but no such order shall be granted except when, after a full hearing, the court has determined that the purposes of the proceeding have been fully accomplished. (1947, c. 923.)

§ 58-155.4. Grounds for liquidation.—The Commissioner may apply for an order directing him to liquidate the business of a domestic insurer or of the United States branch of an alien insurer having trustee assets in this State, regardless of whether or not there has been a prior order directing him to rehabilitate such insurer, upon any of the grounds specified in § 58-155.2 or upon any one or more of the following grounds: That the insurer

(a) Has ceased transacting insurance for a period of one year; or

(b) Has commenced voluntary liquidation or dissolution, or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs, or to dissolve its corporate charter, or to procure the appointment of a receiver, trustee, custodian, or sequestrator under any law except this chapter; or

(c) Has not organized or completed its organization and obtained a certificate of authority as an insurer. (1947, c. 923.)

§ 58-155.5. Order of liquidation.—An order to liquidate the business of a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer, to liquidate its business, to deal with the insurer's property and business in his own name as Commissioner or in the name of the insurer as the court may direct, to give notice to all creditors who may have claims against the insurer to present such claims, and to dissolve the insurer. (1947, c. 923.)

§ 58-155.6. Liquidation of alien insurers.—An order to liquidate the business of the United States branch of an alien insurer having trustee assets in this State shall be in the same terms as those prescribed for domestic insurers, except that only the assets in this State of the business of such United States branch shall be included therein. (1947, c. 923.)

§ 58-155.7. Conservation of assets of foreign insurer.—The Commissioner may apply for an order directing him to conserve the assets within this State of a foreign insurer upon any one or more of the following grounds:

(a) Upon any of the grounds specified in paragraphs (a) to (i) inclusive of § 58-155.2, and in paragraph (b) of § 58-155.4.

(b) That its property has been sequestrated in the state of its domicile or in any other jurisdiction. (1947, c. 923.)

§ 58-155.8. Conservation of assets of alien insurer.—The Commissioner may apply for an order directing him to conserve the assets within this State of an alien insurer upon any one or more of the following grounds:

(a) Upon any of the grounds specified in paragraphs (a) to (i) inclusive of § 58-155.2, and in paragraph (b) of § 58-155.4; or

(b) That the insurer has failed to comply, within the time designated by the Commissioner, with an order of the Commissioner pursuant to law to make good an impairment of its trustee funds; or

(c) That the property of the insurer has been sequestrated in its domiciliary sovereignty or elsewhere. (1947, c. 923.)

§ 58-155.9. Order of conservation or ancillary liquidation of foreign or alien insurers.—1. An order to conserve the assets of a foreign or alien insurer shall direct the Commissioner forthwith to take possession of the property of the insurer within this State and to conserve it, subject to the further direction of the court.

2. Whenever a domiciliary receiver is appointed for any such insurer in its domiciliary state which is also a reciprocal state, as defined in § 58-155.10, the court shall on application of the Commissioner appoint the Commissioner as the

ancillary receiver in this State, subject to the provisions of the Uniform Insurers Liquidation Act. (1947, c. 923.)

§ 58-155.10. **Uniform Insurers Liquidation Act; definitions.**—This section and §§ 58-155.11 to 58-155.17 inclusive, comprise and may be cited as the Uniform Insurers Liquidation Act. For the purposes of this Act:

1. "Insurer" means any person, firm, corporation, association or aggregation of persons doing an insurance business and subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization, or conservation by, the Commissioner, or the equivalent insurance supervisory official of another state.

2. "Delinquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer.

3. "State" means any state of the United States, and also the District of Columbia, Alaska, Hawaii and Puerto Rico.

4. "Foreign country" means territory not in any state.

5. "Domiciliary state" means the state in which an insurer is incorporated or organized, or, in the case of an insurer incorporated or organized in a foreign country, the state in which such insurer, having become authorized to do business in such state, has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders, or policyholders and creditors in the United States; and any such insurer is deemed to be domiciled in such state.

6. "Ancillary state" means any state other than a domiciliary state.

7. "Reciprocal state" means any state other than this State in which in substance and effect the provisions of this Act are in force, including the provisions requiring that the Insurance Commissioner or equivalent supervisory official be the receiver of a delinquent insurer.

8. "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons, and as to such specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders, or all policyholders and creditors in the United States, shall be deemed general assets.

9. "Preferred claim" means any claim with respect to which the law of a state or of the United States accords priority of payment from the general assets of the insurer.

10. "Special deposit claim" means any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes of persons, but not including any general assets.

11. "Secured claim" means any claim secured by mortgage, trust, deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims which more than four months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.

12. "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require. (1947, c. 923.)

§ 58-155.11. **Conduct of delinquency proceedings against insurers domiciled in this State.**—1. Whenever under the laws of this State a receiver is to be appointed in delinquency proceedings for an insurer domiciled in this State, the court shall appoint the Commissioner as such receiver. The court shall

direct the Commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

2. As domiciliary receiver the Commissioner shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer wherever located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer, or to liquidate the United States branch of an alien insurer domiciled in this State, and he shall have the right to recover the same and reduce the same to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are hereinafter prescribed for ancillary receivers appointed in this State as to assets located in this State.

3. The recording of the order directing possession to be taken, or a certified copy thereof, in the record of lis pendens in the office of the clerk of the superior court of the county wherein the property is located shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded.

4. The Commissioner as domiciliary receiver shall be responsible on his official bond for the proper administration of all assets coming into his possession or control. The court may at any time require an additional bond from him or his deputies if deemed desirable for the protection of the assets.

5. Upon taking possession of the assets of an insurer the domiciliary receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by the laws of this State for the purpose of liquidating, rehabilitating, reorganizing or conserving the affairs of the insurer.

6. In connection with delinquency proceedings the Commissioner may appoint one or more special deputy commissioners to act for him, and may employ such counsel, clerks, and assistants as he deems necessary. The compensation of the special deputies, counsel, clerks or assistants and all expenses of taking possession of the insurer and of conducting the proceedings shall be fixed by the receiver, subject to the approval of the court, and shall be paid out of the funds or assets of the insurer. Within the limits of the duties imposed upon them special deputies shall possess all the powers given to, and, in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to such proceedings. (1947, c. 923.)

§ 58-155.12. Conduct of delinquency proceedings against insurers not domiciled in this State.—1. Whenever under the laws of this State an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this State, the court shall appoint the Commissioner as ancillary receiver. The Commissioner shall file a petition requesting the appointment (a) if he finds that there are sufficient assets of such insurer located in this State to justify the appointment of an ancillary receiver, or (b) if ten or more persons resident in this State having claims against such insurer file a petition with the Commissioner requesting the appointment of such ancillary receiver.

2. The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all the property, contracts, and rights of action, and all of the books and records of the insurer located in this State, and he shall have the immediate right to recover balances due from local agents and to obtain possession of any books and records of the insurer found in this State. He shall also be entitled to recover the other assets of the insurer located in this State except that upon the appointment of an ancillary receiver in this State, the ancillary receiver shall during the ancillary receivership proceedings have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and secured claims which are proved and al-

lowed in the ancillary proceedings in this State, and shall pay the necessary expenses of the proceedings. All remaining assets he shall promptly transfer to the domiciliary receiver. Subject to the foregoing provisions the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets, as a receiver of an insurer domiciled in this State.

3. The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this State to recover any assets of such insurer to which he may be entitled under the laws of this State. (1947, c. 923.)

§ 58-155.13. Claims of nonresidents against domestic insurers.—1. In a delinquency proceeding begun in this State against an insurer domiciled in this State, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

2. Converted claims belonging to claimants residing in reciprocal states may either (a) be proved in this State as provided by law, or (b) if ancillary proceedings have been commenced in such reciprocal states, may be proved in those proceedings. In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this State as provided in § 58-155.14 with respect to ancillary proceedings in this State, the final allowance of such claim by the courts in the ancillary state shall be accepted in this State as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state. (1947, c. 923.)

§ 58-155.14. Claims against foreign insurers.—1. In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer, who reside within this State, may file claims either with the ancillary receiver, if any, appointed in this State, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

2. Controverted claims belonging to claimants residing in this State may either (a) be proved in the domiciliary state as provided by the law of that state, or (b) if ancillary proceedings have been commenced in this State, be proved in those proceedings. In the event that any such claimant elects to prove his claim in this State, he shall file his claim with the ancillary receiver in the manner provided by the law of this State for the proving of claims against insurers domiciled in this State, and he shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least forty days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver, within thirty days after the giving of such notice, shall give notice in writing to the ancillary receiver and to the claimant, either by registered mail or by personal service, of his intention to contest such claim, he shall be entitled to appear or to be represented in any proceeding in this State involving the adjudication of the claim. The final allowance of the claim by the courts of this State shall be accepted as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within this State. (1947, c. 923.)

§ 58-155.15. Priority of certain claims.—1. In a delinquency proceeding against an insurer domiciled in this State, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of this State. All such claims whether owing to residents or nonresidents shall be given equal priority of payment from general assets regardless of where such assets are located.

2. In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of this State shall be preferred if like claims are preferred by the laws of that state.

3. The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but such sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective deposits, have been paid percentages of their claims equal to the percentage paid from special deposit.

4. The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this Act, or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amount shall be conclusive; otherwise the amount shall be determined in the delinquency proceeding in the domiciliary state. (1947, c. 923.)

§ 58-155.16. Attachment and garnishment of assets.—During the pendency of delinquency proceedings in this or any reciprocal state no action or proceeding in the nature of an attachment, garnishment or execution shall be commenced or maintained in the courts of this State against the delinquent insurer or its assets. Any lien obtained by such action or proceeding within four months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding. (1947, c. 923.)

§ 58-155.17. Uniformity of interpretation.—This Uniform Insurers Liquidation Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. To the extent that its provisions, when applicable, conflict with other provisions of this article, the provisions of this Act shall control. (1947, c. 923.)

§ 58-155.18. Commencement of proceedings.—1. Proceedings under this article involving a domestic insurer shall be commenced in the superior court for the county in which is located the insurer's home office. Proceedings under this article involving other insurers shall be commenced in the superior court of Wake County.

2. The Commissioner shall commence any such proceeding, the Attorney General representing him, by an application to the court or to any judge thereof, for an order directing the insurer to show cause why the Commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application together with such other relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, subscribers or the public may require. (1947, c. 923.)

§ 58-155.19. Injunctions.—1. Upon application by the Commissioner for such an order to show cause or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents, employees and all other persons from the transac-

tion of its business or the waste or disposition of its property until the further order of the court.

2. The court may at any time during a proceeding under this article issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof. (1947, c. 923.)

§ 58-155.20. Removal of proceedings.—At any time after the commencement of a proceeding under this article the Commissioner may apply ex parte to the court for an order changing the venue of, and removing the proceeding to Wake County, or, in the discretion of the Commissioner, to any other county of this State in which he deems that such proceeding may be most economically and efficiently conducted.

Upon the filing of any such application for removal, the court shall direct the clerk of the court in which the proceeding is then pending to transmit all the papers filed therein with such clerk to the clerk of the court to which the proceeding is removed, and the proceeding shall thereafter be conducted in such other court as though it had been commenced in such court. (1947, c. 923.)

§ 58-155.21. Deposit of monies collected.—The monies collected by the Commissioner in a proceeding under this article, shall be, from time to time, deposited in one or more State or national banks, savings banks, or trust companies, and in the case of the insolvency or voluntary or involuntary liquidation of any such depository which is an institution organized and supervised under the laws of this State, such deposits shall be entitled to priority of payment on an equality with any other priority given by the banking law of this State. The Commissioner may in his discretion deposit such monies or any part thereof in a national bank or trust company as a trust fund. (1947, c. 923.)

§ 58-155.22. Exemption from filing fees.—The Commissioner shall not be required to pay any fee to any public officer in this State for filing, recording, issuing a transcript or certificate, or authenticating any paper or instrument pertaining to the exercise by the Commissioner of any of the powers or duties conferred upon him under this article, whether or not such paper or instrument be executed by the Commissioner or his deputies, employees or attorneys of record and whether or not it is connected with the commencement of an action or proceeding by or against the Commissioner, or with the subsequent conduct of such action or proceeding. (1947, c. 923.)

§ 58-155.23. Borrowing on pledge of assets.—For the purpose of facilitating the rehabilitation, liquidation, conservation or dissolution of an insurer pursuant to this article, the Commissioner may, subject to the approval of the court, borrow money and execute, acknowledge and deliver notes or other evidences of indebtedness therefor and secure the repayment of the same by the mortgage, pledge, assignment, transfer in trust or hypothecation of any or all of the property whether real, personal or mixed of such insurer, and the Commissioner, subject to the approval of the court, shall have power to take any and all other action necessary and proper to consummate any such loans and to provide for the repayment thereof. The Commissioner shall be under no obligation personally or in his official capacity as Commissioner to repay any loan made pursuant to this section. (1947, c. 923.)

§ 58-155.24. Report to the General Assembly.—The Commissioner shall transmit to the General Assembly in his biennial report, the names of all insurers proceeded against under this article together with such facts as shall acquaint the policyholders, creditors, stockholders and the public with all proceedings. To that end the special deputy Commissioner in charge of any such in-

surer shall file annually with the Commissioner a report of the affairs of the insurer. (1947, c. 923.)

§ 58-155.25. Date rights fixed on liquidation.—The rights and liabilities of the insurer and of its creditors, policyholders, stockholders, members, subscribers and all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date on which the order directing the liquidation of the insurer is filed in the office of the clerk of the court which made the order, subject to the provisions of § 58-155.29 with respect to the rights of claimants holding contingent claims. (1947, c. 923.)

§ 58-155.26. Voidable transfers or liens.—1. Any transfer of, or lien upon, the property of an insurer which is made or created within four months prior to the granting of an order to show cause under this article with the intent of giving to any creditor or of enabling him to obtain a greater percentage of his debt than any other creditor of the same class and which is accepted by such creditor having reasonable cause to believe that such a preference will occur, shall be voidable.

2. Every director, officer, employee, stockholder, member, subscriber and any other person acting on behalf of such insurer who shall be concerned in any such prohibited act or deed and every person receiving thereby any property of such insurer or the benefit thereof shall be personally liable therefor and shall be bound to account to the Commissioner.

3. The Commissioner as liquidator, rehabilitator or conservator in any proceeding under this article, may avoid any transfer of, or lien upon the property of an insurer which any creditor, stockholder, subscriber or member of such insurer might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of the granting of an order to show cause under this article. Such property or its value may be recovered from anyone who has received it except a bona fide holder for value as above specified. (1947, c. 923.)

§ 58-155.27. Priority of claims for compensation.—1. Compensation actually owing to employees other than officers of an insurer, for services rendered within three months prior to the commencement of a proceeding against the insurer under this article, but not exceeding three hundred dollars for each such employee, shall be paid prior to the payment of every other debt or claim, and in the discretion of the Commissioner may be paid as soon as practicable after the proceeding has been commenced; except that at all times the Commissioner shall reserve such funds as will in his opinion be sufficient for the expenses of administration.

2. Such priority shall be in lieu of any other similar priority which may be authorized by law as to the wages or compensation of such employees. (1947, c. 923.)

§ 58-155.28. Offsets.—1. In all cases of mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this article, such credits and debts shall be set off and the balance only shall be allowed or paid, except as provided in paragraph two of this section.

2. No offset shall be allowed in favor of any such person where (a) the obligation of the insurer to such person would not at the date of the entry of any liquidation order, or otherwise, as provided in § 58-155.25, entitle him to share as a claimant in the assets of the insurer, or (b) the obligation of the insurer to such person was purchased by or transferred to such person with a view of its being used as an offset, or (c) the obligation of such person is to pay an assessment levied against the members of a mutual insurer, or against the subscribers of a reciprocal insurer, or is to pay a balance upon a subscription to the capital stock of a stock insurer. (1947, c. 923.)

§ 58-155.29. Allowance of certain claims.—1. No contingent claim shall share in a distribution of the assets of an insurer which has been adjudicated to be insolvent by an order made pursuant to § 58-155.30 except that such claims shall be considered, if properly presented, and may be allowed to share where:

(a) Such claim becomes absolute against the insurer on or before the last day fixed for filing of proofs of claim against the assets of such insurer, or

(b) There is a surplus and the liquidation is thereafter conducted upon the basis that such insurer is solvent.

2. Where an insurer has been so adjudicated to be insolvent any person who has a cause of action against an insured of such insurer under a liability insurance policy issued by such insurer, shall have the right to file a claim in the liquidation proceedings, regardless of the fact that such claim may be contingent, and such claim may be allowed:

(a) If it may be reasonably inferred from the proof presented upon such claim that such person would be able to obtain a judgment upon such cause of action against such insured; and

(b) If such person shall furnish suitable proof, unless the court for good cause shown shall otherwise direct, that no further valid claims against such insurer arising out of his cause of action other than those already presented can be made; and

(c) If the total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its total liability would be were it not in liquidation.

No judgment against such an insured taken after the date of the entry of the liquidation order shall be considered in the liquidation proceedings as evidence of liability, or of the amount of damages, and no judgment against an insured taken by default, inquest or by collusion prior to the entry of the liquidation order shall be considered as conclusive evidence in the liquidation proceeding either of the liability of such insured to such person upon such cause of action or of the amount of damages to which such person is therein entitled.

3. No claim of any secured claimant shall be allowed at a sum greater than the difference between the value of the claim without security and the value of the security itself as of the date of entry of the order of liquidation or such other date set by the court for fixation of rights and liabilities as provided in § 58-155.25 unless the claimant shall surrender his security to the Commissioner in which event the claim shall be allowed in the full amount for which it is valued. (1947, c. 923.)

§ 58-155.30. Time to file claims.—1. If upon the granting of an order of liquidation under this article or at any time thereafter during the liquidation proceeding the insurer shall not be clearly solvent, the court shall after such notice and hearing as it deems proper, make an order declaring the insurer to be insolvent. Thereupon, regardless of any prior notice which may have been given to creditors, the Commissioner shall notify all persons who may have claims against such insurer and who have not filed proper proofs thereof, to present the same to him, at a place specified in such notice, within four months from the date of the entry of such order, or, if the Commissioner shall certify that it is necessary, within such longer time as the court shall prescribe. The last day for the filing of proofs of claim shall be specified in the notice. Such notice shall be given in a manner determined by the court.

2. Proofs of claim may be filed subsequent to the date specified, but no such claim shall share in the distribution of the assets until all allowed claims, proofs of which have been filed before said date, have been paid in full with interest. (1947, c. 923.)

§ 58-155.31. Report for assessment.—Within three years from the

date an order of rehabilitation or liquidation of a domestic mutual insurer or a domestic reciprocal insurer was filed in the office of the clerk of the court by which such order was made, the Commissioner may make a report to the court setting forth:

- (a) The reasonable value of the assets of the insurer;
- (b) The insurer's probable liabilities; and
- (c) The probable necessary assessment, if any, to pay all possible claims and expenses in full, including expenses of administration. (1947, c. 923.)

§ 58-155.32. **Levy of assessment.**—1. Upon the basis of the report provided for in § 58-155.31 including any amendment thereof, the court, ex parte, may levy one or more assessments against all members of such insurer who, as shown by the records of the insurer, were members of a mutual insurer or subscribers in a reciprocal insurer, at any time within one year prior to the date of issuance of the order to show cause under § 58-155.18.

2. Such assessment or assessments shall cover the excess of the probable liabilities over the reasonable value of the assets, together with the estimated cost of collection and percentage of uncollectibility thereof. The total of all assessments against any member or subscriber with respect to any policy, by whomsoever levied or for whatsoever purposes levied, shall be for no greater amount than that specified in the policy or policies of the member or subscriber and as limited under this chapter; except that if the court finds that the policy was issued at a rate of premium below the minimum rate lawfully permitted for the risk insured, the court may determine the upper limit of such assessment upon the basis of an adequate rate for the insurance.

3. No assessment shall be levied against any member or subscriber with respect to any nonassessable policy issued in accordance with this chapter. (1947, c. 923.)

§ 58-155.33. **Order to pay assessment.**—After levy of assessment as provided in § 58-155.32, upon the filing of a further detailed report by the Commissioner, the court shall issue an order directing each member of a mutual insurer or each subscriber in a reciprocal insurer, if he shall not pay the amount assessed against him to the Commissioner on or before a day to be specified in the order, to show cause why he should not be held liable to pay such assessment together with costs as set forth in § 58-155.35 and why the Commissioner should not have judgment therefor. (1947, c. 923.)

§ 58-155.34. **Publication and transmittal of assessment order.**—The Commissioner shall cause a notice of such assessment order setting forth a brief summary of the contents of such order to be:

- (a) Published in such manner as shall be directed by the court; and
- (b) Enclosed in a sealed envelope, addressed and mailed postage prepaid to each member or subscriber liable thereunder at his last known address as it appears on the records of the insurer, at least twenty days before the return day of the order to show cause provided for in § 58-155.33. (1947, c. 923.)

§ 58-155.35. **Judgment upon the assessment.**—1. On the return day of the order to show cause provided for in § 58-155.33 if the member or subscriber does not appear and serve verified objections upon the Commissioner, the court shall make an order adjudging that such member or subscriber is liable for the amount of the assessment against him together with ten dollars costs, and that the Commissioner may have judgment against the member or subscriber therefor.

2. If on such return day the member or subscriber shall appear and serve verified objections upon the Commissioner there shall be a full hearing before the court or a referee to hear and determine, who, after such hearing, shall make an order either negating the liability of the member or subscriber to pay the assessment or affirming his liability to pay the whole or some part thereof together

with twenty-five dollars costs and the necessary disbursements incurred at such hearing, and directing that the Commissioner in the latter case may have judgment therefor.

3. A judgment upon any such order, whether granted by a court or by a referee, shall have the same force and effect, and may be entered and docketed and may be appealed from as if it were a judgment in an original action brought in the court in which the proceeding is pending. (1947, c. 923.)

SUBCHAPTER III.

FIRE INSURANCE.

ARTICLE 18.

General Regulations of Business.

§ 58-156: Repealed by Session Laws 1945, c. 378.

§ 58-157. **Performance of contracts as to devices not prohibited.**—Nothing contained in this chapter shall be construed as prohibiting the performance of any contract hereafter made for the introduction or installation of automatic sprinklers or other betterments or improvements for reducing the risk by fire or water on any property located in this State, and containing provisions for obtaining insurance against loss or damage by fire or water, for a specified time at a fixed rate; provided, every policy issued under such contract shall be as provided by law. (1929, c. 145, s. 1.)

§ 58-158. **Limitation as to amount and term; indemnity contracts for difference in actual value and cost of replacement.**—No insurance company or agent shall knowingly issue any fire insurance policy upon property within this State for an amount which, together with any existing insurance thereon, exceeds the fair value of the property, nor for a longer term than seven years: Provided, any fire insurance company authorized to transact business in this State may, by appropriate riders or endorsements or otherwise, provide insurance indemnifying the insured for the difference between the actual value of the insured property at the time any loss or damage occurs, and the amount actually expended to repair, rebuild or replace on the premises described in the policy, or some other location within the State of North Carolina with new materials of like size, kind and quality, such property as has been damaged or destroyed by fire or other perils insured against. Policies issued in violation of this section are binding upon the company issuing them, but the company is liable for the forfeitures by law prescribed for such violation. (1899, c. 54, ss. 39, 99; 1903, c. 438, s. 10; Rev., s. 4755; C. S., s. 6418; 1949, c. 295, s. 1.)

Cross Reference.—As to forfeiture prescribed, see § 58-173.

Editor's Note.—The 1949 amendment rewrote this section and inserted the proviso.

Determining Amount of Loss.—A statement of an agent acting for his company in writing fire insurance, made after an inspection of the property to be insured, is competent upon the question of the amount of the loss, in the action of the insured to recover upon the policy issued, especially as this section requires that the insurer should know the true value of the property, etc., to be insured before issuing the policy thereon. *Queen v. Dixie Fire Ins. Co.*, 177 N. C. 34, 97 S. E. 741 (1919).

Construction of Policy.—Where plain-

tiffs' property consisted of one building containing three stores, and the insurer contended that the policy issued covered only one of the stores and not the entire building, it appearing that that amount of the policy was greatly in excess of the value of the one store, but was about the value of the entire building, and that insured paid the premium based upon the amount for which the policy was issued, it was held that in construing the policy it would not be presumed that insurer charged a premium based upon a valuation greatly in excess of the value of the property insured in violation of this and § 58-175, but that the policy covered the entire building. *Williams v. Greensboro Fire Ins. Co.*, 209 N. C. 765, 185 S. E. 21 (1936).

§ 58-159. **Limit of liability on total loss.**—Subject to the provisions of G. S. § 58-158, when buildings insured against loss by fire and situated within the State are totally destroyed by fire, the company is not liable beyond the actual cash value of the insured property at the time of the loss or damage; and if it appears that the insured has paid a premium on a sum in excess of the actual value, he shall be reimbursed the proportionate excess of premium paid on the difference between the amount named in the policy and the ascertained values, with interest at six per centum (6%) per annum from the date of issue. (1899, c. 54, s. 40; Rev., s. 4756; C. S., s. 6419; 1949, c. 295, s. 2.)

Editor's Note.—The 1949 amendment rewrote this section and added the reference to § 58-158.

§ 58-160. **Policies for the benefit of mortgagees.**—Where by an agreement with the insured, or by the terms of a fire insurance policy taken out by a mortgagor, the whole or any part of the loss thereon is payable to a mortgagee of the property for his benefit, the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of their priority of claim, as their claims appear, not beyond the amount for which the company is liable, and such payments are, to the extent thereof, payment and satisfaction of the liabilities of the company under the policy. (1899, c. 54, s. 41; Rev., s. 4757; C. S., s. 6420.)

Editor's Note.—See 13 N. C. Law Rev. 98.

Priority between Mortgagees.—Where the owner of lands borrows money thereon under two separate mortgages from different persons, one registered prior to the other, and the mortgagor contracts with each to take out certain policies of fire insurance for their benefit, the rights of the mortgagees to the proceeds under the policies will be determined by the contracts as executed in the loss payable clauses in the policies, and where they are of the New York standard form, and made payable to the mortgagees "as interest may appear," the mortgagee under the prior registered mortgage has superior lien on the proceeds to the one having the later registered security. *Wayne Nat. Bank v. National Bank*, 197 N. C. 68, 147 S. E. 691 (1929).

Where mortgagor procured insurance for benefit of mortgagee, whose mortgage was registered December 14, 1920, and for the benefit of subsequent mortgagee whose

mortgage was not executed until May 11, 1925, claim of first mortgagee should first be paid out of funds derived from policy under this section, providing that where, by terms of fire policy taken out by mortgagor, loss is payable to mortgagee for his benefit, company shall pay all mortgages in order of their priority of claim, and in view of § 47-20, by which priority is given to mortgage which was first recorded. *Wayne Nat. Bank v. National Bank*, 197 N. C. 68, 147 S. E. 691 (1929).

Where neither Mortgagee Has Claim to Priority.—If neither of two mortgagees, for whom insurance has been procured, has any priority of claim or of liens, the proceeds of the policies will ordinarily be divided between them in proportion to their respective claims. *Wayne Nat. Bank v. National Bank*, 197 N. C. 68, 147 S. E. 691 (1929).

Cited in *Peeler v. United States Casualty Co.*, 197 N. C. 286, 148 S. E. 261 (1929).

§ 58-161: Repealed by Session Laws 1945, c. 378.

§ 58-162. **Reinsurance assumed from unlicensed companies prohibited.**—No fire, marine, or fire and marine insurance company licensed to do business in North Carolina shall assume reinsurance on property located in the State of North Carolina from a company which is not licensed to do business in North Carolina. A company violating the provisions of this section shall be subject to cancellation of its license to do business in this State and upon conviction thereof shall be punished by a fine of five hundred dollars (\$500.00) for each offense. (1899, c. 54, s. 63; 1901, c. 391, s. 5; Rev., s. 4770; C. S., s. 6422; 1945, c. 378.)

Editor's Note.—The 1945 amendment ally, and inserted in lieu thereof the present section. repealed the former section, which restricted and regulated reinsurance gener-

§ 58-162.1. **Limitation of fire insurance risks.**—No insurer authorized to do in this State the business of fire insurance shall expose itself to any loss on any one fire risk, whether located in this State or elsewhere, in an amount exceeding ten per cent of its surplus to policyholders, except that in the case of risks adequately protected by automatic sprinklers or risks principally of noncombustible construction and occupancy such insurer may expose itself to any loss on any one risk in an amount not exceeding twenty-five per cent of the sum of (a) its unearned premium reserve and (b) its surplus to policyholders. Any risk or portion of any risk which shall have been reinsured shall be deducted in determining the limitation of risk prescribed in this section. (1945, c. 378.)

§ 58-163: Repealed by Session Laws 1945, c. 378.

§ 58-164. **Uniform Unauthorized Insurers Act.** — (a) No person, corporation, association or partnership shall in this State act as agent for any insurer not authorized to transact business in this State, or negotiate for or place or aid in placing insurance coverage in this State for another with any such insurer.

(b) No person, corporation, association or partnership shall in this State aid any unauthorized insurer in effecting insurance or in transacting insurance business in this State, either by fixing rates, by adjusting or investigating losses, by inspecting or examining risks, by acting as attorney-in-fact or as attorney for service for process, or otherwise, except as provided in paragraph (e) hereof.

(c) No person, corporation, association or partnership shall make, negotiate for or place, or aid in negotiating or placing any insurance contract in this State for another who is an applicant for insurance covering any property or risk in another state, territory or district of the United States with any insurer not authorized to transact insurance business in the state, territory or district wherein such property or risk or any part thereof is located.

(d) The provisions of the three foregoing paragraphs do not apply to contracts of reinsurance, or to contracts of insurance made through authorized surplus line agents or authorized surplus line brokers as provided in §§ 58-53.1, 58-53.2 and 58-53.3, nor do they apply to any insurer not authorized in this State, or its representatives, in investigating, adjusting losses or otherwise complying in this State with the terms of its insurance contracts made in a state wherein the insurer was authorized; provided, the property or risk insured under such contracts at the time such contract was issued was located in such other state. A motor vehicle used and kept garaged principally in another state shall be deemed to be located in such state.

(e) (1) The transacting of business in this State by a foreign or alien insurer without a license and the issuance or delivery by such foreign or alien insurer of a policy or contract of insurance to a citizen of this State or to a resident thereof, or to a corporation authorized to do business therein, is equivalent to an appointment by such insurer of the Commissioner and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding arising out of such policy or contract of insurance, and the said issuance or delivery is a signification of its agreement that any such service of process is of the same legal force and validity as personal service of process in this State upon it.

(2) Such service of process shall be made by delivering and leaving with the Commissioner or to some person in apparent charge of his office two copies thereof and the payment to him of such fees as may be prescribed by law. The Commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep

a record of all such process so served upon him. Such service of process is sufficient provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow. However, no plaintiff or complainant shall be entitled to a judgment by default under this subparagraph (2) until the expiration of thirty days from the date of the filing of the affidavit of compliance.

(3) Service of process in any such action, suit or proceeding shall be in addition to the manner provided in the preceding subparagraph (2) be valid if served upon any person within this State who, in this State on behalf of such insurer, is

a. soliciting insurance, or

b. making any contract of insurance or issuing or delivering any policies or written contracts of insurance, or

c. collecting or receiving any premium for insurance; and a copy of such process is sent within ten days thereafter by registered mail by plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

d. Nothing in this paragraph (e) shall limit or abridge the right to serve process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

(f) No unauthorized insurer shall institute or file, or cause to be instituted or filed, any suit, action or proceeding in this State to enforce any right, claim or demand arising out of the transaction of business in this State until such insurer shall have obtained a license to transact insurance business in this State. Nothing in this subsection shall be construed to require an unauthorized insurance company to obtain a certificate of authority before instituting or filing, or causing to be instituted or filed, any suit, action or proceeding either in connection with any of its investments in this State or in connection with any contract issued by it at a time when it was authorized to do business in the state where such contract was issued.

(g) (1) Before any unauthorized insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either (a) file with the clerk of the court in which such action, suit or proceeding is pending a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action or (b) procure a license to transact the business of insurance in this State.

(2) The court in any action, suit or proceeding in which service is made in the manner prescribed in subparagraphs (2) and (3) of paragraph (e) may order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of subparagraph (1) of this paragraph (g) and to defend such action.

(3) Nothing in subparagraph (1) of this paragraph (g) shall be construed to prevent an unauthorized insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in subparagraphs (2) and (3) of paragraph (e) on the ground either (a) that no policy or contract of in-

insurance has been issued or delivered to a citizen or resident of this State or to a corporation authorized to do business therein, or (b) that such insurer has not been transacting business in this State, or (c) that the person on whom service was made pursuant to subparagraph (3) of paragraph (e) was not doing any of the acts enumerated therein.

(h) Any person, corporation, association or partnership violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars nor more than five hundred dollars.

(i) This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(j) This section may be cited as the Uniform Unauthorized Insurers Act. (1899, c. 54, s. 105; Rev., s. 4763; C. S., s. 6424; 1945, c. 386.)

Editor's Note.—The 1945 amendment rewrote and added extensively to the former section which merely provided that no action would lie on the policy of an unlicensed company. The amendatory act, which amended, inserted or repealed a large number of sections in this chapter, provides: "This act shall not apply to common carriers having relief departments, pension or annuity plans, or other organizations or associations for the benefit of their employees or former employees; or

to associations of such common carriers administering such departments, plans or organizations."

The statute does not make the policy void in the hands of the assured. The company issuing a policy in violation of this section may not receive the premiums and rely upon the statute to invalidate the policy, for this would permit it to take advantage of its own wrong. *Hay & Bro. v. Union Fire Ins. Co.*, 167 N. C. 82, 83 S. E. 241 (1914).

§ 58-165: Repealed by Session Laws 1945, c. 378.

Editor's Note.—The repealed section was rewritten as § 58-53.1.

§ 58-166: Transferred to § 58-53.2 by Session Laws 1945, c. 378.

§ 58-167: Transferred to § 58-53.3 by Session Laws 1945, c. 378.

§ 58-168. **Resident agents required.**—Foreign fire insurance companies legally authorized to do business in this State through regularly commissioned and licensed agents located in the State shall not make contracts of fire insurance on property herein, except through such resident agents as are regularly commissioned by them and licensed to write policies of fire insurance in this State. This section does not apply to direct insurance covering the rolling stock of railroad corporations or property in transit while in the possession and custody of railroad corporations or other common carriers. (1899, c. 54, s. 107; 1901, c. 391, s. 8; Rev., s. 4764; C. S., s. 6428.)

§ 58-169. **Policies through nonresident agent prohibited.**—Every fire insurance company authorized to do business in the State is prohibited from authorizing or allowing any person, agent, firm, or corporation who is a nonresident of this State, to issue or cause to be issued, except through a licensed agent, any policy of insurance on property located in the State. (1903, c. 488, s. 1; 1905, c. 170; Rev., s. 4765; C. S., s. 6429.)

Validity as to Insured.—Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another state which

is unauthorized to write it here, because of this section, the policy is valid as to the right of action of the insured thereon. *Hay & Bro. v. Union Fire Ins. Co.*, 167 N. C. 82, 83 S. E. 241 (1914).

§§ 58-170, 58-171: Repealed by Session Laws 1945, c. 458.

Editor's Note.—Repealed § 58-170 was rewritten as §§ 58-44.1, 58-44.2 and 58-44.3.

Repealed § 58-171 was rewritten as § 58-44.4.

§ 58-172. **Agreements restricting agent's commission; penalty.**—It is unlawful for any insurance company doing the business of insurance as de-

fined in subsections 3 to 22 inclusive of § 58-72 and employing an agent representing another such company, either directly or through any organization or association, to enter into, make or maintain any stipulation or agreement in anywise limiting the compensation such agent may receive from any such other company or forbidding or prohibiting reinsurance of the risks of any such domestic company in whole or in part by any other company holding membership in or co-operating with such organization or association. The penalty for any violation of this section shall be a fine of not less than two hundred and fifty (\$250.00) dollars nor more than five hundred (\$500.00) dollars, and the forfeiture of license to do business in this State for a period of twelve months following conviction. (1905, c. 424; Rev., ss. 3491, 4768; 1915, c. 166, ss. 2, 3; C. S., s. 6432; 1945, c. 458.)

Editor's Note.—Prior to the 1945 amendment this section was restricted to fire insurance. The amendment rewrote the first sentence and substituted the

words "following conviction" for the word "thereafter" at the end of the second sentence.

§ 58-173. Punishment for issuing fire policies contrary to law.—Any insurance company or agent who makes, issues, or delivers a policy of fire insurance in willful violation of the provisions of this chapter which prohibit a domestic insurance company from issuing policies before obtaining certificate and authority from the Commissioner of Insurance; or which prohibit the issuing of a fire insurance policy for more than the fair value of the property or for a longer term than seven years; or which prohibit stipulations in insurance contracts restricting the jurisdiction of courts, or limiting the time within which an action may be brought to less than one year after the cause of action accrues or to less than six months after a nonsuit by the plaintiff, shall forfeit for each offense not less than fifty nor more than two hundred dollars; but the policy shall be binding upon the company issuing it. (1899, c. 54, s. 99; 1903, c. 438, s. 10; Rev., s. 4832; C. S., s. 6433.)

ARTICLE 19.

Fire Insurance Policies.

§ 58-174. Terms and conditions must be set out in policy.—In all insurance against loss by fire the conditions of insurance must be stated in full, and the rules and bylaws of the company are not a warranty or a part of the contract, except as incorporated in full into the policy. (1899, c. 54, s. 42; Rev., s. 4758; C. S., s. 6434.)

§ 58-175. Items to be expressed in policies.—Upon request there shall be printed, stamped, or written on each fire policy issued in this State the basis rate, deficiency charge, the credit for improvements, and the rate at which written, and whenever a rate is made or changed on any property situated in this State upon request a full statement thereof showing in detail the basis rate, deficiency charges and credits, as well as rate proposed to be made, shall be delivered to the owner or his representative having the insurance on the property in charge, by the company, association, their agent or representative. (1915, c. 109, s. 3; C. S., s. 6435; 1925, c. 70, s. 3; 1945, c. 378.)

Editor's Note.—The 1945 amendment surance. It also omitted a provision re-omitted a former provision as to notice of quiring agent to inspect risks and inserted filing of rates with the Department of In- such provisions as § 58-175.1.

§ 58-175.1. Agent to inspect risks.—Every agent of a fire insurance company shall, before issuing a policy of insurance on property situated in a city or town, inspect the same, informing himself as to its value and insurable condition. (1915, c. 109, s. 3; C. S., s. 6435; 1925, c. 70, s. 3; 1945, c. 378.)

Editor's Note.—This section was formerly a part of § 58-175.

FIRST PAGE OF STANDARD FIRE POLICY

No.

[Space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy.]

[Space for listing amounts of insurance, rates and premiums for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached.]

In Consideration of the Provisions and Stipulations herein or added hereto
and of Dollars Premium

this Company, for the term } from the day of, 19 {at noon, Standard Time, at
of } to the day of, 19 {location of property involved,

to an amount not exceeding Dollars,

does insure

and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at

Secretary.

President.

Countersigned this day of, 19
AGENT.

SECOND PAGE OF STANDARD FIRE POLICY.

1 **Concealment.** This entire policy shall be void if, whether
2 **fraud.** before or after a loss, the insured has wil-
3 fully concealed or misrepresented any ma-
4 **terial fact or circumstance** concerning this insurance or the
5 **subject thereof,** or the interest of the insured therein, or in case
6 **of any fraud or false swearing** by the insured relating thereto.
7 **Uninsurable** This policy shall not cover accounts, bills,
8 **and** currency, deeds, evidences of debt, money or
9 **excepted property.** securities; nor, unless specifically named
10 hereon in writing, bullion or manuscripts.
11 **Perils not** This Company shall not be liable for loss by
12 **included.** fire or other perils insured against in this
13 policy caused, directly or indirectly, by: (a)
14 **enemy attack** by armed forces, including action taken by mili-
15 **tary, naval or air forces** in resisting an actual or an immediately
16 **impending enemy attack;** (b) invasion; (c) insurrection; (d)
17 **rebellion;** (e) revolution; (f) civil war; (g) usurped power; (h)
18 **order of any civil authority** except acts of destruction at the time
19 **of and for the purpose of preventing the spread of fire,** provided
20 **that such fire did not originate from any of the perils excluded**
21 **by this policy;** (i) neglect of the insured to use all reasonable
22 **means to save and preserve the property at and after a loss,** or
23 **when the property is endangered by fire in neighboring prem-**
24 **ises;** (j) nor shall this Company be liable for loss by theft.
25 **Other Insurance.** Other insurance may be prohibited or the
26 amount of insurance may be limited by en-
27 **dorsement attached hereto.**
28 **Conditions suspending or restricting insurance.** Unless other-
29 **wise provided in writing** added hereto this Company shall not
30 **be liable for loss occurring**
31 (a) while the hazard is increased by any means within the con-
32 **trol or knowledge of the insured;** or
33 (b) while a described building, whether intended for occupancy
34 **by owner or tenant, is vacant or unoccupied beyond a period of**
35 **sixty consecutive days;** or
36 (c) as a result of explosion or riot, unless fire ensue, and in
37 **that event for loss by fire only.**
38 **Other perils** Any other peril to be insured against or sub-
39 **or subjects.** ject of insurance to be covered in this policy
40 shall be by endorsement in writing hereon or
41 added hereto.
42 **Added provisions.** The extent of the application of insurance
43 under this policy and of the contribution to
44 **be made by this Company in case of loss, and any other pro-**
45 **vision or agreement not inconsistent with the provisions of this**
46 **policy, may be provided for in writing** added hereto, but no pro-
47 **vision may be waived except such as by the terms of this policy**
48 **is subject to change.**
49 **Waiver** No permission affecting this insurance shall
50 **provisions.** exist, or waiver of any provision be valid,
51 unless granted herein or expressed in writing
52 **added hereto.** No provision, stipulation or forfeiture shall be
53 **held to be waived by any requirement or proceeding on the part**
54 **of this Company relating to appraisal or to any examination**
55 **provided for herein.**
56 **Cancellation** This policy shall be cancelled at any time
57 **of policy.** at the request of the insured, in which case
58 this Company shall, upon demand and sur-
59 **render of this policy, refund the excess of paid premium above**
60 **the customary short rates for the expired time.** This pol-
61 **icy may be cancelled at any time by this Company by giving**
62 **to the insured a five days' written notice of cancellation with**
63 **or without tender of the excess of paid premium above the pro-**
64 **rata premium for the expired time, which excess, if not ten-**
65 **dered, shall be refunded on demand.** Notice of cancellation shall
66 **state that said excess premium (if not tendered) will be re-**
67 **funded on demand.**
68 **Mortgagee** If loss hereunder is made payable, in whole
69 **interests and** or in part, to a designated mortgagee not
70 **obligations.** named herein as the insured, such interest in
71 this policy may be cancelled by giving to such
72 mortgagee a ten days' written notice of can-
73 **cancellation.**
74 **If the insured fails to render proof of loss such mortgagee, upon**
75 **notice, shall render proof of loss in the form herein specified**
76 **within sixty (60) days thereafter and shall be subject to the pro-**
77 **visions hereof relating to appraisal and time of payment and of**
78 **bringing suit.** If this Company shall claim that no liability ex-
79 **isted as to the mortgagor or owner, it shall, to the extent of pay-**
80 **ment of loss to the mortgagee, be subrogated to all the mort-**
81 **gagee's rights of recovery, but without impairing mortgagee's**
82 **right to sue; or it may pay off the mortgage debt and require**
83 **an assignment thereof and of the mortgage.** Other provisions
84 relating to the interests and obligations of such mortgagee may
85 be added hereto by agreement in writing.
86 **Pro rata liability.** This Company shall not be liable for a great
87 proportion of any loss than the amount
88 hereby insured shall bear to the whole insurance covering the
89 property against the peril involved, whether collectible or not.
90 **Requirements in** The insured shall give immediate written
91 **case loss occurs.** notice to this Company of any loss, protect
92 the property from further damage, forthwith
93 separate the damaged and undamaged personal property, pro-
94 **vide it in the best possible order, furnish a complete inventory**
95 **of the destroyed, damaged and undamaged property, showing**
96 **detail quantities, costs, actual cash value and amount of loss**
97 **claimed; and within sixty days after the loss, unless such re-**
98 **quirement is extended in writing by this Company, the insured shall ren-**
99 **der to this Company a proof of loss, signed and sworn to by the**
100 **insured, stating the knowledge and belief of the insured as to**
101 **the following; the time and origin of the loss, the interest of**
102 **the insured and of all others in the property, the actual cash value**
103 **of each item thereof and the amount of loss thereto, all encum-**
104 **brances thereon, all other contracts of insurance, whether valid**
105 **or not, covering any of said property, any changes in the time**
106 **of use, occupation, location, possession or exposures of said prop-**
107 **erty since the issuing of this policy, by whom and for what pur-**
108 **pose any building herein described and the several portions**
109 **thereof were occupied at the time of loss and whether or not**
110 **then stood on leased ground, and shall furnish a copy of all**
111 **descriptions and schedules in all policies and, if required, veri-**
112 **fy plans and specifications of any building, fixtures or machin-**
113 **ery destroyed or damaged.** The insured, as often as may be rea-
114 **sonably required, shall exhibit to any person herein described,**
115 **Company all that remains of any property herein described, and**
116 **submit to examinations under oath by any person named by**
117 **the Company, and subscribe the same; and, as often as may be**
118 **reasonably required, shall produce for examination all books**
119 **account, bills, invoices and other vouchers, or certified copies**
120 **thereof if originals be lost, at such reasonable time and place**
121 **as may be designated by this Company or its representative,**
122 **shall permit extracts and copies thereof to be made.**
123 **Appraisal.** In case the insured and this Company shall
124 fail to agree as to the actual cash value
125 of the loss, then, on the written demand of either,
126 **each shall select a competent and disinterested appraiser and**
127 **the other of the appraiser selected within twenty days of the**
128 **demand. The appraisers shall first select a competent and**
129 **interested umpire; and failing for fifteen days to agree on**
130 **such umpire, then, on request of the insured or this Company,**
131 **such umpire shall be selected by a judge of a court of record**
132 **in the state in which the property covered is located. The**
133 **appraisers shall then appraise the loss, stating separately a**
134 **cash value and loss to each item; and, failing to agree, they**
135 **shall submit their differences, only, to the umpire. An award in**
136 **favor of either party shall be binding on both. The umpire**
137 **shall determine the amount of actual cash value and loss. The**
138 **appraiser shall be paid by the party selecting him and the**
139 **appraiser's fees of appraisal and umpire shall be paid by the**
140 **party equally.**
141 **Company's** It shall be optional with this Company
142 **options.** to take all, or any part, of the property
143 agreed or appraised value, and also to
144 pair, rebuild or replace the property destroyed or damaged
145 **other of like kind and quality within a reasonable time, or**
146 **ing notice of its intention so to do within thirty days after**
147 **receipt of the proof of loss herein required.**
148 **Abandonment.** There can be no abandonment to this Com-
149 pany of any property.
150 **When loss** The amount of loss for which this Company
151 **payable.** may be liable shall be payable sixty days
152 after proof of loss, as herein provided.
153 received by this Company and ascertainment of the loss is
154 either by agreement between the insured and this Company
155 pressed in writing or by the filing with this Company
156 award as herein provided.
157 **Suit.** No suit or action on this policy for the
158 recovery of any claim shall be sustainable
159 **court of law or equity unless all the requirements of this**
160 **shall have been complied with, and unless commenced**
161 **twelve months next after inception of the loss.**
162 **Subrogation.** This Company may require from the
163 insured an assignment of all right of recovery
164 **any party for loss to the extent that payment therefor**
165 **by this Company.**

THIRD PAGE OF STANDARD FIRE POLICY

ATTACH FORM BELOW THIS LINE

BACK OF STANDARD FIRE POLICY
(OPTIONAL)

Standard Fire Insurance Policy of the States of

Expires _____

Property _____

Assured _____

No. _____

(COMPANY)

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

§ 58-176. **Fire insurance contract; standard policy provisions.**—(1) The printed form of a policy of fire insurance, as set forth in subsection three shall be known and designated as the "Standard Fire Insurance Policy of the State of North Carolina."

(2) No policy or contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this State, unless it shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy.

There shall be printed at the head of said policy the name of the insurer or insurers issuing the policy; the location of the home office thereof; a statement whether said insurer or insurers are stock or mutual corporations or are reciprocal insurers. No provisions of this section limit a company to the use of any particular size or manner of folding the paper upon which the policy is printed; provided, however, that any company organized under special charter provisions may so indicate upon its policy, and may add a statement of the plan under which it operates in this State.

The standard fire insurance policy provided for herein need not be used for effecting reinsurance between insurers.

(3) The form of the standard fire insurance policy of the State of North Carolina (with permission to substitute for the word "company" a more accurate descriptive term for the type of insurer) shall be as follows: (See the four preceding pages for this form photographically reproduced from the original legal size pages.)

(1899, c. 54, s. 43; 1901, c. 391, s. 4; Rev., s. 4760; 1915, c. 109, s. 9; C. S., s. 6437; 1945, c. 378.)

- I. General Consideration.
- II. Title or Interest of Insured.
- III. Certain Other Conditions.
- IV. Liability of Insurer in Case of Loss; Subrogation.
- V. Liability of Agent.

Cross References.—See § 58-177. As to limitation of actions, see § 58-31 and note.

I. GENERAL CONSIDERATION.

Editor's Note.—See 13 N. C. Law Rev. 98.

The 1945 amendment rewrote this section. Prior to the amendment, the form of the standard policy was set out in § 58-177, while the subject of permissible variations in the policy, now largely governed by § 58-177, was covered by this section. The following note contains cases construing both sections, most of the cases being decided before the 1945 amendment became effective.

Provisions of Standard Form Are Those of the Law.—The material provisions of the standard form of a fire insurance policy written in accordance with this section are those of the law. *Greene v. Insurance Co.*, 196 N. C. 335, 145 S. E. 616 (1928).

And Policy Must Comply with Statute.—The Commissioner of Insurance has no power to authorize or acquiesce in the issuance of policies unauthorized or forbidden by statute. *Glover v. Rowan Mut. Fire Ins. Co.*, 228 N. C. 195, 45 S. E. (2d) 45

(1947).

Agreements in the policy contrary to statutory provisions are void. *Buckner v. United States Fire Ins. Co.*, 209 N. C. 640, 184 S. E. 520 (1936).

Validity and Binding Effect.—The provisions of the standard form of fire insurance policy are valid. *Zibelin v. Pawtucket Mut. Fire Ins. Co.*, 229 N. C. 567, 50 S. E. (2d) 290 (1948).

The terms and conditions of the standard form of a fire insurance policy, as provided for in this section and the section following, and the stipulations as to a valid waiver thereof, are valid and binding on the parties. *Midkiff v. North Carolina Home Ins. Co.*, 197 N. C. 139, 147 S. E. 812 (1929).

Rights and Liabilities of Parties Determined from Policy.—The rights and liabilities of both insurer and insured must be determined in accordance with the terms of the standard form of fire insurance policy. *Zibelin v. Pawtucket Mut. Fire Ins. Co.*, 229 N. C. 567, 50 S. E. (2d) 290 (1948).

When a policy of insurance, in the form prescribed by this section, has been issued by an insurance company and accepted by the insured, and has thereby become effective for all purposes as their contract, the rights and liabilities of both the insurer and the insured, under the policy, must be ascertained and determined in accordance with its terms and provisions. These terms

and provisions have been prescribed by statute, and are valid in all respects; they are just both to the insurer and to the insured. Each is presumed to know all the terms, provisions and conditions which are included in the policy. Both are ordinarily bound by them. *Lancaster v. Ins. Co.*, 153 N. C. 285, 69 S. E. 214 (1910); *Midkiff v. North Carolina Home Ins. Co.*, 197 N. C. 139, 147 S. E. 812 (1929).

Loss-Payable Clause.—The rights of the parties under a loss-payable clause in a policy of fire insurance will be determined in accordance with the terms and provisions of the contract, which derive no extra validity by reason of the fact that the form is prescribed by law. *Atlantic Joint Stock Land Bank v. Foster*, 217 N. C. 415, 8 S. E. (2d) 235 (1940).

Binder Slips Not Contrary to Law.—Our statute, by establishing a standard form of fire insurance, does not prevent the binding effect of a parol agreement of insurance, looking to the delivery of the policy according to the form prescribed and evidenced by a written memorandum thereof, called a binder; and when such is shown to have been made in a manner to bind the company, it is in force from that time, and thereafter the insured is responsible for the loss in accordance with the terms of the statutory form of policy. *Lea v. Atlantic Fire Ins. Co.*, 168 N. C. 478, 84 S. E. 813 (1915). See § 58-177, subsection (d).

Waivers Making Policy More Restrictive Are Void.—Waivers inserted in or attached to a policy of fire insurance which have the effect of making the provisions of the standard policy form more restrictive are void under this section and § 58-177. *Glover v. Rowan Mut. Fire Ins. Co.*, 228 N. C. 195, 45 S. E. (2d) 45 (1947).

A waiver attached to a policy of fire insurance which provides that the policy should not cover loss caused by fire originating on the property of a neighbor if the property insured is situated within a stipulated distance of the combustible property of a neighbor, is restrictive of the provisions of the standard policy form and is void. *Glover v. Rowan Mut. Fire Ins. Co.*, 228 N. C. 195, 45 S. E. (2d) 45 (1947).

At the time of issuing the policy the local agent *pro hac vice* represents the company and his knowledge is ordinarily held to be notice to his principal. But this rule does not apply to authorize extension of time for the performance of conditions precedent to establishing liability after the loss has occurred, and in direct contradiction of the terms of the written contract

of insurance. *Zibelin v. Pawtucket Mut. Fire Ins. Co.*, 229 N. C. 567, 50 S. E. (2d) 290 (1948).

Limitations on Agent's Authority Are Binding.—Limitations on the agent's authority expressed in unambiguous language in the policy must be held binding on the insured. *Zibelin v. Pawtucket Mut. Fire Ins. Co.*, 229 N. C. 567, 50 S. E. (2d) 290 (1948).

As to Conditions Arising after Issue of Policy and Loss.—While provisions in the policy restricting the local agent's power to waive conditions as a general rule do not include conditions existing at the inception of the contract, the rule is otherwise as to those arising after the policy has been issued and loss has occurred. *Zibelin v. Pawtucket Mut. Fire Ins. Co.*, 229 N. C. 567, 50 S. E. (2d) 290 (1948).

Agent May Not Alter Terms of Policy after Loss.—Suggestions made by the local agent to the insured after loss are not within the scope of his authority, nor may he alter the terms of the policy after its issue and loss thereunder has been reported. *Zibelin v. Pawtucket Mut. Fire Ins. Co.*, 229 N. C. 567, 50 S. E. (2d) 290 (1948).

Oral Contract with Agent.—In the absence of fraud an insurance company cannot be held liable upon a parol contract alleged to have been made by its agent, which is contradictory of and totally inconsistent with the standard form prescribed by statute. *Hardin v. Liverpool, etc., Ins. Co.*, 189 N. C. 423, 127 S. E. 353 (1925).

Right to Cancel Policy.—Either party to the contract may cancel the standard form policies without the consent of the other, by following the provisions of the policy applicable; the expression in other forms of policies that the policy "may be canceled" is construed as reading, "shall be canceled." *Roberta Mfg. Co. v. Royal Exch. Assur. Co.*, 161 N. C. 88, 76 S. E. 865 (1912).

Same—Provision for Notice.—The provision for five days' notice before cancellation in this section is for the protection of the insured, and the insurer cannot effect cancellation until the expiration of five days from the receipt of the written notice by plaintiff, and whether plaintiff intends to waive this provision and does waive it by returning the policy as requested is for the determination of the jury. *Wilson v. National Union Fire Ins. Co.*, 206 N. C. 635, 174 S. E. 745 (1934).

Applied in *Pettit v. Wood-Owen Trailer Co.*, 214 N. C. 335, 199 S. E. 279 (1938).

II. TITLE OR INTEREST OF INSURED.

Editor's Note.—All of the cases under this analysis line were decided before the 1945 amendments to this section and § 58-177. Most of them construe provisions in the former standard policy to the effect that the policy should be void if the interest of the insured was other than unconditional and sole ownership, if, with the knowledge of the insured, foreclosure proceedings were commenced or notice given of sale of the property under any mortgage or deed of trust, or if any change, other than by the death of an insured, took place in the interest, title or possession of the property.

The requirement of "unconditional and sole ownership" in a policy of fire insurance in the former standard form as required by this section, was statutory as well as contractual. *Roberts v. American Alliance Ins. Co.*, 212 N. C. 1, 192 S. E. 873, 113 A. L. R. 310 (1937).

Misrepresentations as to Title.—Misrepresentations as to title of part of the premises insured avoided the entire contract of insurance. *Cuthberton v. North Carolina Home Ins. Co.*, 96 N. C. 480, 2 S. E. 258 (1887).

Title under Executory Contract.—A vendee of land occupying it under an executory contract, on which he had paid a portion of the price, and on which he had erected a building, was an "unconditional and sole owner" in fee simple within the conditions of a fire policy providing that it should be void if the interest of the insured was other than sole ownership of the fee simple title. *Jordan v. Hanover Fire Ins. Co.*, 151 N. C. 341, 66 S. E. 206 (1909).

Existence of Lien Did Not Violate Provision.—The stipulation in a fire policy for sole and unconditional ownership was not violated by the existence of a lien on the property. *Lancaster v. Southern Ins. Co.*, 153 N. C. 285, 69 S. E. 214 (1910).

Policy Invalidated by Mortgage.—Where the insured failed to state that the property was mortgaged, when in fact it was mortgaged, and the policy provided that the contract of insurance would be void if the insured property was mortgaged, the policy was invalid though the omission was made without the intent to deceive. *Hayes v. United States Fire Ins. Co.*, 132 N. C. 702, 44 S. E. 404 (1903).

Execution of a mortgage on the insured property so affected title as to avoid an insurance policy then existing thereon and forfeit its benefit, if the mortgage was made without the knowledge or consent of the insurance company, and not at-

tested as prescribed by the policy contract, unless the company thereafter, by its acts, conduct and statements had waived the effect of the mortgage and was estopped to assert the forfeiture. *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605 (1909).

Right of Insurer to Know of Encumbrances.—In *Weddington v. Piedmont Fire Ins. Co.*, 141 N. C. 234, 54 S. E. 271 (1906), Mr. Justice Walker says: "The validity of a provision in a policy of insurance against the creating of encumbrances without the consent of the insurer can hardly be contested at this late day. It has now become the settled doctrine of the courts that the facts in regard to title, ownership, encumbrances, and possession of the insured property are all important to be known by the insurer, as the character of the hazard is often affected by these circumstances." See *Watson v. North Carolina Home Ins. Co.*, 159 N. C. 638, 75 S. E. 1105 (1912).

Removal of Encumbrance before Loss.—Where the owner of an unencumbered automobile insured it under a statutory form of policy, stipulating, among other things, that the policy would be void if the interest of the assured was other than unconditional or sole ownership, or if the property was or became encumbered by a chattel mortgage, and thereafter gave a mortgage thereon which was canceled four days before the destruction of the machine by fire, this loss coming within the terms of the policy, the cancellation of the mortgage revived the original status of the policy, the temporary violation of the stipulation being immaterial, and put the policy again in force, the effect of the mortgage being to invalidate the policy during the continuance of the lien, or to suspend the obligation of the insurance company during the violation of the stipulation. *Cottingham v. Maryland Motor Car Ins. Co.*, 168 N. C. 259, 84 S. E. 274 (1915).

The commencement of foreclosure against insured property terminated the policy, there being in the policy a provision to that effect. *Hayes v. United States Fire Ins. Co.*, 132 N. C. 702, 44 S. E. 404 (1903).

Mortgagee Not Liable for Premiums.—The provision in the loss-payable clause of a fire insurance policy taken out by a mortgagor that the mortgagee would pay the premium on demand should the mortgagor not do so, was held to be a condition upon which the mortgagee might receive the benefit of the protection afforded by the policy as a special contract

made in his favor, and not as a covenant that he would pay the premium on demand of the insurer, upon the mortgagor's default; and upon the mortgagee's refusal or neglect to pay the premiums in default upon the insurer's demand, the latter might after ten days' written notice cancel the policy. *Whitehead v. Wilson Knitting Mills*, 194 N. C. 281, 139 S. E. 456, 56 A. L. R. 674 (1927).

Assignment for Creditors.—Making an assignment for creditors avoided a policy containing an unconditional ownership clause. *Roper v. National Fire Ins. Co.*, 161 N. C. 151, 76 S. E. 869 (1912).

Waiver of Sole Ownership Provision.—Where a policy of fire insurance was issued under the former statutory standard form, the condition therein of sole and unconditional ownership of the insured could not be held to have been waived by the insurer or its agent in the absence of knowledge that the insured's ownership was otherwise than as stated in the policy contract. *Hardin v. Liverpool, etc., Ins. Co.*, 189 N. C. 423, 127 S. E. 353 (1925). But where the agent issued the policy with full knowledge of the state of the title the condition was waived. *Gerringer v. North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. 773 (1903).

The condition that the policy should be void if the insured had not the sole and unconditional title was valid and enforceable by the company without the necessity of disclaiming liability upon notice or knowledge of its infraction, and the company's inaction in this respect was not a waiver of the condition. *Smith v. National Ben Franklin Fire Ins. Co.*, 193 N. C. 446, 137 S. E. 310 (1927).

The provision in a policy of fire insurance written in accordance with the former standard statutory form, that the policy should be void if the insured was not the unconditional owner of the property in fee simple, was not waived by a written agreement providing that the agreement was solely for the purpose of determining the loss and to save time to the parties and that it should not operate as a waiver of any conditions or provisions of the policy. *Sasser v. Pilot Fire Ins. Co.*, 203 N. C. 232, 165 S. E. 684 (1932).

III. CERTAIN OTHER CONDITIONS.

Additional Insurance.—The condition against additional insurance on the property, formerly appearing in the standard policy, was valid and enforceable. *Black v. Atlantic Home Ins. Co.*, 148 N. C. 169, 61 S. E. 672 (1908).

When the standard fire insurance policy under this section provided that the policy should be void if the insured procured other contemporaneous insurance on the same property during the term covered, unless the insurer agreed thereto and a writing to that effect was attached to the policy contract, the provision was valid and binding. *Johnson v. Aetna Ins. Co.*, 201 N. C. 362, 160 S. E. 454 (1913).

When the insured had violated the provision of the former standard policy by placing more concurrent insurance on the property than the policy permitted, the policy was invalid. *Roper v. National Fire Ins. Co.*, 161 N. C. 151, 76 S. E. 869 (1912).

Same—Condition Not Applicable.—A policy of fire insurance was issued to the devisee of the fee in property subject to a charge in favor of other beneficiaries under the will. Thereafter the guardian of such other beneficiaries took out a policy, following the former standard form, to protect the interest of his wards. It was held that the insurer issuing the policy to the guardian could not avoid liability thereon, on the ground of the additional insurance issued to the owner of the fee, since such additional insurance was not issued to or for the benefit of those insured under its policy. *Bryan v. Old Colony Ins. Co.*, 213 N. C. 391, 196 S. E. 345 (1938).

Same—Condition May Be Waived by Agent.—Where the insured before taking out additional insurance mentioned his intention to the insurer's subagent who had issued its policy to the insured, and was told that it was all right, this constituted a waiver of the condition. *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 13 S. E. 236 (1891).

Permit When House Unoccupied.—The provision in the standard fire insurance policy requiring a permit in writing from the insurer when the house insured is unoccupied for more than ten (now sixty) days must be complied with to make the insurer liable for damages by fire occurring after ten (now sixty) days' vacancy, and after the policy has been issued and is in binding effect, the local agent of the insurer is without authority to bind his principal by acts and parol representations made contrary to the terms of this provision. *Greene v. Insurance Co.*, 196 N. C. 335, 145 S. E. 616 (1928).

Operating Mill at Night.—Where an insured mill was operated at night, in violation of the former standard policy, but under a permit from the insurance agent,

such operation was no defense to an action on the policy for a loss happening three months after the violation had ceased. *Strause v. Palatine Ins. Co.*, 128 N. C. 64, 38 S. E. 256 (1901).

The "iron-safe clause" in policies of insurance is upheld by the courts as a reasonable contract limitation upon the insurer's risk. *Coggins v. Aetna Ins. Co.*, 144 N. C. 7, 56 S. E. 506 (1907). See § 58-177, subsection (c).

A substantial compliance with an "iron-safe" provision will suffice. *Arnold v. Indemnity Fire Ins. Co.*, 152 N. C. 232, 67 S. E. 574 (1910).

Waiver of "Iron-Safe" Provision.—If the company, knowing the insured has not complied with the "iron-safe" clause, collects the premiums and recognizes the validity and binding force and effect of the policy it has issued, it should not be heard to insist upon the introduction of records, the keeping of which it has thus tacitly waived. *Bullard v. Pilot Fire Ins. Co.*, 189 N. C. 34, 126 S. E. 179 (1925).

Inventory.—An inventory of a stock of general merchandise containing the number of articles and cost of each class at a date, made about one month before the fire, and testified to as being practically the same as on the date of the fire, is a substantial compliance with the inventory provision in the standard form of a fire insurance policy, and is competent as evidence upon the trial. *Mortt v. Liverpool, etc., Ins. Co.*, 192 N. C. 8, 133 S. E. 337 (1926). See also, *Coggins v. Aetna Ins. Co.*, 144 N. C. 7, 56 S. E. 506 (1907).

Time for Filing Proof of Loss and Bringing Action.—After the occurrence of loss insurer's local agent advised insured to defer filing formal claim until such time as materials could be obtained for repairs, and insured failed to file proof of loss within the time specified in the policy and did not institute action on the policy until after the expiration of the time limited therein. There was no denial of liability by insurer on other grounds within the time limited for filing proof of loss. It was held that insurer's demurrer should have been sustained. *Zibelin v. Pawtucket Mut. Fire Ins. Co.*, 229 N. C. 567, 50 S. E. (2d) 290 (1948).

Same—Waiver of Proof of Loss.—The insurer's denial of liability upon its fire insurance policy is a waiver of its right to require the proof of loss therein specified. *Proffitt Mercantile Co. v. State Mut. Fire Ins. Co.*, 176 N. C. 545, 97 S. E. 476 (1918).

Same—Violation of Provision Does Not

Work Forfeiture.—A clause in a policy requiring proof of loss and forbidding the bringing of any suit upon the policy until sixty days thereafter is a continuing one, and does not mean that failure to file proof within sixty days of the fire works a forfeiture of the policy. *Higson v. North River Ins. Co.*, 152 N. C. 206, 67 S. E. 509 (1910).

Limitation of Suit—Effect of Agreement for Appraisal.—The valid provision of a standard fire insurance policy, approved by statute, limiting to twelve months from the time of loss by fire the time within which an action may be maintained, is not waived by the time taken under an agreement for an appraisal and award for the damage sustained by the insured. *Tatham & Co. v. Liverpool, etc., Ins. Co.*, 181 N. C. 434, 107 S. E. 450 (1921).

Same—Not Construed as Statute of Limitations.—As the stipulation of the standard policy is a contract, and not a statute of limitations, it may be waived, or the party for whose benefit it was provided may be estopped by his conduct from insisting upon its enforcement. *Dibbrell v. Georgia Home Ins. Co.*, 110 N. C. 193, 14 S. E. 783 (1892).

The standard policy is not regulated by the statute of limitations, and the disabilities which stop the running of the statute have no effect upon it. Hence, the imprisonment of the insured will not give him a right to recover when he has delayed his action for more than a year. This rule applies likewise to minors. *Holly v. London Assur. Co.*, 170 N. C. 4, 86 S. E. 694 (1915).

Same—Construed with § 58-31.—The provisions of a standard fire insurance policy, as set out in this section, must be construed with the provisions of § 58-31, and when the action is brought within the time therein prescribed it will not be barred. *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605 (1909).

Under the standard policy and § 58-31, the insured has sixty days to file his proof of loss, and then he has twelve months within which to commence his suit. *Muse v. London Assur. Corp.*, 108 N. C. 240, 13 S. E. 94 (1891); *Dibbrell v. Georgia Home Ins. Co.*, 110 N. C. 193, 14 S. E. 783 (1892); *Lowe v. United States Mut. Acci. Ass'n*, 115 N. C. 18, 20 S. E. 169 (1894); *Gerringer v. North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. 773 (1903).

Waiver of Stipulations Generally.—The terms and conditions of standard form of a fire insurance policy and the stipula-

tions as to a valid waiver thereof are valid and binding on the parties. *Midkiff v. North Carolina Home Ins. Co.*, 197 N. C. 139, 147 S. E. 812 (1929).

Knowledge of Insurer as Waiver.—*Argall v. Old North State Ins. Co.*, 84 N. C. 355 (1881), holds that a breach of a condition in the policy will not avoid it, if the insurer has knowledge thereof, and does not object, in which case the breach is considered as waived. *Scottish Fire Ins. Co. v. Stuyvesant Ins. Co.*, 161 N. C. 485, 76 S. E. 728 (1913).

Waiver by Agent.—An agent of a fire insurance company, whether general or local, cannot waive the requirements of a standard policy except in the form prescribed by the statute. *Roper v. National Fire Ins. Co.*, 161 N. C. 151, 76 S. E. 869 (1912).

The provision restricting the agent's power to waive conditions does not, as a general rule, refer to or include conditions existing at the inception of the contract, but those arising after the policy is issued. Conditions which form a part of the contract of insurance at its inception may be waived by the agent of the insurer, although they are embraced in the policy when it is delivered; and the local agent's knowledge of such conditions is deemed to be the knowledge of his principal. *Bullard v. Pilot Fire Ins. Co.*, 189 N. C. 34, 126 S. E. 179 (1925). See *Hayes v. United States Fire Ins. Co.*, 132 N. C. 702, 44 S. E. 404 (1903); *Weddington v. Piedmont Fire Ins. Co.*, 141 N. C. 234, 54 S. E. 271 (1906); *Johnson v. Rhode Island Ins. Co.*, 172 N. C. 142, 90 S. E. 124 (1916); *Fireman's Fund Ins. Co. v. Rowland Lumber Co.*, 186 N. C. 269, 119 S. E. 362 (1923); *Smith v. National Ben. Franklin Fire Ins. Co.*, 193 N. C. 446, 137 S. E. 310 (1927). See also, ante, this note, "General Consideration," I.

Sending a check in payment of the claim may constitute a waiver, whether received or not, of unfulfilled conditions. *Roper v. National Fire Ins. Co.*, 161 N. C. 151, 76 S. E. 869 (1912).

IV. LIABILITY OF INSURER IN CASE OF LOSS; SUBROGATION.

Amount Recoverable.—The standard policy set out in this section refers to "actual cash value." In cases decided prior to the enactment of this statute, it was held that the measure of the amount the insured was entitled to recover was the "fair" cash value of the property at the time and place of the loss. *Fowler v. Old North State Ins. Co.*, 74 N. C. 89

(1876); *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62 (1891); *Boyd v. Royal Ins. Co.*, 111 N. C. 372, 16 S. E. 389 (1892).

Loss by theft is excluded from the standard policy set out in this section. However, it was formerly held that such loss consequent on the removal of goods in case of fire was fairly within a contract to insure against fire. *Whitehurst v. Fayetteville Mut. Ins. Co.*, 51 N. C. 352 (1859).

Damage by Water.—In an early case decided prior to the enactment of this section it was held that an insurance company was liable on a fire insurance policy for damages done to goods by water used in saving them from destruction by fire. *Whitehurst v. Fayetteville Mut. Ins. Co.*, 51 N. C. 352 (1859).

Option to Repair, Rebuild, or Replace Property.—A provision in a policy of fire insurance by which, in case of loss, it is made optional with the insurer to repair, rebuild, or replace the property destroyed, by giving notice within a certain time, constitutes a contract exclusively between insurer and insured; and neither a judgment creditor nor a mortgagee can interpose to prevent its performance; and if the insurer has not given notice of an intention to repair, etc., within the time specified, no one but the insured can take advantage of it and require the payment of the insurance money instead. *Stamps v. Commercial Fire Ins. Co.*, 77 N. C. 209, 24 Am. Rep. 443 (1877).

Insurer Subrogated to Rights of Insured.—Upon paying the loss by fire, the insurer is entitled to subrogation to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid, both by provision of this section and under equitable principles. *Powell v. Wake Water Co.*, 171 N. C. 290, 88 S. E. 426 (1916); *Lumberman's Mut. Ins. Co. v. Southern R. Co.*, 179 N. C. 255, 102 S. E. 417 (1920); *Buckner v. United States Fire Ins. Co.*, 209 N. C. 640, 184 S. E. 520 (1936), citing *Cunningham v. Seaboard Air Line R. Co.*, 139 N. C. 427, 51 S. E. 1029 (1905); *Fidelity Ins. Co. v. Atlantic Coast Line R. Co.*, 165 N. C. 136, 80 S. E. 1069 (1914).

Subrogation to Rights of Mortgagee.—Where the mortgagee has insured the mortgaged property for his own benefits, and where the mortgagor has assumed the risk of loss under his contract of purchase, the insurer, having paid the loss, is subrogated to the rights of the mortga-

gee. *Stuyvesant Ins. Co. v. Reid*, 171 N. C. 513, 88 S. E. 779 (1916).

Where, pursuant to the terms of a deed of trust, the mortgagee insured the property and added the amount of the premiums to the mortgage debt, and the contract of insurance provided that in case of loss the insurer should be subrogated to the rights of the mortgagee, and that in case of conflict between the contract of insurance and the standard policy set out in this section the standard policy should prevail, and the mortgagor had no notice of the subrogation agreement, it was held that the insurer had no right to subrogation, either under the terms of the policy or on any equitable principle, and that the mortgagor was entitled to have the amount paid by the insurer applied on the mortgage debt. *Buckner v. United States Fire Ins. Co.*, 209 N. C. 640, 184 S. E. 520 (1936).

V. LIABILITY OF AGENT.

Loss Occasioned Insured When Policy Invalid.—Where the general agent of a fire insurance company for a limited territory, through the negligence of an employee, fails to write into the policy a

statement required to make it valid, the agents are liable in damages to the insured for loss by fire, in an action based solely on the ground of negligence and not upon the invalid contract of insurance negligently issued by them. *Case v. Ewbanks, Ewbanks & Co.*, 194 N. C. 775, 140 S. E. 709 (1927).

Election of Remedies.—Where a non-resident defendant fire insurance company has upon petition removed a cause from the State to the federal court upon a policy of insurance that was void in that jurisdiction, but not in the jurisdiction of the courts of this State, and the federal court has adjudicated that the plaintiff could not recover under the contract for a loss by fire, the plaintiff may thereafter bring action in the State court against the agents and recover damages from them occasioned by their own neglect in not inserting a provision in the policy that would have rendered it valid, the subject matter of the latter action being based upon negligence and not on the policy contract, and the doctrine of the election of remedies does not apply. *Case v. Ewbanks, Ewbanks & Co.*, 194 N. C. 775, 140 S. E. 709 (1927).

§ 58-177. Standard policy; permissible variations.—No fire insurance company shall issue fire insurance policies on property in this State other than those of the standard form as set forth in § 58-176, except as follows:

(a) A company may print on or in its policies the date of incorporation, the amount of its paid-up capital stock, the names of its officers, and to the words at the top of the back of said policy, "Standard Fire Insurance Policy of the States of" may be added after or before the words "North Carolina" the names of any states in which the said policy form may be standard when the policy is used.

(b) A company may use in its policies written or printed forms of description and specification of the property insured.

(c) A company may write or print upon the margin or across the face of a policy, or upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by an officer or agent of the company so using them. Provided, however, such provisions shall not have the effect of making the provisions of the standard policy form more restrictive except for such restrictions as are provided for in the charter or bylaws of a domestic mutual fire insurance company doing business in no more than three adjacent counties of the state and chiefly engaged in writing policies of insurance on rural properties upon an assessment or nonpremium basis, provided all such restrictions contained in the charter and bylaws of such domestic mutual fire insurance company shall be actually included within the printed terms of the policy contract so affected as a condition precedent to their being effective and binding on any policyholder. The iron safe or any similar clause requiring the taking of inventories, the keeping of books and producing the same in the adjustment of any loss, shall not be used or operative in the settlement of losses on buildings, furniture and fixtures, or any property not subject to any change in bulk and value.

(d) Binders or other contracts for temporary insurance may be made, orally or in writing, for a period which shall not exceed thirty days, and shall be deemed

to include all the terms of such standard fire insurance policy and all such applicable endorsements, approved by the Commissioner, as may be designated in such contract of temporary insurance; except that the cancellation clause of such standard fire insurance policy, and the clause thereof specifying the hour of the day at which the insurance shall commence, may be superseded by the express terms of such contract of temporary insurance.

(e) Two or more companies authorized to do in this State the business of fire insurance, may, with the approval of the Commissioner, issue a combination standard form of fire insurance policy which shall contain the following provisions:

(1) A provision substantially to the effect that the insurers executing such policy shall be severally liable for the full amount of any loss or damage, according to the terms of the policy, or for specified percentages or amounts thereof, aggregating the full amount of such insurance under such policy.

(2) A provision substantially to the effect that service of process, or of any notice or proof of loss required by such policy, upon any of the companies executing such policy, shall be deemed to be service upon all such insurers.

(f) Appropriate forms of supplemental contract or contracts or extended coverage endorsements and other endorsements whereby the interest in the property described in such policy shall be insured against one or more of the perils which the company is empowered to assume, in addition to the perils covered by said standard fire insurance policy may be approved by the Commissioner, and their use in connection with a standard fire insurance policy may be authorized by him. In his discretion the Commissioner may authorize the printing of such supplemental contract or contracts or extended coverage endorsements and other endorsements in the form of the standard fire insurance policy. The first page of the policy may in form approved by the Commissioner be arranged to provide space for the listing of amounts of insurance, rates and premiums for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached or printed therein, and such other data as may be conveniently included for duplication on daily reports for office records.

(g) A company may print on or in its policy, with the approval of the Commissioner, any provision which it is required by law to insert in its policies not in conflict with the provisions of such standard form. Such provisions shall be printed apart from the other provisions, agreements, or conditions of the policy, under a separate title, as follows: "Provisions Required by Law to Be Inserted in This Policy." (1899, c. 54, s. 43; 1901, c. 391, s. 4; Rev., s. 4759; 1907, c. 800, s. 1; 1915, c. 109, s. 10; C. S., s. 6436; 1925, c. 70, s. 5; 1945, c. 378; 1949, c. 418.)

Cross Reference.—See § 58-176 and note.

Editor's Note.—The 1945 amendment rewrote this section, and the 1949 amendment

added the exception clause to the proviso in subsection (c).

§ 58-178. Notice by insured or agent as to increase of hazard, unoccupancy and other insurance.—If notice in writing signed by the insured, or his agent, is given before loss or damage by any peril insured against under the standard fire insurance policy to the agent of the company of any fact or condition stated in paragraphs (a), (b) or with respect to "other insurance" of the standard form of policy set out in § 58-176 it is equivalent to an agreement in writing added thereto, and has the force of the agreement in writing referred to in the foregoing form of policy with respect to the liability of the company and the waiver; but this notice does not affect the right of the company to cancel the policy as therein stipulated. (1899, c. 54, s. 43; Rev., s. 4761; 1907, c. 578, s. 1; 1915, c. 109, s. 11; C. S., s. 6438; 1929, c. 60, s. 1; 1945, c. 378.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 58-178.1. **Judge to select umpire.**—The resident judge of the superior court of the district in which the property insured is located is designated as the judge of the court of record to select the umpire referred to in the standard form of policy. (1945, c. 378.)

§ 58-179: Repealed by Session Laws 1945, c. 378.

§ 58-180. **Effect of failure to give notice of encumbrance.**—No policy of insurance issued upon any property shall be held void because of the failure to give notice to the company of a mortgage or deed of trust existing thereon or thereafter placed thereon, except during the life of the mortgage or deed of trust. (1915, c. 109, s. 4; C. S., s. 6440.)

Cross Reference.—See § 58-177 and note thereto.

§ 58-180.1. **Policy issued to husband or wife on joint property.**—Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the insured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless it appears that in the procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof. (1945, c. 378.)

§ 58-181: Repealed by Session Laws 1945, c. 378.

Editor's Note.—The repealed section was rewritten as § 58-30.1 by Session Laws 1945, c. 377.

ARTICLE 20.

Deposits by Insurance Companies.

§ 58-182. **Amount of deposits required of foreign or alien fire and/or marine insurance companies.**—Unless otherwise provided in this article, every fire, marine, or fire and marine insurance company chartered by any other state or foreign government shall make and maintain deposits of securities with the Commissioner in the following amounts: (a) companies whose premium income derived from this State is less than fifty thousand dollars (\$50,000.00) per annum, ten thousand dollars (\$10,000.00); (b) companies whose premium income is more than fifty thousand dollars (\$50,000.00) but less than one hundred thousand dollars (\$100,000.00) per annum, twenty thousand dollars (\$20,000.00); (c) companies whose premium income is more than one hundred thousand dollars (\$100,000.00) per annum, twenty-five thousand dollars (\$25,000.00), for which deposit the Commissioner shall give a receipt. (1909, c. 923, s. 1; 1911, c. 164, s. 1; Ex. Sess. 1913, c. 62, ss. 1, 2, 3; 1915, c. 166, s. 6; C. S., s. 6442; 1933, c. 60; 1945, c. 384.)

Editor's Note.—The 1933 amendment, discussed in 11 N. C. Law Rev. 234, inserted a provision requiring special deposits from casualty and surety companies. The 1945 amendment rewrote the section generally and eliminated such provision, which is now covered by § 58-182.1. The amendment also struck out the words "Foreign Fire" formerly appearing in the caption of the article.

§ 58-182.1. **Amount of deposits required of foreign or alien fidelity, surety and casualty insurance companies.**—Unless otherwise provided in this article every fidelity, surety or casualty insurance company chartered by any other state or foreign government shall make and maintain deposits of securities with the Commissioner in the following amounts: (a) companies whose premium income derived from this State is less than one hundred thousand dollars (\$100,000.00), twenty-five thousand dollars (\$25,000.00); (b) companies whose

premium income is in excess of one hundred thousand dollars (\$100,000.00), fifty thousand dollars (\$50,000.00), for which deposit the Commissioner shall give a receipt. (1945, c. 384.)

§ 58-182.2. Minimum deposit required upon admission.—Upon admission to do business in the State of North Carolina every foreign or alien fire, marine, or fire and marine, fidelity, surety or casualty company shall deposit with the Commissioner securities in the minimum amounts required under the provisions of §§ 58-182 and 58-182.1. (1945, c. 384.)

§ 58-182.3. Type of deposits.—The deposits required to be made under the provisions of §§ 58-182 and 58-182.1 shall be composed of bonds of the United States, or of the State of North Carolina, or of the cities or counties of this State. (1945, c. 384.)

§ 58-182.4. Replacements upon depreciation of securities.—Whenever any of the securities deposited by companies under the provisions of §§ 58-182 and 58-182.1 shall be depreciated or reduced in value, such company shall forthwith increase the deposit in order to maintain the required deposit in accordance with the amounts required by the said sections. (1945, c. 384.)

§ 58-182.5. Power of attorney.—With the securities deposited in accordance with §§ 58-182 and 58-182.1 the company shall at the same time deliver to the Commissioner of Insurance a power of attorney executed by its president and secretary or other proper officers authorizing the sale or transfer of said securities or any part thereof for the purpose of paying any of the liabilities provided for in this article. (1945, c. 384.)

§ 58-182.6. Securities held by Treasurer; faith of State pledged therefor; nontaxable.—The securities required to be deposited by each insurance company in this article shall be delivered for safekeeping by the Commissioner to the Treasurer of the State who shall receipt him therefor. For the securities so deposited the faith of the State is pledged that they shall be returned to the companies entitled to receive them or disposed of as herein provided for. The securities deposited by any company under this article shall not, on account of such securities being in this State, be subjected to taxation but shall be held exclusively and solely for the protection of contract holders. (1945, c. 384.)

§ 58-182.7. Authority to increase deposit.—When, in the opinion of the Commissioner, it is necessary for the protection of the public interest to increase the amount of deposits specified in §§ 58-182 and 58-182.1, the companies described in said sections shall, upon demand, make additional deposits in such sums as the Commissioner may require, and such additional deposits shall be held in accordance with and for the purposes set out in this article. (1945, c. 384.)

§ 58-182.8. Deposits of domestic companies.—The Commissioner may in the public interest require domestic fire, marine or fire and marine, fidelity, surety or casualty companies to make and maintain deposits under the provisions of §§ 58-182 to 58-182.7 inclusive. (1945, c. 384.)

§ 58-183. Right of company to receive interest on deposits.—The Commissioner of Insurance, at the time of receiving the securities, shall give to the company authority to draw the interest thereon, as the same may become due and payable, for the use of the company, and this authority shall continue in force until the company fails to pay any liability arising upon any policy made in favor of any person, firm, or corporation which shall be, at the time the liability arises, a resident of this State, or which shall own property in the State covered by policies issued. In case of such failure the corporation charged with the payment of such interest shall be forthwith notified, and thereafter the interest, so long as the liability exists, shall be payable to the Commissioner of In-

urance, to be applied, if necessary, to the payment of such liability. (1909, c. 923, s. 2; C. S., s. 6443.)

§ 58-184. Sale of deposits for payment of liabilities.—If the company fails to pay any of its liabilities on its contracts according to the terms thereof, after the liabilities have been adjusted between the parties in the manner prescribed by the contracts, if any manner is prescribed thereby, or after the same have been ascertained in any manner agreed upon by the parties or by the judgment, order, or decree of the court having jurisdiction of the subject, the Commissioner of Insurance shall, upon application of the party to whom the debt or money is due, and upon satisfactory proof that the notice herein required has been given to the company, proceed to sell at public auction such an amount of the securities as, with the interest in his hands, will pay the sum due and expenses of sale, and out of the proceeds of sale pay said sums and expenses; and the company shall be required forthwith to make good any deficit in the amount of the deposit caused by such sale. The party making application shall give to the company or to its agent in this State twenty days' notice of his intention to apply to the Commissioner of Insurance for the sale of securities. The Commissioner of Insurance shall advertise the sale of the securities for thirty days prior to the day of the sale in some daily newspaper published in the city of Raleigh, and shall state in the advertisement the securities to be sold and the company depositing them, and shall mail a copy to the company. (1909, c. 923, s. 3; C. S., s. 6444.)

§ 58-185. Lien of policyholders; action to enforce.—Upon the securities deposited with the Commissioner of Insurance by any such insurance company, the holders of all contracts of the company who are citizens or residents of this State at such time, or who hold policies issued upon property in the State, shall have a lien for the amounts due them, respectively, under or in consequence of such contracts for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the superior court of the county of Wake to enforce the lien for the benefit of all the holders of such contracts. The Commissioner of Insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such action shall be adjudged against the Commissioner of Insurance. (1909, c. 923, s. 4; C. S., s. 6445.)

Cited in Boney v. Central Mut. Ins. Co.,
213 N. C. 470, 196 S. E. 837, 117 A. L. R.
231 (1938).

§ 58-186. Substitution for securities paid.—Where the principal of any of the securities so deposited is paid to the Commissioner of Insurance, he shall notify the company or its agent in this State, and pay the money so received to the company upon receiving other securities of the character named in this article to an equal amount, or, upon the failure of the company for thirty days after receiving notice to deliver such securities to an equal amount to the Commissioner of Insurance, he may invest the money in any such securities and hold the same as he held those which were paid. (1909, c. 923, s. 5; C. S., s. 6446.)

§ 58-187. Return of deposits.—If such company ceases to do business in this State, and its liabilities, whether fixed or contingent upon its contracts, to persons residing in this State or having policies upon property situated in this State have been satisfied or have been terminated, upon satisfactory evidence of this fact to the Commissioner of Insurance the State Treasurer shall deliver to such company, upon the order of the Commissioner of Insurance, the securities

in his possession belonging to it, or such of them as remain after paying the liabilities aforesaid. (1909, c. 923, s. 6; C. S., s. 6447.)

§ 58-188. Deposit required before license granted; exception.—When any fire insurance company files an application with the Commissioner of Insurance to be admitted to do business in this State, he shall require of it a compliance with the provisions of this article before issuing a license to such company; but this article shall not apply to companies licensed to do a reinsurance business only. (1909, c. 923, s. 7; 1915, c. 166, s. 6; C. S., s. 6448.)

§ 58-188.1. Deposits held in trust by Commissioner or Treasurer.—1. Deposits by Domestic Company.—The Commissioner of Insurance or the Treasurer, in his official capacity, shall take and hold in trust deposits made by any domestic insurance company for the purpose of complying with the laws of any other state to enable the company to do business in that state. The company making the deposits is entitled to the income thereof, and may, from time to time, with the consent of the Commissioner of Insurance or Treasurer, and when not forbidden by the law under which the deposit was made, change in whole or in part the securities which compose the deposit for other solvent securities of equal par value. Upon request of any domestic insurance company such officer may return to the company the whole or any portion of the securities of the company held by him on deposit, when he is satisfied that they are subject to no liability and are not required to be longer held by any provision of law or purpose of the original deposit.

2. Deposits by Foreign or Alien Company.—The Commissioner or Treasurer may return to the trustees or other representatives authorized for that purpose any deposit made by a foreign or alien insurance company, when it appears that the company has ceased to do business in the State and is under no obligation to policyholders or other persons in the State for whose benefit the deposit was made.

3. Action to Enforce or Terminate the Trust.—An insurance company which has made a deposit in this State pursuant to this chapter, or its trustees or resident managers in the United States, or the Commissioner of Insurance, or any creditor of the company, may at any time bring an action in the superior court of Wake County against the State and other parties properly joined therein, to enforce, administer, or terminate the trust created by the deposit. The process in this action shall be served on the officer of the State having the deposit, who shall appear and answer in behalf of the State and perform such orders and judgments as the court may make in such action. (1899, c. 54, s. 17; 1901, c. 391, s. 2; 1903, c. 438, s. 1, c. 536, s. 4; Rev., s. 4709; C. S., s. 6313; 1945, c. 384.)

Editor's Note.—The 1945 amendment inserted the words "or alien" in subsection 2.

§ 58-188.2. Deposits subject to approval and control of Commissioner.—The deposits of securities required to be made by any Insurance Company in this State shall be approved by the Commissioner of Insurance of the State, and he may examine them at all times, and may order all or any part thereof changed for better security, and no change or transfer of the same may be made without his assent. (1903, c. 536, s. 5; Rev., s. 4710; C. S., s. 6314; 1945, c. 384.)

Editor's Note.—The 1945 amendment transferred this section from § 58-56.

§ 58-188.3. Deposits by alien companies required and regulated.—An alien company, other than life, shall not be admitted to do business in this State until, in addition to complying with the conditions by law prescribed for the licensing and admission of such companies to do business in this State, it has made a deposit with the Treasurer or Commissioner of Insurance of this

State, or with the financial officer of some other state of the United States, of a sum not less than the capital required of like companies under this chapter. This deposit must be in exclusive trust for the benefit and security of all the company's policyholders and creditors in the United States, and may be made in the securities, but subject to the limitations, specified in this chapter with regard to the investment of the capital of domestic companies formed and organized under the provisions of this chapter. The deposit shall be deemed for all purposes of the insurance law the capital of the company making it. (1899, c. 54, s. 64; 1903, c. 438, s. 6; Rev., s. 4711; C. S., s. 6315; 1945, c. 384.)

Editor's Note.—The 1945 amendment transferred this section from § 58-57, substituted "alien" for "foreign" in the caption, and substituted at the beginning of the section the words "An alien company,

other than life" for the words "A foreign company, if incorporated or associated under the laws of any government or state other than the United States or one of the United States."

§ 58-188.4. Deposits by life companies not chartered in United States.—Every alien life insurance company organized under the laws of any other country than the United States must have and keep on deposit with some state insurance department or in the hands of trustees, in exclusive trust for the security of its contracts with policyholders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than three hundred thousand dollars. (1899, c. 54, s. 56; Rev., s. 4712; C. S., s. 6316; 1945, c. 384.)

Editor's Note.—The 1945 amendment transferred this section from § 58-58, inserted the word "alien" as the second word of the section, and increased the amount at

the end of the section from two hundred thousand to three hundred thousand dollars.

§ 58-188.5. Registration of bonds deposited in name of Treasurer.—The Commissioner of Insurance is hereby empowered, upon the written consent of any insurance company depositing with the Commissioner or the State Treasurer under any law of this State, any state, county, city, or town bonds or notes which are payable to bearer, to cause such bonds or notes to be registered as to the principal thereof in lawful books of registry kept by or in behalf of the issuing state, county, city or town, such registration to be in the name of the Treasurer of North Carolina in trust for the company depositing the notes or bonds and the State of North Carolina, as their respective interest may appear, and is further empowered to require of any and all such companies the filing of written consent to such registration as a condition precedent to the right of making any such deposit or right to continue any such deposit heretofore made. (1925, c. 145, s. 2; 1945, c. 384.)

Editor's Note.—The 1945 amendment transferred this section from § 58-59.

§ 58-188.6. Notation of registration; release.—Bonds or notes so registered shall bear notation of such registration on the reverse thereof, signed by the registering officer or agent, and may be released from such registration and may be transferred on such books of registry by the signature of the State Treasurer. (1925, c. 145, s. 3; 1945, c. 384.)

Editor's Note.—The 1945 amendment transferred this section from § 58-60.

§ 58-188.7. Expenses of registration.—The necessary expenses of procuring such registration and any transfer thereof shall be paid by the company making the deposits. (1925, c. 145, s. 4; 1945, c. 384.)

Editor's Note.—The 1945 amendment transferred this section from § 58-61.

§ 58-188.8. Bond in lieu of deposit.—In lieu of any deposit required in

this chapter a company may give a surety bond issued by a company licensed in this State, the form of which bond shall be approved by the Commissioner. (1945, c. 384.)

ARTICLE 21.

Insuring State Property.

§ 58-189. **State property fire insurance fund created.**—Upon the expiration of all existing policies of fire insurance upon State owned buildings, fixtures, furniture, and equipment therein, including all such property the title to which may be in any State department, institution, or agency, the State of North Carolina shall not reinsure any of such properties.

There is hereby created a "State property fire insurance fund," which shall be as a special fund in the State treasury, for the purpose of providing a reserve against loss from fire at State departments and institutions. The sinking fund commission shall invest all funds deposited in the "State property fire insurance fund" in the same type of securities in which State sinking funds may be invested and all earnings of the fund shall become a part of the fund and be held and invested as contributions are invested. The unexpended appropriations of State departments and institutions for fire insurance premiums for the fiscal year 1944-45 and the appropriations for fire insurance premiums made for the biennium 1945-47 or that may thereafter be made for this purpose shall be transferred to the "State property fire insurance fund." (1945, c. 1027, s. 1.)

Editor's Note.—The 1945 amendment procure policies of insurance on State property. rewrote this section, which formerly required the Commissioner of Insurance to

§ 58-190. **Appropriations.**—Upon the expiration of the existing fire insurance policies on said properties and in making appropriations for any biennium after the next biennium, the Commissioner of Insurance shall file with the budget bureau his estimate of the appropriations which will be necessary in order to set up and maintain an adequate reserve to provide a fund sufficient to protect the State, its departments, institutions, and agencies from loss or damage to any of said properties up to fifty per centum of the value thereof. Appropriations made for the creating of such fire insurance reserves against property of the Department of Agriculture, or the State Highway and Public Works Commission or any special operating fund shall be charged against the funds of such departments. (1945, c. 1027, s. 2.)

Editor's Note.—The 1945 amendment to the payment of premiums on policies rewrote this section, which formerly related insuring State property.

§ 58-191. **Payment of losses.**—In case of total loss of any property of any State institution or partial loss thereof or the loss or damage of any other aforesaid State owned property, the Commissioner of Insurance is authorized, empowered and directed to determine the amount of the loss and to certify the amount of loss to the department or institution concerned, to the budget bureau and to the Governor and Council of State. The Governor and Council of State may authorize transfers from the "State property fire insurance fund" to the State agency having suffered a fire damage in such amount as they may consider necessary to restore the loss sustained, and in the event there is not a sufficient sum in said State property fire insurance fund, the Governor and Council of State may supplement said fund from the contingency and emergency fund, and if there is not a sufficient amount therein, then from the State postwar reserve fund. Such funds as shall be allocated from such reserve fund shall be paid therefrom upon warrant of the State Auditor. (1945, c. 1027, s. 3.)

Editor's Note.—The 1945 amendment covering property of, or in charge of, the Department of Agriculture and the State Prison. rewrote this section, which formerly related to the payment of premiums for policies

§ 58-192. Information furnished Commissioner by officers in charge.—It is the duty of the different officers or boards having in their custody any property belonging to the State to inform the Commissioner, giving him in detail a full description of same, and to keep him informed of any changes in such property or its location or surroundings. (1901, c. 710, ss. 1, 2; 1903, c. 771, s. 2; Rev., s. 4828; C. S., s. 6452.)

§ 58-193. Commissioner to inspect State property; plans submitted.—It is the duty of the Commissioner at least once in each year, or oftener, if deemed necessary, to visit, inspect, and thoroughly examine each State institution or other State property with a view to its protection from fire, as well as to the safety of its inmates or the property therein in case of fire, and call to the attention of the board or officer having the same in charge any defect noted by him or any improvement deemed necessary. No board, commission, superintendent, or other person or persons authorized and directed by law to select plans and erect buildings for the use of the State of North Carolina or any institution thereof, or for the use of any county, city, or incorporated town or school district shall receive and approve of any plans until they are submitted to and approved by the Commissioner of Insurance of the State as to the safety of the proposed buildings from fire, as well as the protection of the inmates in case of fire. (1901, c. 710, ss. 1, 2; 1903, c. 771, s. 3; Rev., s. 4829; 1909, c. 880; 1919, c. 186, s. 3; C. S., s. 6453.)

§ 58-194. Report required of Commissioner.—The Commissioner of Insurance must submit to the Governor a full report of his official action under this article, with such recommendations as commend themselves to him, and it shall be embodied in or attached to his biennial report to the General Assembly. (1901, c. 710, ss. 1, 2; 1903, c. 771, s. 4; Rev., s. 4830; C. S., s. 6454; 1945, c. 386.)

Editor's Note.—The 1945 amendment appearing after the word "submit" near the struck out the word "annually" formerly beginning of the section.

SUBCHAPTER IV.

LIFE INSURANCE.

ARTICLE 22.

General Regulations of Business.

§ 58-195. Definitions; requisites of contract.—All corporations or associations doing business in this State, under any charter or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract, or pledge for the payment of endowments or annuities, or who employ agents to solicit such business, are life insurance companies, in all respects subject to the laws herein made and provided for the government of life insurance companies, and shall not make any such insurance, guaranty, contract, or pledge in this State with any citizen, or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment, the consideration therefor and such other provisions as the Commissioner may require. (1899, c. 54, s. 55; Rev., s. 4773; C. S., s. 6455; 1945, c. 379.)

Editor's Note.—The 1945 amendment repealed the former section and inserted the present one in place thereof. Formerly the section applied also to partnerships and individuals. The amendatory act, which amended, inserted or repealed a large number of sections of this chapter, provides: "This act shall not apply to common carriers having relief departments, pension or annuity plans, or other organizations or

associations for the benefit of their employees of former employees; or to associations of such common carriers adminis-

tering such departments, plans or organizations."

§ 58-195.1. Industrial life insurance defined.—Industrial life insurance is hereby declared to be that form of life insurance under which the premiums are payable monthly or oftener, provided the face amount of insurance stated in the policy does not exceed one thousand dollars (\$1,000.00) and the words "Industrial Policy" are printed upon the policy as a part of the descriptive matter. (1945, c. 379; 1947, c. 721.)

Editor's Note.—Prior to the 1947 amendment the premiums were payable weekly or monthly or oftener.

§ 58-196: Transferred to § 58-151.1 by Session Laws 1945, c. 379.

§ 58-197. Soliciting agent represents the company.—A person who solicits an application for insurance upon the life of another, in any controversy relating thereto between the insured or his beneficiary and the company issuing a policy upon such application, is the agent of the company and not of the insured. (1907, c. 958, s. 1; C. S., s. 6457.)

This section does not attempt to prescribe the extent of the agent's authority or to convert a special or limited agency into one with general powers. *Fountain v. Mutual Life Ins. Co.*, 55 F. (2d) 120 (1932). See also *Provident Mut. Life Ins. Co. v. Parsons*, 70 F. (2d) 863 (1934).

Insurer Liable for Delay of Agent.—"If the defendant's agent wrongfully failed to deliver the policy within a reasonably short time after its receipt, during which

time the plaintiff's intestate was in good health and ready, able, and willing to pay the premium on delivery, as stipulated, and plaintiff's intestate having thereafter become ill, the defendant could not withhold the delivery so as to release it from responsibility. *American Trust Co. v. Life Ins. Co.*, 173 N. C. 558, 92 S. E. 706 (1917)." *Fox v. Volunteer State Life Ins. Co.*, 185 N. C. 121, 116 S. E. 266 (1923).

§ 58-198. Discrimination between insurants forbidden.—A life insurance company doing business in this State shall not make any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon, nor pay or allow as inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance; nor give, sell, or purchase, or offer to give, sell, or purchase as inducement to insurance or in connection therewith any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits to accrue therein, or anything of value whatsoever not specified in the policy. (1899, c. 54, s. 57; 1903, c. 438, ss. 5, 10; Rev., s. 4775; 1911, c. 196, s. 7; C. S., s. 6458.)

The purpose of the statute is to prevent discrimination among policyholders of like class and expectancy, and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurant and the company in reference thereto shall be plainly expressed in the policy. *Smathers v.*

Bankers Life Ins. Co., 151 N. C. 98, 65 S. E. 746 (1909).

The purpose of the statute is to require all of the contract between the parties to be set forth in the policy and to afford protection to the policyholder. The purpose is to require the parties to incorporate in the insurance contract anything pertaining to its validity at the time it is written.

New York Life Ins. Co. v. Guyes, 22 F. Supp. 454 (1938).

The prohibition of discrimination is a restriction applicable to the insurer, and the statute purports to operate upon insurance companies alone. Robinson v. Security Life, etc., Co., 163 N. C. 415, 79 S. E. 681 (1913).

Instance of Illegal Discrimination.—The exercise of an opinion given by a mutual life insurance company to one of its policyholders of greater value than that given to the others is an illegal and void discrimination, prohibited by our statute and general principles of law. Graham v. Mutual Life Ins. Co., 176 N. C. 313, 97 S. E. 6 (1918).

Statute Does Not Invalidate Policies.—This section does not invalidate contracts of insurance made in violation of its provisions. Robinson v. Security Life, etc., Co., 163 N. C. 415, 79 S. E. 681 (1913). See Security Life, etc., Co. v. Costner, 149 N. C. 293, 63 S. E. 304 (1908).

And Insured May Recover for Cancellation of Policy.—Where the insured has, in good faith, entered into a policy contract with the company whereby he has secured a policy at a reduced rate of premium, the parties are not in pari delicto; and he may recover damages, upon the cancellation by the company of his policy, for its discrimination forbidden by the statute. Robinson v. Security Life, etc., Co., 163 N. C. 415, 79 S. E. 681 (1913).

Transactions up to the issuance of a life policy merge therein upon its issuance and acceptance by the insured. Graham v. Mutual Life Ins. Co., 176 N. C. 313, 97 S. E. 6 (1918). See New York Life Ins. Co. v. Guyes, 22 F. Supp. 454 (1938), citing Floors v. Aetna Life Ins. Co., 144 N. C. 232, 56 S. E. 915 (1907).

And Collateral Agreements Are Not Binding Unless Included in Policy.—Under this section, the terms and conditions of the insurance must be plainly expressed in the policy as issued, and collateral agreements with local agents are not binding unless included in the policy. Graham v. Mutual Life Ins. Co., 176 N. C. 313, 97 S. E. 6 (1918).

It would seem that an agreement by a local agent that the policy would be in ef-

fect from the date of application and payment of the first premium, where the policy provided it would be effective from delivery, would be in contravention of this section. Jones v. Gate City Life Ins. Co., 216 N. C. 300, 4 S. E. (2d) 848 (1939).

A policyholder cannot enforce against the insurance company a severable collateral agreement to his policy contract of life insurance which is prohibited by this statute, upon the principle that the law was not passed for the benefit of the company resisting recovery, but for the protection of the policyholders when it appears that the agreement is executory in character and gives him a preference over the general body of policyholders for whose benefit the statute was passed. In such cases, the parties are in pari delicto. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 65 S. E. 746 (1909).

When a collateral agreement delivered to insured with his policy provided for the reduction of premiums to be paid thereon, and is claimed to be the sole inducement moving him to take the policy, it is necessary for these inducements so claimed to be specified in the policy contract. Otherwise the collateral agreement is prohibited by the statute and not enforceable. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 65 S. E. 746 (1909).

A valid policy of life insurance is severable from an invalid collateral agreement made at one and the same time, respecting a benefit prohibited by the statute. Security Life, etc., Co. v. Costner, 149 N. C. 293, 63 S. E. 304 (1908).

And Insurer May Recover on Note Given in Payment of Policy.—When the insured has given his note for the premiums on his life insurance policy, and has received for one year, in this manner, the benefits of the insurance, he cannot avoid paying his note upon the ground of his having collaterally contracted with the company for the deduction of a certain amount by way of renewal commissions in violation of the provisions of this section. Security Life, etc., Co. v. Costner, 149 N. C. 293, 63 S. E. 304 (1908), cited in Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 65 S. E. 746 (1909).

§ 58-199. Misrepresentations of policy forbidden.—No life insurance company doing business in this State, and no officer, director, solicitor, or other agent thereof, shall make, issue, or circulate, or cause to be made, issued, or circulated any estimate, illustration, circular, or statement of any sort misrepresenting the terms of the policy issued by it or the dividends or share of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof. Nor shall any such company, agent, or broker make any misrepresentation to any person insured in said com-

pany or in any other insurer or governmental agency for the purpose of inducing or tending to induce such person to lapse, forfeit, or surrender his said insurance. (1913, c. 95; C. S., s. 6459; 1947, c. 721.)

Editor's Note.—The 1947 amendment “insurer or governmental agency” for the substituted in the last sentence the words word “company.”

§ 58-200: Repealed by Session Laws 1945, c. 379.

§ 58-201. **Reserve fund of domestic companies to be calculated.**—The valuation of the reserves on the policies and bonds of every life insurance company incorporated by the laws of this State shall be based upon any recognized standard of valuation and mortality table as the Commissioner should deem best for the security of the business and the safety of the persons insured. The Commissioner shall annually value or cause to be valued the reserves on all policies and annuities of each domestic company and may accept the valuation of such reserves made by the company upon such evidence of its correctness as he may require. Upon this valuation being made by the Commissioner and a certificate thereof furnished by him, each company shall pay to such officer, to defray the expenses thereof, the sum of one cent for every thousand dollars of the whole amount insured by its policies so valued. The reserve fund hereinbefore provided for shall not be available for or used for any other purpose than the discharge of policy obligations, but is a trust fund to be held and expended only for the benefit of policyholders. In case of the insolvency of the company, the reserve on outstanding policies may, with the consent of the Commissioner, be used for the reinsurance of its policies to the extent of their pro rata part thereof. (1903, c. 536, s. 4; 1905, c. 410; Rev., s. 4777; 1907, c. 1000, s. 7; C. S., s. 6461; 1945, c. 379.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 58-201.1. **Standard Valuation Law.**—1. This section shall be known as the Standard Valuation Law.

2. The Commissioner shall annually value, or cause to be valued, the reserve liabilities (hereinafter called reserves) for all outstanding life insurance policies and annuity and pure endowment contracts of every life insurance company doing business in this State, and may certify the amount of such reserves, specifying the mortality table or tables, rate or rates of interest and methods (net level premium method or other) used in the calculation of such reserves. Group methods and approximate averages for fractions of a year or otherwise may be used in calculating such reserves and the valuation made by the company may be accepted by the Commissioner upon such evidence of its correctness as the Commissioner may require. In lieu of the valuation of the reserves herein required of any foreign or alien company, he may accept any valuation made, or caused to be made, by the insurance supervisory official of any state or other jurisdiction when such valuation complies with the minimum standard herein provided and if the official of such state or jurisdiction accepts as sufficient and valid for all legal purposes the certificate of valuation of the Commissioner when such certificate states the valuation to have been made in a specified manner according to which the aggregate reserves would be at least as large as if they had been computed in the manner prescribed by the law of that state or jurisdiction.

3. The minimum standard for the valuation of all such policies and contracts issued prior to the operative date of § 58-201.2 shall be that provided by the laws in effect immediately prior to such date. The minimum standard for the valuation of all such policies and contracts issued on or after the operative date of § 58-201.2 shall be the Commissioner's reserve valuation method defined in subsection four, three and one-half per cent (3½%) interest, and the following tables:

(a) For all ordinary policies of life insurance issued on the standard basis, excluding any disability and accidental death benefits in such policies, the commissioner's 1941 Standard Ordinary Mortality Table.

(b) For all industrial life insurance policies issued on the standard basis, excluding any disability and accidental death benefits in such policies, the 1941 Standard Industrial Mortality Table.

(c) For annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies, the 1937 Standard Annuity Mortality Table.

(d) For total and permanent disability benefits in or supplementary to ordinary policies or contracts, Class (3) Disability Table (1926) which, for active lives, shall be combined with a mortality table permitted for calculating the reserves for life insurance policies.

(e) For accidental death benefits in or supplementary to policies, the Inter-Company Double Indemnity Mortality Table combined with a mortality table permitted for calculating the reserves for life insurance policies.

(f) For group life insurance, life insurance issued on the substandard basis and other special benefits, such tables as may be approved by the Commissioner.

4. Reserves according to the Commissioner's reserve valuation method, for the life insurance and endowment benefits of policies providing for a uniform amount of insurance and requiring the payment of uniform premiums shall be the excess, if any, of the present value, at the date of valuation, of such future guaranteed benefits provided for by such policies, over the then present value of any future modified net premiums therefor. The modified net premiums for any such policy shall be such uniform percentage of the respective contract premiums for such benefits that the present value, at the date of issue of the policy, of all such modified net premiums shall be equal to the sum of the then present value of such benefits provided for by the policy and the excess of (a) over (b), as follows:

(a) A net level annual premium equal to the present value, at the date of issue, of such benefits provided for after the first policy year, divided by the present value, at the date of issue, of an annuity of one per annum payable on the first and each subsequent anniversary of such policy on which a premium falls due; provided, however, that such net level annual premium shall not exceed the net level annual premium on the nineteen year premium whole life plan for insurance of the same amount at an age one year higher than the age at issue of such policy.

(b) A net one year term premium for such benefits provided for in the first policy year.

Reserves according to the Commissioner's reserve valuation method for (1) life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums, (2) annuity and pure endowment contracts, (3) disability and accidental death benefits in all policies and contracts, and (4) all other benefits, except life insurance and endowment benefits in life insurance policies, shall be calculated by a method consistent with the principles of this section.

5. In no event shall a company's aggregate reserves for all life insurance policies, excluding disability and accidental death benefits, issued on or after the operative date of § 58-201.2, be less than the aggregate reserves calculated in accordance with the method set forth in subsection four and the mortality table or tables and rate or rates of interest used in calculating nonforfeiture benefits for such policies.

6. Reserves for all policies and contracts issued prior to the operative date of § 58-201.2 may be calculated, at the option of the company, according to any standards which produce greater aggregate reserves for all such policies and contracts than the minimum reserves required by the laws in effect immediately prior to such date.

Reserves for any category of policies, contracts or benefits as established by the Commissioner, issued on or after the operative date of § 58-201.2, may be calculated, at the option of the company, according to any standards which produce greater aggregate reserves for such category than those calculated according to the minimum standard herein provided, but the rate or rates of interest used shall not be higher than the corresponding rate or rates of interest used in calculating any nonforfeiture benefits provided for therein. Provided, however, that reserves for participating life insurance policies issued on or after the operative date of § 58-201.2 may, with the consent of the Commissioner, be calculated according to a rate of interest lower than the rate of interest used in calculating the nonforfeiture benefits in such policies, with the further proviso that if such lower rate differs from the rate used in the calculation of the nonforfeiture benefits by more than one-half per cent ($\frac{1}{2}\%$), the company issuing such policies shall file with the Commissioner a plan providing for such equitable increases, if any, in the cash surrender values and nonforfeiture benefits in such policies as the Commissioner shall approve.

Any such company which at any time shall have adopted any standard of valuation producing greater aggregate reserves than those calculated according to the minimum standard herein provided may, with the approval of the Commissioner, adopt any lower standard of valuation, but not lower than the minimum herein provided.

7. If the gross premium charged by any life insurance company on any policy or contract is less than the net premium for the policy or contract according to the mortality table, rate of interest and method used in calculating the reserve thereon, there shall be maintained on such policy or contract a deficiency reserve in addition to all other reserves required by law. For each such policy or contract the deficiency reserve shall be the present value, according to such standard, of an annuity of the difference between such net premium and the premium charged for such policy or contract, running for the remainder of the premium-paying period. (1945, c. 379.)

§ 58-201.2. Standard nonforfeiture provisions.—1. This section shall be known as the Standard Nonforfeiture Law.

2. In the case of policies issued on or after the operative date of this section, as defined in subsection 8, no policy of life insurance, except as stated in subsection 7, shall be issued or delivered in this State unless it shall contain in substance the following provisions, or corresponding provisions which in the opinion of the Commissioner are at least as favorable to the defaulting or surrendering policyholder:

(a) That, in the event of default in any premium payment after premiums have been paid for at least one full year in the case of ordinary insurance or three full years in the case of industrial insurance, the company will grant, upon proper request not later than sixty days after the due date of the premium in default, a paid-up nonforfeiture benefit on a plan stipulated in the policy, effective as of such due date, of such value as may be hereinafter specified.

(b) That, upon surrender of the policy within sixty days after the due date of any premium payment in default after premiums have been paid for at least three full years in the case of ordinary insurance or five full years in the case of industrial insurance, the company will pay, in lieu of any paid-up nonforfeiture benefit, a cash surrender value of such amount as may be hereinafter specified.

(c) That a specified paid-up nonforfeiture benefit shall become effective as specified in the policy unless the person entitled to make such election elects another available option not later than sixty days after the due date of the premium in default. Nothing herein shall prevent the use of an automatic premium loan provision.

(d) That, if the policy shall have become paid-up by completion of all premium payments or if it is continued under any paid-up nonforfeiture benefit which became effective on or after the third policy anniversary in the case of ordinary insurance or the fifth policy anniversary in the case of industrial insurance, the company will pay, upon surrender of the policy within thirty days after any policy anniversary, a cash surrender value of such amount as may be hereinafter specified.

(e) A statement of the mortality table and interest rate used in calculating the cash surrender values and the paid-up nonforfeiture benefits available under the policy, together with a table showing the cash surrender value, if any, and paid-up nonforfeiture benefit, if any, available under the policy on each policy anniversary either during the first twenty policy years or during the term of the policy, whichever is shorter, such values and benefits to be calculated upon the assumption that there are no dividends or paid-up additions credited to the policy and that there is no indebtedness to the company on the policy.

(f) A brief and general statement of the method to be used in calculating the cash surrender value and the paid-up nonforfeiture benefit available under the policy on any policy anniversary with an explanation of the manner in which the cash surrender values and the paid-up nonforfeiture benefits are altered by the existence of any paid-up additions credited to the policy or any indebtedness to the company on the policy.

Any of the foregoing provisions or portions thereof not applicable by reason of the plan of insurance may, to the extent inapplicable, be omitted from the policy.

The company shall reserve the right to defer the payment of any cash surrender value for a period of six months after demand therefor with surrender of the policy.

3. Any cash surrender value available under the policy in the event of default in a premium payment due on any policy anniversary, whether or not required by subsection two, shall be an amount not less than the excess, if any, of the present value, on such anniversary, of the future guaranteed benefits which would have been provided for by the policy, including any existing paid-up additions, if there had been no default, over the sum of (a) the then present value of the adjusted premiums as defined in subsection five, corresponding to premiums which would have fallen due on and after such anniversary, and (b) the amount of any indebtedness to the company on the policy. Any cash surrender value available within thirty days after any policy anniversary under any policy paid up by completion of all premium payments or any policy continued under any paid-up nonforfeiture benefit, whether or not required by subsection two, shall be an amount not less than the present value, on such anniversary, of the future guaranteed benefits provided for by the policy, including any existing paid-up additions, decreased by any indebtedness to the company on the policy.

4. Any paid-up nonforfeiture benefit available under the policy in the event of default in a premium payment due on any policy anniversary shall be such that its present value as of such anniversary shall be at least equal to the cash surrender value then provided for by the policy or, if none is provided for, at least equal to that cash surrender value which would have been required by this section in the absence of the condition that premiums shall have been paid for at least a specified period.

5. The adjusted premiums for any policy shall be calculated on an annual basis and shall be such uniform percentage of the respective premiums specified in the policy for each policy year that the present value, at the date of issue of the policy, of all such adjusted premiums shall be equal to the sum of (i) the then present value of the future guaranteed benefits provided for by the policy; (ii) two per cent of the amount of insurance, if the insurance be uniform in amount, or of the equivalent uniform amount, as hereinafter defined, if the amount of insurance varies with duration of the policy; (iii) forty per cent of

the adjusted premium for the first policy year; (iv) twenty-five per cent of either the adjusted premium for the first policy year or the adjusted premium for a whole life policy of the same uniform or equivalent uniform amount with uniform premiums for the whole of life issued at the same age for the same amount of insurance, whichever is less. Provided, however, that in applying the percentages specified in (iii) and (iv) above, no adjusted premium shall be deemed to exceed four per cent (4%) of the amount of insurance or level amount equivalent thereto. The date of issue of a policy for the purpose of this subsection shall be the date as of which the rated age of the insured is determined.

In the case of a policy providing an amount of insurance varying with duration of the policy, the equivalent level amount thereof for the purpose of this section shall be deemed to be the level amount of insurance provided by an otherwise similar policy, containing the same endowment benefit or benefits, if any, issued at the same age and for the same term, the amount of which does not vary with duration and the benefits under which have the same present value at the inception of the insurance as the benefits under the policy.

All adjusted premiums and present values referred to in this section shall be calculated on the basis of the Commissioner's 1941 Standard Ordinary Mortality Table for ordinary insurance and the 1941 Standard Industrial Mortality Table for industrial insurance and the rate of interest, not exceeding three and one-half per cent (3½%) per annum, specified in the policy for calculating cash surrender value and paid-up nonforfeiture benefits. Provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than one hundred and thirty per cent (130%) of the rates of mortality according to such applicable table. Provided, further, that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the company and approved by the Commissioner.

6. Any cash surrender value and any paid-up nonforfeiture benefit, available under the policy in the event of default in a premium payment due at any time other than on the policy anniversary, shall be calculated with allowance for the lapse of time and the payment of fractional premiums beyond the last preceding policy anniversary. All values referred to in subsections three, four and five may be calculated upon the assumption that any death benefit is payable at the end of the policy year of death. The net value of any paid-up additions, other than paid-up term additions, shall be not less than the dividends used to provide such additions. Notwithstanding the provisions of subsection three, additional benefits payable (a) in the event of death or dismemberment by accident or accidental means, (b) in the event of total and permanent disability, (c) as reversionary annuity or deferred reversionary annuity benefits, (d) as decreasing term insurance benefits provided by a rider or supplemental policy provision to which, if issued as a separate policy, this section would not apply, and (e) as other policy benefits additional to life insurance and endowment benefits, and premiums for all such additional benefits, shall be disregarded in ascertaining cash surrender values and nonforfeiture benefits required by this section, and no such additional benefits shall be required to be included in any paid-up nonforfeiture benefits.

7. The provisions of this section shall not apply to any industrial sick benefit insurance as defined in this chapter, nor to any reinsurance, group insurance, pure endowment, annuity or reversionary annuity contract, nor to any term policy of uniform amount, or renewal thereof, of twenty years or less, for which uniform premiums are payable during the entire term of the policy, nor to any term policy of decreasing amount on which each adjusted premium, calculated as specified in subsection five, is less than the adjusted premium so calculated, on such twenty year term policy issued at the same age and for the same initial amount of in-

surance, nor to any policy which shall be delivered outside this State through an agent or other representative of the company issuing the policy.

8. After the effective date of this section, any company may file with the Commissioner a written notice of its election to comply with the provisions of this section after a specified date before January 1, 1950. After the filing of such notice then upon such specified date (which shall be the operative date for such company) this section shall become operative with respect to the policies thereafter issued by such company. If a company makes no such election, the operative date of this section for such company shall be January 1, 1950. (1945, c. 379.)

§ 58-202. Reinsurance of companies regulated.—The receiver of any life insurance company organized under the laws of this State, when the assets of the company are sufficient for that purpose, and the consent of two-thirds of its policyholders has been secured in writing, may reinsure all the policy obligations of such company in some other solvent life insurance company, or, when the assets are insufficient to secure the reinsurance of all the policies in full, he may reinsure such a percentage of each and every policy outstanding as the assets will secure; but there must be no preference or discrimination as against any policyholder, and the contract for such reinsurance by the receiver must be approved by the Commissioner of Insurance of this State before it has effect. (1899, c. 54, s. 58; 1903, c. 536, s. 9; Rev., s. 4778; C. S., s. 6462; 1945, c. 379.)

Editor's Note.—The 1945 amendment substituted "companies" for "risks" in the caption, and struck out the former first sentence reading "No domestic life in-

surance company may reinsure its risks without the permission of the commissioner of insurance, except to the extent of one-half of any individual risk."

§ 58-203: Repealed by Session Laws 1945, c. 379.

§ 58-204. Insurable interest as between stockholders, partners, etc.—Where two or more persons own stock or interests in the same corporation, partnership or business association and have heretofore contracted or hereafter contract with one another for the purchase, at the death of one, by the survivor or survivors of the stock, share or interest of the deceased, the person or persons making the contract of purchase shall be deemed to have, and are hereby declared to have, an insurable interest in the life or lives of the person or persons contracting to sell. (1941, c. 201.)

Editor's Note.—For comment on section, see 19 N. C. Law Rev. 490.

§ 58-205. Rights of beneficiaries.—When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, is entitled to its proceeds against the creditors and representatives of the person effecting the insurance. The person to whom a policy of life insurance is made payable may maintain an action thereon in his own name. Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband, or by any other person, and whether the assignment or transfer is made by her husband or by any other person, inures to her separate use and benefit and to that of her children, if she dies in his lifetime. (Const., Art. X, s. 7; 1899, c. 54, s. 59; Rev., ss. 4771, 4772; C. S., s. 6464.)

Cross References.—See § 58-206 and note. As to wife insuring life of husband, see § 52-9. As to payment of sum due minor insurance beneficiary, see § 2-52.

Editor's Note.—See 13 N. C. Law Rev. 95.

Change of Beneficiary.—A beneficiary in a policy of life insurance has only a con-

tingent interest therein, and where the insured retains the right to change the beneficiary by the terms of the policy, he may do so, and where upon the death of the beneficiary the insured changes the beneficiary, in accordance with the terms of the policy, to a trustee for the use of certain creditors and heirs at law of the insured, the other creditors may not claim that the change in the beneficiary was void as being fraudulent as to them. *Teague v. Pilot Life Ins. Co.*, 200 N. C. 450, 157 S. E. 421 (1931).

Where a policy of life insurance reserves the right in the insured to change the beneficiary therein named, the named beneficiary has only a contingent interest therein, and the insured may change the beneficiary in accordance with the terms of the policy at any time, and where the insured has done all that is possible under the circumstances to change the beneficiary in accordance with the terms of the policy, such change of beneficiary will be given effect under the principle that equity regards as done that which ought to have been done, and where the insured's wife is thus made the beneficiary the proceeds inure to her sole benefit free from the claims of his creditors. *Meadows Fertilizer Co. v. Godley*, 204 N. C. 243, 167 S. E. 816 (1933).

Same—By Insolvent Insured.—By reason of the provisions of this statute, it was held in *Pearsall v. Bloodworth*, 194 N. C. 628, 140 S. E. 303 (1927), that where

the insured in a policy of life insurance, payable at his death to his estate, procured a change of beneficiary in said policy in accordance with its provisions, by which his wife became the beneficiary, such change was not void as against creditors although at the date of the change made at his request the insured was insolvent. *Teague v. Pilot Life Ins. Co.*, 200 N. C. 450, 157 S. E. 421 (1931). See *Meadows Fertilizer Co. v. Godley*, 204 N. C. 243, 167 S. E. 816 (1933).

Same—Change Not Effected.—Where deceased had expressed an intention to change the beneficiary in a policy of insurance on his life, but had done no affirmative act to effect such change, the court's judgment that no change of beneficiary had been effected was upheld. *Meadows Fertilizer Co. v. Godley*, 204 N. C. 243, 167 S. E. 816 (1933).

Where Beneficiary Dead.—When A insured his life for the benefit of "his wife and children," and at the time the policy was issued he had no wife, but did have two children, one of whom died before A, it was held that upon A's death the money due on the policy should be divided between the surviving child and the administrator of the dead child. The insertion of "his wife" as a beneficiary, when he had no wife living, was a nullity. *Hooker v. Sugg*, 102 N. C. 115, 8 S. E. 919 (1889).

Applied in *Russell v. Owen*, 203 N. C. 262, 165 S. E. 687 (1932).

§ 58-205.1. Minors may enter into insurance or annuity contracts and have full rights, powers and privileges thereunder.—All minors in North Carolina of the age of fifteen years and upwards shall have full power and authority to make contracts of insurance or annuity with any life insurance company authorized to do business in the State of North Carolina, either domestic or foreign, and to exercise all the powers, rights, and privileges of ownership conferred upon them under the terms of any and all such contracts applied for by and issued to them, and with full power to surrender, assign, modify, pledge, or change such contracts, and to receive any dividends thereon and generally to have the full power and authority in the premises that persons twenty-one years and upwards could and would have relative to any and all such contracts. (1945, c. 379; 1947, c. 721.)

Editor's Note.—The 1947 amendment substituted near the middle of the section the words "by and" for the word "or."

§ 58-206. Creditors deprived of benefits of life insurance policies except in cases of fraud.—If a policy of insurance is effected by any person on his own life or on another life in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance or the executor or administrator of such insured or of the person effecting such insurance, shall be entitled to its proceeds and avails against creditors and representatives of the insured and of the person effecting same, whether

or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person: Provided, that subject to the statute of limitations, the amount of any premiums for said insurance paid with the intent to defraud creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms unless, before such payment, the company shall have written notice by or in behalf of the creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount claimed. (1931, c. 179, s. 1; 1947, c. 721.)

Cross Reference.—See § 58-205 and note.

Editor's Note.—The 1947 amendment struck out the words "or his executors or administrators" and inserted in lieu thereof the words "or the executor or administrator of such insured or of the person effecting such insurance."

Section Amendatory of § 58-205.—This section, in form an independent statute, is actually an amendment of § 58-205. It makes six changes in the statutory exemption of the beneficiary of a life insurance policy from the claims of creditors of the insured. It leaves out the requirement of § 58-205 that the beneficiary to be so protected must have an insurable interest. This is said to be undesirable in the case where the insurance is effected by one on the life of another for a third person. Vance, Insurance, (2d ed.) p. 154, n. 1. The section extends the exemption to include beneficiaries made such by a change of beneficiaries and to include assignees of the policy. Compare, as to the need for an

insurable interest in the assignee, Powell v. Dewey, 123 N. C. 103, 31 S. E. 381 (1898); Hinton v. Mutual Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474 (1904), where wife assigned insurance payable to her estate to her husband's creditors; Hardy v. Aetna Life Ins. Co., 152 N. C. 286, 67 S. E. 767 (1910); Hardy v. Aetna Life Ins. Co., 154 N. C. 430, 70 S. E. 828 (1911), where uncle assigned insurance payable to his estate to nephew. As to bona fide assignment, see Johnson v. Mutual Benefit & Ins. Co., 157 N. C. 106, 72 S. E. 847 (1911); McNeal v. Life & Cas. Ins. Co. of Tenn., 192 N. C. 450, 135 S. E. 300 (1926). See 9 N. C. Law Rev. 377.

Statute Not Retroactive.—This section cannot affect policies written before the effective date of the statute. Com'r of Banks v. Yelverton, 204 N. C. 441, 168 S. E. 505 (1933).

Cited in Meadows Fertilizer Co. v. Godley, 204 N. C. 243, 167 S. E. 816 (1933).

§ 58-207. Notice of nonpayment of premium required before forfeiture.—No life insurance corporation doing business in this State shall, within one year after the default in payment of any premium, installment, or interest, declare forfeited or lapsed any policy hereafter issued or renewed, except policies on which premiums are payable monthly or at shorter intervals and except group insurance contracts and term insurance contracts for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest, or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof due on such policy, the place where it shall be paid, and the person to whom the same is payable has been duly addressed and mailed, postage paid, to the person whose life is insured, or to the assignee or owner of the policy, or to the person designated in writing by such insured, assignee or owner, if notice of the assignment has been given to the corporation, at his or her last known post-office address in this State, by the corporation or by any officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable, as regards policies which do not contain a provision for grace or are not entitled to grace in the payment of premiums and at least five and not more than forty-five days prior to the day when the same is payable as regards policies which do contain a provision for grace or are entitled to grace in the payment of premiums. The notice shall also state that unless such premium,

interest, installment, or portion thereof then due shall be paid to the corporation or to the duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy, as in the contract provided. If the payment demanded by such notice shall be made within its time limit therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy unless the same is instituted within three years from the day upon which default was made in paying the premium, installment, interest, or portion thereof for which it is claimed that forfeiture ensued. (1909, c. 884; C. S., s. 6465; 1929, c. 308, s. 1; 1931, c. 317; 1945, c. 379.)

Editor's Note.—The 1929 amendment added the last two sentences. The 1931 amendment added certain provisions which were transferred by the 1945 amendment to become § 58-260.1. The 1945 amendment also made other changes in this section.

The insurance company must give notice that the premiums are due and the policy is not subject to forfeiture until the statutory time after such notice is given. *Aiken v. Atlantic Life Ins. Co.*, 173 N. C. 400, 92 S. E. 184 (1917).

New Policy in Lieu of Policy Issued before Statute.—Where an old policy issued before this statute was withdrawn and a new policy issued after this statute, notice must be given in accordance with the statute in order to have a legal forfeiture. *Garland v. Jefferson Standard Life Ins. Co.*, 179 N. C. 67, 101 S. E. 616 (1919).

Notice as to Extension Notes Not Required.—Where there has been a default and forfeiture and the insured has furnished a health certificate and secured a reinstatement and an extension of time for payment, it is not necessary to again give the statutory notice of the time when the extension notes will become due. *Philadelphia Life Ins. Co. v. Hayworth*, 296 F. 339 (1924).

Notice of Next Premium Not Waiver of Forfeiture.—Where a policy of life insurance is forfeited for failure to pay at

maturity a note given for extension of payment of premium, the mailing of notice of the next regular quarterly premium by the insurer in compliance with this section, which notice does not demand payment of the balance due on the extended premium, is not a waiver by the insurer of forfeiture. *Sellers v. Life Ins. Co.*, 205 N. C. 355, 171 S. E. 328 (1933).

Tender Need Not Be Kept Open.—After tender and failure of insurer to accept the tender the insured does not have to keep the tender open. An application for reinstatement does not alter the insured's rights, if the policy has not been forfeited. *Aiken v. Atlantic Life Ins. Co.*, 173 N. C. 400, 92 S. E. 184 (1917).

Limitation of Actions.—In an action for the recovery of premiums paid on forfeited policies issued on the lives of relatives, where the evidence was to the effect that these policies were canceled for the non-payment of premiums on March 19, 1936, and that summons was issued February 17, 1942, the action was barred by this section and § 1-52. *Bynum v. Life Ins. Co. of Virginia*, 222 N. C. 742, 24 S. E. (2d) 613 (1943).

Cited in *Felts v. Shenandoah Life Ins. Co.*, 221 N. C. 148, 19 S. E. (2d) 259 (1942); *Abrams v. Metropolitan Life Ins. Co.*, 223 N. C. 500, 27 S. E. (2d) 148 (1943); *Abrams v. Metropolitan Life Ins. Co.*, 224 N. C. 1, 29 S. E. (2d) 130 (1944).

§ 58-208. Minimum premium rates for assessment life insurance companies.—No assessment life insurance corporation, organization or association of any kind issuing policies or contracts upon the life of any resident of this State shall hereafter be organized or licensed by the Commissioner of Insurance unless such corporation, organization or association adopt premium rates based upon the attained age of the assured at the time of issuance of the contract and such rates shall not be less than those fixed by the American Experience Table of Mortality or any other recognized table of mortality approved by the Com-

missioner of Insurance. Nothing contained in this section shall be construed to affect burial associations regulated under §§ 58-224 to 58-241, or railroad burial associations. (1939, c. 161.)

Editor's Note.—For comment on section, see 17 N. C. Law Rev. 362.

§ 58-209. **Distribution of surplus in mutual companies.**—Every life insurance company doing business in this State upon the principle of mutual insurance, or the members of which are entitled to share in the surplus funds thereof, may distribute the surplus annually, or once in two, three, four, or five years, as its directors determine. No payments shall be made to policyholders by way of dividends unless the company possesses admitted assets in the amount of such payments in excess of its capital and/or minimum required surplus and all other liabilities. (1903, c. 536, s. 10; Rev., s. 4776; C. S., s. 6466; 1945, c. 379.)

Editor's Note.—The 1945 amendment rewrote the second sentence.

§ 58-210. **Group life insurance defined.**—No policy of group life insurance shall be delivered in this State unless it conforms to one of the following descriptions:

(1) A policy issued to an employer, or to the trustee of a fund established by an employer, which employer or trustee shall be deemed the policyholder, to insure employees of the employer for the benefit of persons other than the employer, subject to the following requirements:

(a) The employees eligible for insurance under the policy shall be all of the employees of the employer, or all of any class or classes thereof determined by conditions pertaining to their employment. The policy may provide that the term "employees" shall include the employees of one or more subsidiary corporations, and the employees, individual proprietors, and partners of one or more affiliated corporations, proprietors or partnerships if the business of the employer and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract, or otherwise. The policy may provide that the term "employees" shall include the individual proprietor or partners if the employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include retired employees.

(b) The premium for the policy shall be paid by the policyholder, either wholly from the employer's funds or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employees. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured employees. A policy on which part of the premium is to be derived from funds contributed by the insured employees may be placed in force only if at least 75% of the then eligible employees, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured employees must insure all eligible employees, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(c) The policy must cover at least 25 employees at date of issue.

(d) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the employees or by the employer or trustee. No policy may be issued which provides insurance on any employee which together with any other insurance under any group life insurance policy or policies issued to the employer or to the trustee of a fund established in whole or in part by the employer exceeds \$20,000, except that this limitation shall not apply to amounts of group permanent life insurance issued in connection with a pension or profit-sharing plan.

(2) A policy issued to a creditor, who shall be deemed the policyholder, to insure debtors of the creditor, subject to the following requirements:

(a) The debtors eligible for insurance under the policy shall be all of the debtors of the creditor whose indebtedness is repayable in installments, or all of any class or classes thereof determined by conditions pertaining to the indebtedness or to the purchase giving rise to the indebtedness. The policy may provide that the term "debtors" shall include the debtors of one or more subsidiary corporations, and the debtors of one or more affiliated corporations, proprietors or partnerships if the business of the policyholder and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract or otherwise.

(b) The premium for the policy shall be paid by the policyholder, either from the creditor's funds, or from charges collected from the insured debtors, or from both. A policy on which part or all of the premium is to be derived from the collection from the insured debtors or identifiable charges not required of uninsured debtors shall not include, in the class or classes of debtors eligible for insurance, debtors under obligations outstanding at its date of issue without evidence of individual insurability unless at least 75% of the then eligible debtors elect to pay the required charges. A policy on which no part of the premium is to be derived from the collection of such identifiable charges must insure all eligible debtors, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(c) The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least 100 persons yearly, or may reasonably be expected to receive at least 100 new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability if less than 75% of the new entrants become insured.

(d) The amount of insurance on the life of any debtor shall at no time exceed the amount owed by him which is repayable in installments to the creditor, or \$5,000, whichever is less.

(e) The insurance shall be payable to the policyholder. Such payment shall reduce or extinguish the unpaid indebtedness of the debtor to the extent of such payment.

(3) A policy issued to a labor union, which shall be deemed the policyholder, to insure members of such union for the benefit of persons other than the union or any of its officials, representatives or agents, subject to the following requirements:

(a) The members eligible for insurance under the policy shall be all of the members of the union, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the union, or both.

(b) The premium for the policy shall be paid by the policyholder, either wholly from the union's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance. A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least 75% of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(c) The policy must cover at least 25 members at date of issue.

(d) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the union. No policy may be issued which provides insurance on any union member which to-

gether with any other insurance under any group life insurance policies, issued to the union exceeds \$20,000.

(4) A policy issued to the trustee of a fund established by two or more employers in the same industry or kind of business or by two or more labor unions, which trustee shall be deemed the policyholder, to insure employees of the employers or members of the unions for the benefit of persons other than the employers or the unions, subject to the following requirements:

(a) The persons eligible for insurance shall be all of the employees of the employers or all of the members of the unions, or all of any class or classes thereof determined by conditions pertaining to their employment, or to memberships in the unions, or to both. The policy may provide that the term "employees" shall include the individual proprietor or partners if an employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include the trustee or the employees of the trustee, or both, if their duties are principally connected with such trusteeship. The policy may provide that the term "employees" shall include retired employees.

(b) The premium for the policy shall be paid by the trustee wholly from funds contributed by the employers of the insured persons. The policy must insure all eligible persons, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(c) The policy must cover at least 100 persons at date of issue.

(d) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the insured persons or by the policyholder, employers, or unions. No policy may be issued which provides insurance on any person, which together with any other insurance under any group life insurance policy or policies issued to the employers, or any of them, or to the trustee of a fund established in whole or in part by the employers, or any of them, exceeds \$20,000, except that this limitation shall not apply to amounts of group permanent life insurance issued in connection with a pension or profit-sharing plan.

(5) A policy issued to an association of persons having a common professional or business interest, which association shall be deemed the policyholder, to insure members of such association for the benefit of persons other than the association or any of its officials, representatives or agents, subject to the following requirements:

(a) Such association shall have had an active existence for at least two years immediately preceding the purchase of such insurance, was formed for purposes other than procuring insurance and does not derive its funds principally from contributions of insured members toward the payment of premiums for the insurance.

(b) The members eligible for insurance under the policy shall be all of the members of the association or all of any class or classes thereof determined by conditions pertaining to their employment, or the membership in the association, or both. The policy may provide that the term "members" shall include the employees of members, if their duties are principally connected with the member's business or profession.

(c) The premium for the policy shall be paid by the policyholder, either wholly from the association's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance, nor if the Commissioner finds that the rate of such contributions will exceed the maximum rate customarily charged employees insured under like group life insurance policies issued in accordance with the provisions of paragraph (1). A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least

75% of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(d) The policy must cover at least 25 members at date of issue.

(e) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the association. No policy may be issued which provides insurance on any member which together with any other insurance under any group life insurance policies issued to the association exceeds \$20,000. (1925, c. 58, s. 1; 1931, c. 328; 1943, c. 597, s. 1; 1947, c. 834.)

Editor's Note.—The 1947 amendment rewrote this section as amended in 1931 and 1943.

For comment on the former section and

amendments thereto, see 3 N. C. Law Rev. 145; 12 N. C. Law Rev. 167; 21 N. C. Law Rev. 355. For comment on the 1947 amendment, see 25 N. C. Law Rev. 432.

§ 58-211. Group life insurance standard provisions.—No policy of group life insurance shall be delivered in this State unless it contains in substance the following provisions, or provisions which in the opinion of the Commissioner are more favorable to the persons insured, or at least as favorable to the persons insured and more favorable to the policyholder, provided, however, (a) that provisions (6) to (10) inclusive shall not apply to policies issued to a creditor to insure debtors of such creditor; (b) that the standard provisions required for individual life insurance policies shall not apply to group life insurance policies; and (c) that if the group life insurance policy is on a plan of insurance other than the term plan, it shall contain a nonforfeiture provision or provisions which in the opinion of the Commissioner is or are equitable to the insured persons and to the policyholder, but nothing herein shall be construed to require that group life insurance policies contain the same nonforfeiture provisions as are required for individual life insurance policies:

(1) A provision that the policyholder is entitled to a grace period of thirty-one days for the payment of any premium due except the first, during which grace period the death benefit coverage shall continue in force, unless the policyholder shall have given the insurer written notice of discontinuance in advance of the date of discontinuance and in accordance with the terms of the policy. The policy may provide that the policyholder shall be liable to the insurer for the payment of a pro rata premium for the time the policy was in force during such grace period.

(2) A provision that the validity of the policy shall not be contested, except for nonpayment of premiums, after it has been in force for two years from its date of issue; and that no statement made by any person insured under the policy relating to his insurability shall be used in contesting the validity of the insurance with respect to which such statement was made after such insurance has been in force prior to the contest for a period of two years during such person's lifetime nor unless it is contained in a written instrument signed by him.

(3) A provision that a copy of the application, if any, of the policyholder shall be attached to the policy when issued, that all statements made by the policyholder or by the persons insured shall be deemed representations and not warranties, and that no statement made by any person insured shall be used in any contest unless a copy of the instrument containing the statement is or has been furnished to such person or to his beneficiary.

(4) A provision setting forth the conditions, if any, under which the insurer reserves the right to require a person eligible for insurance to furnish evidence of individual insurability satisfactory to the insurer as a condition to part or all of his coverage.

(5) A provision specifying an equitable adjustment of premiums or of benefits or of both to be made in the event the age of a person insured has been misstated, such provision to contain a clear statement of the method of adjustment to be used.

(6) A provision that any sum becoming due by reason of the death of the person insured shall be payable to the beneficiary designated by the person insured, subject to the provisions of the policy in the event there is no designated beneficiary as to all or any part of such sum living at the death of the person insured, and subject to any right reserved by the insurer in the policy and set forth in the certificate to pay at its option a part of such sum not exceeding \$250 to any person appearing to the insurer to be equitably entitled thereto by reason of having incurred funeral or other expenses incident to the last illness or death of the person insured.

(7) A provision that the insurer will issue to the policyholder for delivery to each person insured an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom the insurance benefits are payable, and the rights and conditions set forth in (8), (9) and (10) following.

(8) A provision that if the insurance, or any portion of it, on a person covered under the policy ceases because of termination of employment or of membership in the class or classes eligible for coverage under the policy, such person shall be entitled to have issued to him by the insurer, without evidence of insurability, an individual policy of life insurance without disability or other supplementary benefits, provided application for the individual policy shall be made, and the first premium paid to the insurer, within thirty-one days after such termination, and provided further that,

(a) The individual policy shall, at the option of such person, be on any one of the forms, except term insurance, then customarily issued by the insurer at the age and for the amount applied for;

(b) The individual policy shall be in an amount not in excess of the amount of life insurance which ceases because of such termination, provided that any amount of insurance which shall have matured on or before the date of such termination as an endowment payable to the person insured, whether in one sum or in instalments or in the form of an annuity, shall not, for the purposes of this provision, be included in the amount which is considered to cease because of such termination; and

(c) The premium on the individual policy shall be at the insurer's then customary rate applicable to the form and amount of the individual policy, to the class of risk to which such person then belongs, and to his age attained on the effective date of the individual policy.

(9) A provision that if the group policy terminates or is amended so as to terminate the insurance of any class of insured persons, every person insured thereunder at the date of such termination whose insurance terminates and who has been so insured for at least five years prior to such termination date shall be entitled to have issued to him by the insurer an individual policy of life insurance, subject to the same conditions and limitations as are provided by (8) above, except that the group policy may provide that the amount of such individual policy shall not exceed the smaller of (a) the amount of the person's life insurance protection ceasing because of the termination or amendment of the group policy, less the amount of any life insurance for which he is or becomes eligible under any group policy issued or reinstated by the same or another insurer within thirty-one days after such termination, and (b) \$2,000.

(10) A provision that if a person insured under the group policy dies during the period within which he would have been entitled to have an individual policy issued to him in accordance with (8) or (9) above and before such an individual policy shall have become effective, the amount of life insurance which

he would have been entitled to have issued to him under such individual policy shall be payable as a claim under the group policy, whether or not application for the individual policy or the payment of the first premium therefor has been made. (1925, c. 58, s. 2; 1943, c. 597, s. 2; 1947, c. 834.)

Editor's Note.—The 1947 amendment see 21 N. C. Law Rev. 355; on the 1947 rewrote this section as amended in 1943. amendment, see 25 N. C. Law Rev. 435.

For comment on the 1943 amendment.

§ 58-211.1. Group annuity contracts defined; requirements.—Any policy or contract, except a joint, reversionary or survivorship annuity contract, whereby annuities are payable dependent upon the continuation of the lives of more than one person, shall be deemed a group annuity contract. The person, firm or corporation to whom or to which such contract is issued, as herein provided, shall be deemed the holder of such contract. The term “annuitant” as used herein, refers to any person upon whose continued life such annuity is dependent. No authorized insurer shall deliver or issue for delivery in this State any group annuity contract except upon a group of annuitants which conforms to the following: Under a contract issued to an employer, or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business, the stipulated payments on which shall be paid by the holder of such contract either wholly from the employer's funds or funds contributed by him, or partly from such funds and partly from funds contributed by the employees covered by such contract, and providing a plan of retirement annuities under a plan which permits all of the employees of such employer or of any specified class or classes thereof to become annuitants. Any such group of employees may include retired employees, and may include officers and managers as employees, and may include the employees of subsidiary or affiliated corporations of a corporation employer, and may include the individual proprietors, partners and employees of affiliated individuals and firms controlled by the holders through stock ownership, contract or otherwise. (1947, c. 721.)

Editor's Note — For comment on this section, see 25 N. C. Law Rev. 437.

§ 58-211.2. Employee life insurance defined.—Employee life insurance is hereby declared to be that plan of life insurance other than salary savings life insurance under which individual policies are issued to the employees of any employer where such policies are issued on the lives of not less than ten nor more than forty-nine employees at date of issue. Premiums for such policies shall be paid by the employer or the trustee of a fund established by the employer either wholly from the employer's funds, or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employees. (1947, c. 721.)

Editor's Note.—For comment on this section, see 25 N. C. Law Rev. 436.

§ 58-212. Voting power under policies of group life insurance.—In every group policy issued by a domestic life insurance company, the employer shall be deemed to be the policyholder for all purposes within the meaning of this chapter, and, if entitled to vote at meetings of the company, shall be entitled to one vote thereat. (1925, c. 58, s. 3.)

§ 58-213. Exemption from execution.—No policy of group insurance, nor the proceeds thereof, when paid to any employee or employees thereunder, shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such employee, or his beneficiary, or any other person who may have a right thereunder, either before or after payment; nor shall the proceeds thereof, when not made payable to a named beneficiary, constitute

a part of the estate of the employee for the payment of his debts. (1925, c. 58, s. 4.)

ARTICLE 23.

Registered Policies.

§ 58-214. **Deposits to secure registered policies.**—Any life insurance company, incorporated under the laws of this State, may deposit with the Commissioner securities of the kind authorized for the investment of the funds of life insurance companies, which shall be legally transferred by it to him as Commissioner and his successors for the common benefit of all the holders of its “registered” policies and annuity bonds issued under the provisions of this article; and these securities shall be held by him and his successors in office in trust for the purposes and objects specified herein.

All securities offered to the Commissioner for deposit under this section shall be received and held pursuant to regulations promulgated by the Commissioner. (1905, c. 504, s. 12; Rev., s. 4780; 1909, c. 920, ss. 1, 2; 1911, c. 140, s. 1; 1917, c. 191, s. 2; C. S., s. 6467; 1945, c. 379.)

Cross References.—As to investments in bonds guaranteed by the United States, see § 53-44. As to investments in bonds and notes secured by mortgages insured by the Federal Housing Administration, see § 53-45. See also § 53-60 as to investments

in federal farm loan bonds, and see § 142-29 as to investments in refunding bonds of North Carolina.

Editor’s Note.—The 1945 amendment rewrote this section.

§ 58-215. **Additional deposits may be required.**—Each company which has made deposits herein provided for shall make additional deposits from time to time, as the Commissioner of Insurance prescribes, in amounts of not less than five thousand dollars and of such securities as are described in the preceding section, so that the admitted value of the securities deposited shall equal the net value of the registered policies and annuity bonds issued by the company, less such liens not exceeding such value as the company has against it. The Commissioner shall annually value or cause to be valued such policies and shall prepare an estimate based upon probable changes in the minimum amounts to be kept on deposit for each month of the ensuing year. (1905, c. 504, s. 15; Rev., s. 4781; 1909, c. 920, s. 3; 1911, c. 140, s. 2; 1917, c. 191, s. 3; C. S., s. 6468; 1945, c. 379.)

Editor’s Note.—The 1945 amendment rewrote a part of this section.

§ 58-216. **Withdrawal of deposits.**—Any such company whose deposits exceed the net value of all registered policies and annuity bonds it has in force, less such liens not exceeding such value as the company holds against them, may withdraw such excess or it may withdraw any of such securities at any time by depositing in their place others of equal value and of the character authorized by law; and as long as such company remains solvent and keeps up its deposits, as herein required, it may collect the interest and coupons on the securities deposited as they accrue; and any life insurance company may withdraw such securities by and with the consent of the policyholder only; and in case of such withdrawal, the certificate of registration in each case must be surrendered for cancellation, or a receipt from the policyholder, satisfactory to the Commissioner of Insurance, must be produced before such withdrawal of deposits shall be allowed. (1905, c. 504, s. 18; Rev., s. 4782; 1911, c. 134; C. S., s. 6469.)

§ 58-217: Repealed by Session Laws 1945, c. 379.

§ 58-218. **Record of securities kept by Commissioner; deficit made good.**—The Commissioner of Insurance shall keep a careful record of the securities deposited by each company, and when furnishing the annual certificates

of value required in this article, he may enter thereon the face and market value of the securities deposited by such company. If at any time it appears from such certificate or otherwise that the value of securities held on deposit is less than the net value of the registered policies and annuity bonds issued by such companies, it is not lawful for the Commissioner of Insurance to execute the certificate on any additional policies or annuity bonds of such company until it has made good the deficit. If any company fails or neglects to make such deposits for sixty days the Commissioner may suspend its license to do business until such deposit be made. (1905, c. 504, s. 16; Rev., s. 4784; C. S., s. 6471; 1945, c. 379.)

Editor's Note.—The 1945 amendment struck out the word "hereafter" formerly appearing before the word "required" in the first sentence, and substituted in the last sentence the words "the Commissioner may suspend its license to do business until such deposit be made" for the words "it shall be deemed to be insolvent and shall be proceeded against in the manner provided by law in such cases."

§ 58-219. **Registered policies certified.**—After making the deposits provided for in this article no company may issue a policy of insurance or endorsement or an annuity bond known or designated as "registered" unless it has upon its face a certificate in the following words: "This policy or annuity bond is registered and secured by pledge of bonds, stocks, or securities deposited with this Department as provided by law," which certificate shall be signed by the Commissioner of Insurance and sealed with the seal of his office. Such policies and bonds shall be known as "registered" policies and annuity bonds, and a sample copy of such kind, class, and issue shall be kept in the office of the Commissioner of Insurance. All policies and bonds of each kind and class issued, and the copies thereof, filed in the office of the Commissioner of Insurance must have imprinted thereon some appropriate designating letter, combination of letters or terms identifying the special forms of contract, together with the year of adoption of such form, and whenever any change or modification is made in the form of contracts, policy, or bond, the designating letters or terms and year of adoption thereon shall be changed accordingly. (1905, c. 504, s. 13; Rev., s. 4785; C. S., s. 6472.)

§§ 58-220, 58-221: Repealed by Session Laws 1945, c. 379.

§ 58-222. **Power of Commissioner in case of insolvency.**—If at any time the affairs of a life insurance company which has deposited securities under the provisions of this article, in the opinion of the Commissioner of Insurance, appear in such condition as to render the issuing of additional policies and annuity bonds by such company injurious to the public interest, the Commissioner of Insurance may take such proceedings against the company as are authorized by law to be taken against other insolvent companies, and said companies are in all respects subject to the provisions of law affecting other companies. (1905, c. 504, s. 20; Rev., s. 4788; C. S., s. 6475.)

§ 58-223. **Fees for registering policies.**—Every company making deposits under the provisions of this article must pay to the Commissioner of Insurance for each certificate on registered policies or annuity bonds, including seal, a fee of fifty cents for those exceeding ten thousand dollars in amount and twenty-five cents for all under ten thousand dollars in amount, except policies for one hundred dollars and not exceeding five hundred dollars the fee shall be fifteen cents; for policies of one hundred dollars or less the fee shall be ten cents. (1905, c. 504, s. 21; Rev., s. 4789; C. S., s. 6476; 1945, c. 379.)

Editor's Note.—The 1945 amendment struck out from the end of the section the words "for each certificate, including seal, the fee shall be twenty-five cents."

§ 58-223.1. **Registration of policies.**—After January first, one thousand nine hundred and forty-seven, the Commissioner shall not register any

new policies that are issued by any company, nor accept any deposits covering reserves on business thereafter written. (1945, c. 379.)

ARTICLE 24.

Mutual Burial Associations.

§ 58-224. **Mutual burial associations placed under supervision of Burial Association Commissioner.**—All mutual burial associations now organized and operating in the State of North Carolina, and all mutual burial associations hereafter organized and operating within said State, shall be under the general supervision of a Burial Association Commissioner to be appointed by the Governor of the State of North Carolina, whose term shall be for a period of four years and his salary to be fixed by the Governor. (1941, c. 130, s. 2.)

Editor's Note.—This and the following sections down through § 58-241 became effective on July 1, 1941.

§ 58-225. **Maintenance of separate branches, when operated for benefit of both races.**—All burial associations now operating in the State of North Carolina and all burial associations hereafter organized and operated in the State of North Carolina, for the benefit of both races, shall maintain and operate two separate branches, and the provisions of article 24 shall apply to each branch as a separate association, except as hereinafter provided. (1941, c. 130, s. 3.)

§ 58-226. **Requirements as to rules and bylaws.**—All burial associations now operating within the State of North Carolina, and all burial associations hereafter organized and operating within the State of North Carolina shall have and maintain rules and bylaws embodying the following:

Article 1. The name of this association shall be which shall indicate that said association is a mutual burial association.

Article 2. The objects and purposes for which this association is formed and the purposes for which it has been organized, and the methods and plan of operation of any association already organized, shall be to provide a plan for each member of this association for the payment of one funeral benefit for each member, which benefit shall consist of a funeral in merchandise and service, with no free embalming or free ambulance service included in such benefits; and in no case shall any cash be paid. No other free service or any other thing free shall be held out, promised or furnished in any case. Such funeral benefit shall be in the amount of one hundred dollars (\$100.00) of merchandise and service, without free embalming or free ambulance service, for persons of the age of ten years and over, and in the amount of fifty dollars (\$50.00) for persons under the age of ten years.

Article 3. Any person of either the white or colored race who has passed his or her first birthday, and who has not passed his or her sixty-fifth birthday, and who is in good health and not under treatment of any physician, nor confined in any institution for the treatment of mental or other disease, may become a member of such burial association by the payment of a membership fee by such person, or for such person, of twenty-five cents. Applicant's birthday must be written in the application and subject to verification by any record the Burial Association Commissioner may deem necessary to prove or establish a true date of the birth of any applicant.

Article 4. The annual meeting of the association shall be held at (here insert the place, date and hour); each member shall have one vote at said annual meeting and fifteen members of the association shall constitute a

quorum. There shall be elected at the annual meeting of said association a board of directors of seven members, each of whom shall serve for a period of from one to five years as the membership may determine and until his or her successor shall have been elected and qualified. Any member of the board of directors who shall fail to maintain his or her membership, as provided in the rules and bylaws of said association, shall cease to be a member of the board of directors and a director shall be appointed by the president of said association for the unexpired term of such disqualified member. There shall be at least an annual meeting of the board of directors, and such meeting shall be held immediately following the annual meeting of the membership of the association. The directors of the association may, by a majority vote, hold other meetings of which notice shall be given to each member by mailing such notice five days before the meeting to be held. At the annual meetings of the directors of the association, the board of directors shall elect a president, a vice-president, and a secretary-treasurer. The president and vice-president shall be elected from among the directors, but the secretary-treasurer may be selected from the director membership or from the membership of the association, it being provided that it is not necessary that the secretary-treasurer shall be a member of the board of directors. Among other duties that the secretary-treasurer may perform, he shall be chargeable with keeping an accurate and faithful roll of the membership of this association at all times and he shall be chargeable with the duty of faithfully preserving and faithfully applying all moneys coming into his hands by virtue of his said office. The president, vice-president and secretary-treasurer shall constitute a board of control who shall direct the affairs of the association in accordance with these articles and the bylaws of the association, and subject to such modification as may be made or authorized by an act of the General Assembly. The secretary-treasurer shall keep a record of all assessments made, dues collected and benefits paid. The books of the association, together with all records and bank accounts shall be at all times open to the inspection of the Burial Association Commissioner or his duly constituted auditors or representatives. It shall be the duty of the secretary or secretary-treasurer of each association to keep the books of the association posted up to date so that the financial standing of the association may be readily ascertained by the Burial Association Commissioner or any auditor or representative employed by him. Upon the failure of any secretary or secretary-treasurer to comply with this provision, it shall be the duty of the Burial Association Commissioner to employ an auditor or bookkeeper to take charge of the books of the association and do whatever work is necessary to bring the books up to date. The Burial Association Commissioner shall have the power and authority to set a fee sufficient to pay the said auditor or bookkeeper for the work done upon the books of said association and the secretary or secretary-treasurer of the association shall pay the fees as specified by the Burial Association Commissioner out of the funds of the burial association. This fee must be included in the twenty-five per cent allowed by law for the operation of the burial associations.

Article 5. Upon the death of any officer, his successor shall be elected by the board of directors for the unexpired term. The president, vice-president and secretary-treasurer shall be elected for a term of from one to five years, and shall hold office until his successor is elected and qualified, subject to the power of the board of directors to remove any officer for good cause shown: Provided, that any officer removed by the board of directors shall have the right of appeal to the membership of the association, such appeal to be heard at the next ensuing annual meeting of said membership.

Article 6. Each member shall be assessed according to the following schedule (or in multiples thereof) at the age of entry of the member: Provided, those members joining at ages under ten shall be charged with the assessment for age ten when they reach their tenth birthday:

ASSESSMENT RATE FOR AGE GROUPS:

| | |
|--|--------------------|
| First to tenth birthday | five cents (5c) |
| Tenth to thirtieth birthday | ten cents (10c) |
| Thirtieth to fiftieth birthday | twenty cents (20c) |
| Fiftieth to sixty-fifth birthday | thirty cents (30c) |

(Ages shall be defined as having passed a certain birthday instead of nearest birthday.) Assessment shall always be made on the entire membership in good standing.

Article 7. No benefit will be paid for natural death occurring within thirty days from the date of the certificate of membership, which certificate shall express the true date such person becomes a member of this association, and the certificate issued shall be in acknowledgment of membership in this association. Benefits will be paid for death caused by accidental means occurring any time after date of membership certificate. No benefits will be paid in case of suicidal death of any member within one year from the date of the membership certificate. No agent or other person shall have authority to issue membership certificates in the field, but such membership certificates shall be issued at the home office of the association by duly authorized officers: The president, vice-president or secretary, and a record thereof duly made.

Article 8. Any member failing to pay any assessment within thirty days after notice shall be in bad standing, and unless and until restored, shall not be entitled to benefits. Notice shall be presumed duly given when mailed, postage paid, to the last known address of such members: Provided, moreover, that notice to the head of a family shall be construed as notice to the entire membership of such family in said association. Any member or head of a family changing his or her address shall give notice to the secretary-treasurer in writing of such change, giving the old address as well as the new, and the head of a family notifying the secretary-treasurer of change in address shall list with the secretary in such notice all the members of his or her family having membership in said association. Any member in bad standing may, within ninety days after the date of an assessment notice, be reinstated to good standing by the payment of all delinquent dues and assessments: Provided such person shall at the same time submit to the secretary-treasurer satisfactory evidence of good health, in writing, and no benefit will be paid for natural death occurring within thirty days after reinstatement. In case of death caused by accidental means, benefit will be in force immediately after reinstatement. Any person desiring to discontinue his membership for any reason shall communicate such desire to the secretary-treasurer immediately and surrender his or her certificate of membership. Any adult member who is the head of a family, and who, with his family, has become in bad standing, shall furnish to the secretary-treasurer satisfactory evidence of the good health of each member desired to be reinstated in writing.

Article 9. The benefits herein provided are for the purpose of furnishing a funeral and burial service for a deceased member. The service shall be in keeping with the services and casket, sold at the same price, similar to that provided and charged by reputable funeral directors of this or other like communities.

Article 10. It is understood and stipulated that the funeral and burial service provided in article nine hereof shall be rendered by (give name of funeral director and town), which funeral director is designated in these rules and bylaws as the official funeral director of this association, and such funeral director shall be, by the secretary-treasurer of this association, immediately notified upon the death of any member, and upon the death of any member it shall be the duty of his or her nearest relative to notify the secretary-treasurer of the association of the death of such member. In the event a member in good standing shall die at a place beyond the territory served by the above named funeral director, the secretary of this association, being notified of such death, shall cause the de-

ceased to receive a funeral and burial service equal to that provided for in these bylaws. The benefits provided for are to be payable to the funeral director rendering such funeral and burial service, which payment the secretary-treasurer is authorized to make. If the secretary-treasurer of the association shall fail, on demand, to provide the benefits as listed in article nine of these rules and bylaws by arrangement with the official funeral director serving the community in which the services are required, then the benefits shall be paid in cash to the representative of the deceased qualified under law to receive such payments.

Article 11. If the proceeds of one assessment on the entire membership produces more than enough for burial or burials, on account of which said assessment is made, the balance shall be placed in the treasury of the association to apply on future burials. Assessments shall be made in such multiples of the assessment rate as is necessary to provide a fund to take care of anticipated death. Whenever possible, assessments will be made at definitely stated intervals so as to reduce the cost of collection and to prevent lapse.

Article 12. In the event the proceeds of one assessment on the entire membership does not prove sufficient at any time to yield the benefit provided for in these bylaws, then the secretary-treasurer shall notify the Burial Association Commissioner who shall be authorized, unless the membership is increased to that point where such assessment is sufficient, to cause liquidation of said association, and may transfer all members in good standing to a like organization or association.

Article 13. All legitimate operating expenses of the association shall be paid out of the assessments, but in no case shall the entire expenses exceed twenty-five per cent of the assessments collected, in any one calendar year. In the event the association fails to expend the twenty-five per cent (25%) allowed herein by the thirty-first day of December of any year, then that amount not used shall be placed in the surplus.

Article 14. Special meetings of the association membership may be called by the secretary-treasurer when by him deemed necessary or advisable, and he shall call a meeting when petitioned to do so by sixty-six and two-thirds per cent of the members of said association who are in good standing.

Article 15. The secretary-treasurer shall, upon satisfactory evidence that membership was granted to any person not qualified at the time of entry as provided under article three of these bylaws, refund any amounts paid as assessment, and shall remove the name from the membership roll.

Article 16. Any member may pay any number of assessments in advance, in which case such member will not be further assessed until a like number of assessments shall have been levied against the remaining membership.

Article 17. No person may maintain active membership in two separate burial associations and, upon evidence that membership is maintained contrary to this article, the secretary-treasurer may call upon such member to forfeit all benefits and fees paid in either one or the other of the associations. Any person who is found to have maintained membership in two associations shall forfeit all benefits and fees paid in the second association of which he became a member, unless the membership in the original association was discontinued or such association had been placed in liquidation.

Article 18. Each year, before the annual meeting of the membership of this association, the association shall cause to be published in a newspaper of general circulation in the county in which such association has its principal place of business, or shall cause to be mailed to each member in good standing a statement showing total income collected, expenses paid and burial benefits provided for by such association during the next preceding year.

Article 19. These rules and bylaws shall not be modified, canceled or abridged by any association or other authority except by act of the General Assembly of

North Carolina. (1941, c. 130, s. 4; 1943, c. 272, ss. 1, 2; 1945, c. 125, s. 1; 1947, c. 100, s. 1; 1949, c. 201, ss. 1, 2.)

Editor's Note.—The 1943 amendment added the last four sentences of article 4 and changed the fifth sentence from the end of the article. And the amendment struck out the words "and the frequency of the assessments will be governed by the death rate within the association," formerly appearing at the end of article 6. It also struck out the words "until the next assessment period" formerly appearing as the latter part of the second sentence of article 11. The amendment increased the amount stated in the former third sentence of article 13.

The 1945 amendment struck out the words "in substance" formerly appearing after the word "embodying" in the preliminary paragraph. It also struck out from article 4 the following words: "The secretary-treasurer shall be the only paid

officer of the association and his compensation shall be fixed by the board of directors." The amendment changed article 13 by adding the words "in any one calendar year" to the first sentence, inserting the second sentence and increasing the amount in the former third sentence. The 1947 amendment also increased such amount. The 1949 amendment struck out the former third sentence of article 13 and rewrote article 18.

Members are bound by subsequent legislation making changes in the rules and by laws of burial associations, and changes so made are not offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. *Spearman v. United Mut. Burial Ass'n*, 225 N. C. 185, 33 S. E. (2d) 895 (1945).

§ 58-227. Limitation of soliciting agents; licensing and qualifications; officers exempt from license; issuance of membership certificates.

—Each burial association shall have for each funeral home serving the said burial association not more than five agents or representatives soliciting members other than the secretary-treasurer and president, and before any agent or representative shall or may represent any burial association in North Carolina, he or she shall first apply to the Burial Association Commissioner of North Carolina for a license, and the Burial Association Commissioner shall have full power and authority to issue such license upon proof satisfactory to such Commissioner that such person is capable of soliciting burial association memberships, is of good moral character and recommended by the association in behalf of which such membership solicitations are to be made. The Burial Association Commissioner may reject the application of any person who does not meet the requirements set out by him, as to capacity and moral fitness on recommendations by the association. The Burial Association Commissioner may, upon proof satisfactory to himself that said licensed agent has violated any section of this law, revoke said license. Upon the issuing of a license to solicit membership in any burial association, such person shall be required to pay in cash, at the time of issuing license to such applicant, to the Burial Association Commissioner, the sum of five dollars (\$5.00); moneys derived from this fee or charge to be and remain in the department or office of such Burial Association Commissioner, for supervision of burial associations in this State, subject to withdrawal for expenses of supervision by authority of the Burial Association Commissioner. It shall not be necessary that the president or secretary-treasurer of any burial association shall obtain a license for soliciting membership in any association, of which such person is president or secretary-treasurer. Membership certificates shall not be issued by a solicitor in the field, but shall be reported to the office of the association and there issued and a record made of such issuance at the time such certificate is so issued. (1941, c. 130, s. 5; 1945, c. 125, s. 2; 1947, c. 100, s. 2; 1949, c. 201, s. 3.)

Editor's Note.—The 1945 amendment inserted the third sentence. The 1947 amendment inserted in the first sentence the words "for each funeral home serving

the said burial association." And the 1949 amendment reduced the license fee from \$10.00 to \$5.00.

§ 58-228. Assessments against associations for supervision expense.

—In order to meet the expense of supervision, the Burial Association Commis-

sioner shall prorate the amount of the supervisory cost (over and above any other funds in his hands for this purpose), and assess each association on a pro rata basis in accordance with the number of members of each association, which total assessment shall in no case exceed thirty-six thousand five hundred dollars (\$36,500.00), and each such association shall remit to the Burial Association Commissioner its pro rata part of the assessment, as fixed by the Burial Association Commissioner, which expense shall be included in the twenty-five per cent expense allowance as provided in article 13. This assessment shall be made on the first day of July of each and every year and said assessment shall be paid within thirty days thereafter. In case any association shall fail or refuse to pay such assessment within thirty days, it shall be the duty of the Burial Association Commissioner to transfer all memberships and assets of every kind and description to the nearest next association that is found by the Burial Association Commissioner to be in good sound financial condition. (1941, c. 130, s. 6; 1943, c. 272, s. 3; 1945, c. 125, s. 3; 1947, c. 100, s. 3; 1949, c. 201, s. 4.)

Editor's Note.—The 1943 amendment added the second and third sentences, and limited the assessment to \$25,000.00. The 1945 amendment increased the limit to \$26,500.00, the 1947 amendment increased the limit to \$31,500.00, and the 1949 amendment increased it to \$36,500.00.

§ 58-229. Unlawful to operate without written authority of Commissioner.—It shall be unlawful for any person, firm or corporation, association or organization to organize, operate, or in any way solicit members for a burial association, or for participation in any plan, scheme, or device similar to burial associations, without the written authority of the Burial Association Commissioner, and any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than two hundred and fifty dollars (\$250.00) or imprisoned not less than twelve months, or both, in the discretion of the court: Provided, however, the Burial Association Commissioner shall not withhold authority for the organization or operation of a bona fide burial association, meeting the requirements of this article, unless it shall be found and established to the satisfaction of the Burial Association Commissioner that the person or persons applying for authority to organize and operate such bona fide burial association is disqualified or does not meet the requirements of article 24. (1941, c. 130, s. 7.)

§ 58-229.1. Revocation of license.—In the event it is proven to the satisfaction of the Burial Association Commissioner that any burial association is being operated not in conformity with one or more sections of chapter fifty-eight, article twenty-four of the General Statutes of North Carolina, or it is proven to the satisfaction of the Burial Association Commissioner that the official funeral director, or directors, are not adequately equipped to render the services provided for by said article, then it shall become the duty of the Burial Association Commissioner upon hearing to revoke the license of said burial association and transfer said burial association, its membership and all its assets of every kind and description to another burial association that is found by the Burial Association Commissioner to be in good sound financial condition: Provided, that if said burial association gives notice of appeal as provided for in § 58-236, then said burial association shall continue to operate as before the revocation and until final adjudication. (1945, c. 125, s. 4.)

§ 58-230. Penalty for failure to operate in substantial compliance with article 24.—If any burial association or other organization or official thereof, or any person operates or allows to be operated a burial association on any plan, scheme or bylaws not in substantial compliance with the bylaws set forth in § 58-226, the Burial Association Commissioner may revoke any authority or license granted for the operation of such burial association, and any person, firm or corporation or association convicted of the violation of this section shall be

guilty of a misdemeanor and shall be fined not less than two hundred and fifty dollars (\$250.00) or imprisoned not less than one year in jail, or both, in the discretion of the court. (1941, c. 130, s. 8.)

§ 58-231. Penalty for wrongfully inducing person to change membership.—Any burial association official, agent or representative thereof or any person who shall use fraud or make any promise not part of the printed bylaws, or who shall offer any rebate, gratuity or refund to cause a member of one association to change membership to another association, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars (\$250.00) or imprisoned not less than one year in jail, or both, in the discretion of the court. (1941, c. 130, s. 9.)

§ 58-232. Penalty for making false and fraudulent entries.—Any person or burial association official who makes or allows to be made any false entry on the books of the association with intent to deceive or defraud any member thereof, or with intent to conceal from the Burial Association Commissioner or his deputy or agent, or any auditor authorized to examine the books of such association, under the supervision of the Burial Association Commissioner, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars (\$250.00), or imprisoned in the common jail for not less than twelve months, or both, in the discretion of the court. (1941, c. 130, s. 10; 1945, c. 125, s. 5.)

Editor's Note.—The 1945 amendment inserted near the beginning of the section the words "person or."

§ 58-233. Accepting application without collecting fee.—Any burial association official, agent or representative, or any other person who shall accept an application for membership in any association without collecting the fee from any such person making such application for membership, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars (\$250.00), or imprisoned not less than twelve months in the common jail, or both, in the discretion of the court. (1941, c. 130, s. 11.)

§ 58-234. Removal of secretary-treasurer for failure to maintain proper records.—Any burial association secretary or secretary-treasurer who fails to maintain records to the minimum standards required by the Burial Association Commissioner shall be by such Commissioner removed from office and another elected in his stead, such election to be immediate and by the board of directors of said burial association upon notice of such removal. (1941, c. 130, s. 12.)

§ 58-235. Acceptance of donations, failure to make proper assessments, etc., made misdemeanor.—Any person or persons who accept donations from any source, or who contribute money or funeral services or free embalming, free ambulance service or any other thing free of charge, acting for any burial association, directly or indirectly, or who so acting shall in any way fail to assess for the amount needed to pay death losses and allowable expenses, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars (\$250.00) or imprisoned in the common jail for not less than twelve months, or both, in the discretion of the court. (1941, c. 130, s. 13.)

§ 58-236. Right of appeal upon revocation of license.—Upon the revocation of any license or authority by the Burial Association Commissioner, under any of the provisions of article 24, the said association or individual whose license has been revoked, shall have right of appeal from the action of said Burial Association Commissioner revoking such license or authority to the superior court of the county in which such burial association may be located: Provided, said as-

sociation shall give notice of appeal in writing to the Burial Association Commissioner within ten days from the date of order revoking the said license and the said association giving notice of appeal shall deposit with the Burial Association Commissioner an amount sufficient to cover appeal fees, which the Burial Association Commissioner shall pay to the clerk of the superior court. Upon receipt of said notice of appeal, the Burial Association Commissioner shall file with the clerk of the superior court of the county in which the burial association is located the decision of the Burial Association Commissioner and the clerk of the superior court shall transfer the appeal to the civil issue docket as in cases of appeal from a justice of the peace and the same shall be heard *de novo*. If upon the revocation of a license of a burial association by the Burial Association Commissioner and where the burial association gives the proper notice of appeal, the burial association shall be permitted to operate until a final decision has been made by the higher court. (1941, c. 130, s. 14; 1943, c. 272, s. 4.)

Editor's Note.—The 1943 amendment struck out the words "as in other cases of appeal, and the matter shall be heard *de novo*," formerly ending the first sentence, and inserted in place thereof all of the section beginning with the proviso.

§ 58-237. Bond of secretary or secretary-treasurer of burial associations.—The secretary or secretary-treasurer of any burial association shall, before entering upon the duties of his office and for the faithful performance thereof, execute a bond payable to the association in some bonding company licensed to do business in this State, to be approved by the Burial Association Commissioner, in a sum not less than twenty-five per cent of the surplus of the said association as shown by the financial statement rendered December thirty-first of each year, but in no event shall said bond be less than one thousand dollars (\$1,000.00) and the said bond shall be deposited with the Burial Association Commissioner for safekeeping: Provided, that if any association operates a branch for members of a colored race and the officers of both associations are the same, then the provisions of this section shall apply as of one association: Provided, further, however, that any burial association, with the consent and approval of the Burial Association Commissioner, may give a bond secured by deed of trust on real estate situated in North Carolina, in lieu of procuring said bond from a bonding company; and the bond thus given is not to exceed the tax value for the current year of the real estate securing the same. The said deed of trust is to be deposited with the Burial Association Commissioner and the said deed of trust must constitute a first lien on the property secured by the deed of trust. (1941, c. 130, s. 15; 1943, c. 272, s. 5.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 58-237.1. Number of assessments; reduction and increase.—Each association shall make not less than eight single or four double assessments per annum until such association shall have on hand a surplus of three dollars (\$3.00) per member as shown on the annual statement herein required to be filed by the association. When any association has accumulated such surplus, the association, with the consent of the Burial Association Commissioner may reduce the number of assessments to be made in any one year, which number shall be fixed by the Burial Association Commissioner: Provided, however, that the Burial Association Commissioner shall have the power to increase the number of assessments to be made in any one year when in his opinion the same shall be necessary in order to take care of the death loss. (1943, c. 272, s. 6.)

§ 58-237.2. Minimum membership required.—Each burial association shall at all times maintain an active membership of at least eight hundred members and should any association fail to secure the same within ninety days from the date of the granting of its charter, or at any time allow its active membership to fall below eight hundred members, the Burial Association Commissioner shall re-

voke its license and transfer its membership to another association. (1943, c. 272, s. 6.)

§ 58-237.3: Repealed by Session Laws 1947, c. 100, s. 4.

§ 58-237.4. **Making false or fraudulent statement a misdemeanor.**—Any officer or employee of any burial association authorized to do business under this article, who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership or for the purpose of obtaining money from or benefit any burial association transacting business under this article, or who shall make any false financial statement to the Burial Association Commissioner or to its membership shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1943, c. 272, s. 6.)

§ 58-238. **State-wide organization of associations.**—It shall be lawful for the several mutual burial associations of the State of North Carolina, in good standing, to organize and provide for a state-wide organization of mutual burial associations, which organization shall be for the mutual and general suggestive control of mutual burial associations in the State of North Carolina. Such organization shall have such name as agreed upon by the membership in meetings, and to be composed of members as are lawfully operating in the State and who pay their dues to such association. (1941, c. 130, s. 16.)

§ 58-239. **Article 24 deemed exclusive authority for organization, etc., of mutual burial associations.**—Article 24 shall be deemed and held exclusive authority for the organization and operation of mutual burial associations within the State of North Carolina, and such associations shall not be subject to any other laws respecting insurance companies of any class. (1941, c. 130, s. 17.)

§ 58-240. **Operation of association in violation of law prohibited.**—No person, firm or corporation shall operate as a burial association in this State unless incorporated under the laws of the State of North Carolina, or be composed of a membership constituting an association complying with all the rules, regulations, sections and articles of article 24; and licensed and approved by the Burial Association Commissioner of the State of North Carolina. (1941, c. 130, s. 18.)

§ 58-241. **Appointment and removal of Burial Association Commissioner; bond.**—The Burial Association Commissioner provided for in this article shall be appointed by the Governor for a term of four years, subject to removal for cause, and shall hold office until his successor is appointed and qualified. Such Burial Association Commissioner shall give bond approved by the Insurance Commissioner of the State of North Carolina in the sum of ten thousand dollars (\$10,000.00), conditioned for his faithful application of all funds coming into his hands by virtue of his office. (1941, c. 130, s. 19.)

§ 58-241.1. **Election for benefits or return of assessments on death of member in armed forces.**—If any member of a burial association who is in good standing should die while serving in the military or naval forces of the United States, the spouse, if there is one, or the next of kin in the event there is no spouse, shall be entitled to elect between the benefits prescribed in the bylaws of the burial association and the return of assessments paid into the burial association by the deceased member. Such election must be made within one year from the official notification of death. Acceptance by the spouse or the next of kin of paid-in assessments shall be a complete release to the burial association. In the event the spouse or next of kin shall not elect to receive the paid-in assessments as settlement of all claims against the burial association, then the spouse or next of kin shall be entitled to the benefits prescribed by the bylaws of the burial

association at any time the body of the deceased is returned for burial to the territory served by the burial association. (1943, c. 732, s. 1.)

No Recovery by Personal Representative of Deceased.—The spouse or next of kin of a member of a mutual burial association serving in the armed forces, who dies overseas, may elect to have return of the paid-in assessments in settlement, or to have the prescribed funeral benefits at any time the

body of deceased is returned for burial to the territory served by the burial association; and the personal representative of the deceased may not recover the prescribed funeral benefits. *Spearman v. United Mut. Burial Ass'n*, 225 N. C. 185, 33 S. E. (2d) 895 (1945).

§ 58-241.2. Member in armed forces failing to pay assessments; reinstatement.—If a member of a burial association who is in the military or naval forces of the United States fails to pay any assessment, he shall be in bad standing, and unless and until restored, shall not be entitled to benefits. However, the said member shall be reinstated in the burial association upon application made by him at any time until twelve months after his discharge from the military or naval forces of the United States, notwithstanding his physical condition and without the payment of assessments which have become due during his service in the military or naval forces of the United States. Benefits will be in force immediately after such reinstatement. (1943, c. 732, s. 2.)

§ 58-241.3. Prior death of member in armed forces.—If a member of a burial association who was in good standing has, before March 9, 1943, died while serving in the military or naval forces of the United States, the provisions of § 58-241.1 shall be applicable: Provided, the spouse, if there is one, or the next of kin in the event there is no spouse, must elect to receive the paid-in assessments within one year after March 9, 1943, or be deemed to have elected to receive benefits provided by the bylaws of the burial association. (1943, c. 732, s. 3.)

§ 58-241.4. Hearing by Commissioner of dispute over liability for funeral benefits; appeal.—In case of a disagreement between the representative of a deceased member of any burial association and the association a hearing may be held by the Burial Association Commissioner on request of either party to determine whether the association is liable for the benefits set forth in the policy issued to the said deceased member of said burial association. The Burial Commissioner shall render a decision which shall have the same force and effect as judgments rendered by courts of competent jurisdiction in North Carolina. Either party may appeal from the decision of the Burial Commissioner to the superior court of the county in which the burial association is located as provided in § 58-236 hereof. (1947, c. 100, s. 5.)

SUBCHAPTER V.

AUTOMOBILE LIABILITY INSURANCE.

ARTICLE 25.

Regulation of Automobile Liability Insurance Rates.

§§ 58-242 to 58-245: Repealed by Session Laws 1945, c. 381, s. 2.

§ 58-246. North Carolina Automobile Rate Administrative Office created; objects and functions; hearings on rates.—There is hereby created a bureau to be known as the North Carolina Automobile Rate Administrative Office which office shall be established in the Compensation Rating and Inspection Bureau of North Carolina, created under § 97-102 and shall be a branch and under the management of the general manager of the Compensation Rating and Inspection Bureau of North Carolina, with the following objects, functions and sources of income:

(a) To maintain rules and regulations and fix rates for automobile bodily in-

jury and property damage insurance and equitably adjust the same as far as practicable in accordance with the hazard of the different classes of risks as established by said bureau.

(b) To furnish upon request of any person carrying this form of insurance in the State or to any member of the North Carolina Automobile Rate Administrative Office, upon whose risk a rate has been promulgated, information as to the rating, including the method of its capitulation, and to encourage safety on the highways and streets of the State, by offering reduced premium rates under a uniform system of experience rating as may be approved by the Commissioner of Insurance.

(c) The bureau shall provide reasonable means to be approved by the Commissioner whereby any person affected by a rate made by it may be heard in person or by his authorized representative before the governing or rating committee or other proper executive of the bureau.

(d) The bureau shall not have authority to maintain rules and regulations nor fix rates for bodily injury and property damage insurance for operators of motor vehicles who are required by law to carry any such insurance. The provisions of this subsection shall not apply to private passenger cars or taxicabs required by law to carry bodily injury and property damage insurance. (1939, c. 394, s. 1; 1945, c. 381, s. 2; 1947, cc. 1068, 1073.)

Editor's Note.—The 1945 amendment subsection (c). The 1947 amendments made changes in subsection (a) and added subsection (d).

§ 58-247. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses; Commissioner of Insurance ex officio chairman.—Before the Commissioner of Insurance shall grant permission to any stock, nonstock, or reciprocal insurance company or any other insurance organization to write automobile bodily injury and property damage insurance in this State, it shall be a requisite that they shall subscribe to and become members of the North Carolina Automobile Rate Administrative Office.

(a) Each member of the North Carolina Automobile Rate Administrative Office writing the above classes of insurance in North Carolina shall, as a requisite thereto, be represented in the aforesaid bureau and shall be entitled to one representative and one vote in the administration of the affairs of the bureau. They shall, upon organization, elect a governing committee which governing committee shall be composed of equal representation by stock and nonstock members.

(b) The bureau, when created, shall adopt such rules and regulations for its orderly procedure as shall be necessary for its maintenance and operation. No such rules and regulations shall discriminate against any type of insurer because of its plan of operation, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. The expense of such bureau shall be borne by its members by quarterly contributions to be made in advance, such contributions to be made in advance by prorating such expense among the members in accordance with the amount of gross premiums derived from automobile bodily injury and property damage insurance in North Carolina during the preceding year ending December 31, 1938, and members entering such bureau since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the bureau the necessary expense of the bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee.

(c) The Commissioner of Insurance of the State of North Carolina, or such deputy as he may appoint, shall be ex officio chairman of the North Carolina Automobile Rate Administrative Office and shall preside over all meetings of the governing committee or other meetings of the bureau and it shall be his duty to

determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1939, c. 394, s. 2; 1945, c. 381, s. 2.)

Editor's Note.—The 1945 amendment inserted the word "and" in the first paragraph and struck out the words "and collision" formerly appearing after the word "damage." It made the same changes in the third sentence of subsection (b) and inserted the second sentence thereof.

§ 58-248. Personnel and assistants; general manager; authority of Commissioner of Insurance.—In order to carry into effect the objects of §§ 58-246 to 58-248, the bureau members shall immediately elect its governing committee who shall employ and fix the salaries of such personnel and assistants as are necessary, but the general manager of the Compensation Rating and Inspection Bureau of North Carolina shall be the general manager also of the North Carolina Automobile Rate Administrative Office and the Commissioner of Insurance is hereby authorized to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the pure cost and expense loading of automobile bodily injury and property damage insurance in North Carolina and this information shall be available and for the use of the North Carolina Automobile Rate Administrative Office for the capitulation and promulgation of rates on automobile bodily injury and property damage insurance. All such rates compiled and promulgated by such bureau shall be submitted to the Commissioner of Insurance for approval and no such rates shall be put into effect in this State until approved by the Commissioner of Insurance and not subsequently disapproved: Provided §§ 58-246 to 58-248 shall not apply to publicly owned vehicles. (1939, c. 394, s. 3; 1945, c. 381, s. 2.)

Editor's Note.—The 1945 amendment deleted former references to collision insurance.

§ 58-248.1. Order of Commissioner revising improper rates, classifications and classification assignments.—Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest. (1945, c. 381, s. 2.)

§ 58-248.2. Insurance policy must conform to rates, etc., filed by rating bureau; when deviation allowed.—No insurer, officer, agent or representative thereof shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this State which does not conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the rating bureau. However, an insurer may deviate from the rates promulgated by the rating bureau provided the insurer has filed the deviation to be applied both with the rating bureau and the Commissioner, and provided the said deviation is uniform in its application to all risks in the State of the class to which such deviation is to apply; and provided such deviation is approved by the Commissioner. If approved the deviation shall remain in force for a period of one year from the date of approval by the Commissioner. Such deviation may be renewed annually subject to all of the foregoing provisions. A rate in excess of that promulgated by the rating bureau may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the Commissioner. (1945, c. 381, s. 2.)

§ 58-248.3. Revocation or suspension of license for violation of

article.—If the Commissioner shall find, after due notice and hearing that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 381, s. 2.)

§ 58-248.4. **Punishment for violation of article.**—Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars. (1945, c. 381, s. 2.)

§ 58-248.5. **Review of order of Commissioner.**—A review of any order made by the Commissioner in accordance with the provisions of this article shall be by appeal to the superior court of Wake County in accordance with the provisions of § 58-9.3. (1945, c. 381, s. 2.)

§ 58-248.6. **Appeal to Commissioner from decision of bureau.**—Any member of the bureau may appeal to the Commissioner from any decision of such bureau and the Commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 381, s. 2.)

SUBCHAPTER VI.

ACCIDENT AND HEALTH INSURANCE.

ARTICLE 26.

Nature of Policies.

§ 58-249. **Form, classification, and rates to be approved by Commissioner of Insurance.**—No policy of insurance against loss or damage from the sickness or the bodily injury or death of the insured by accident shall be issued or delivered to any person in this State until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with, and the forms approved by, the Commissioner of Insurance. If the Commissioner shall notify, in writing, the company or other insurer which has filed such form that it does not comply with the requirements of law, specifying the reasons for his opinion, it shall be unlawful thereafter for any such insurer to issue any policy in such form. The action of the Commissioner in this regard shall be subject to review by any court of competent jurisdiction; but nothing in this article shall be construed to give jurisdiction to any court not already having jurisdiction. (1911, c. 209, s. 1; 1913, c. 91, s. 1; C. S., s. 6477; 1945, c. 385.)

Editor's Note.—The 1945 amendment inserted near the end of the first sentence the words "and the forms approved by," and struck out the word "society" formerly appearing after the word "company" near the beginning of the second sentence. It

also struck out from the end of the first sentence the words "nor shall it be so issued or delivered until the expiration of thirty days after it has been so filed unless the Commissioner shall sooner give his written approval thereto."

§ 58-250. **Specifications as to form of policy.**—No such policy which purports to insure only one person shall be delivered or issued for delivery in this State (1) unless the entire money and other considerations therefor are expressed in the policy; nor (2) unless the time at which the insurance thereunder takes effect and terminates is stated in a portion of the policy preceding its execution by the insurer; nor (3) unless every printed portion thereof and of any endorsements or attached papers shall be plainly printed in type of which the face shall be not smaller than ten point; nor (4) unless a brief description thereof be printed

on its first page, and on its filing back in type of which the face shall not be smaller than fourteen point; nor (5) unless the exceptions of the policy be printed with the same prominence as the benefits to which they apply: Provided, however, that any portion of such policy which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-face type and with greater prominence than any other portion of the text of the policy. (1913, c. 91, s. 2; C. S., s. 6478; 1945, c. 385.)

Editor's Note.—The 1945 amendment inserted near the beginning of the section the words "which purports to insure only one person." It also struck out following

subsection (2) the words "nor (3) if the policy purports to insure more than one person," and renumbered former subsections (4) through (6) as (3) through (5).

§ 58-251. Standard provisions in policy.—Every such policy so issued shall contain certain standard provisions, which shall be in the words and in the order hereinafter set forth and be preceded in every policy by the caption "Standard Provisions." In each standard provision, wherever the word "insurer" is used, there shall be substituted therefor "company" or "corporation" or "association" or "society" or such other word as will properly designate the insurer.

1. Provisions Relative to Contract.—A standard provision relative to the contract may be in either of the following two forms: Form (A) to be used in policies which do not provide for reduction of indemnity on account of change of occupation, and Form (B) to be used in policies which do so provide. If Form (B) is used and the policy provides indemnity against loss from sickness, the words "or contracts sickness" may be inserted therein immediately after the words "in the event that the insured is injured."

(A) This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation.

(B) This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the insurer's classification of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the insurer as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the insurer will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the insurer for such more hazardous occupation.

If the law of the state in which the insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the insurer in accordance with such law; but if such filing is not required by such law then they shall mean the insurer's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the insurer is liable.

2. Changes in the Contract.—A standard provision relative to changes in the contract shall be in the following form: No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the insurer and such approval be endorsed hereon.

3. Reinstatement of Policy.—A standard provision relative to reinstatement of policy after lapse may be in either of the three following forms: Form (A) to be

used in policies which insure only against loss from accident; Form (B) to be used in policies which insure only against loss from sickness; and Form (C) to be used in policies which insure against loss from both accident and sickness.

(A) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.

(B) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover such sickness as may begin more than ten days after the date of such acceptance.

(C) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Time of Notice of Claim.—A standard provision relative to time of notice of claim may be in either of the three following forms: Form (A) to be used in policies which insure only against loss from accident; Form (B) to be used in policies which insure only against loss from sickness, and Form (C) to be used in policies which insure against loss from both accident and sickness. If Form (A) or Form (C) is used the insurer may at its option add thereto the following sentence: "In event of accidental death immediate notice thereof must be given to the insurer."

(A) Written notice of injury on which claim may be based must be given to the insurer within twenty days after the date of the accident causing such injury.

(B) Written notice of sickness on which claim may be based must be given to the insurer within ten days after the commencement of the disability from such sickness.

(C) Written notice of injury or of sickness on which claim may be based must be given to the insurer within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness.

5. Sufficient Notice of Claim.—A standard provision relative to sufficiency of notice of claim shall be in the following form, and the insurer shall insert in the blank space such office and its location as it may desire to designate for the purpose of notice:

Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the insurer at or to any authorized agent of the insurer, with particulars sufficient to identify the insured, shall be deemed notice to the insurer. Failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. Furnishing Forms for Proof of Loss.—A standard provision relative to furnishing forms for the convenience of the insured in submitting proof of loss shall be as follows:

The insurer, upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made.

7. Filing Proof of Loss.—A standard provision relative to filing proof of loss shall be in such one of the following forms as may be appropriate to the indemnities provided:

(A) Affirmative proof of loss must be furnished to the insurer at its said office within ninety days after the date of the loss for which claim is made.

(B) Affirmative proof of loss must be furnished to the insurer at its said office within ninety days after the termination of the period of disability for which the company is liable.

(C) Affirmative proof of loss must be furnished to the insurer at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the insurer is liable, and in case of claim for any other loss within ninety days after the date of such loss.

8. Examination of Person and Autopsy.—A standard provision relative to examination of the person of the insured and relative to autopsy shall be in the following form: The insurer shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. Time of Payments.—A standard provision relative to the time within which payments other than those for loss of time on account of disability shall be made may be in either of the following two forms, which may be omitted from any policy providing only indemnity for loss of time on account of disability. The insurer shall insert in the blank space either the word “immediately” or appropriate language to designate such period of time, not more than sixty days, as it may desire: Form (A) to be used in policies which do not provide indemnity for loss of time on account of disability, and Form (B) to be used in policies which do so provide.

(A) All indemnities provided in this policy will be paid after receipt of due proof.

(B) All indemnities provided in this policy for loss other than that of time on account of disability will be paid after receipt of due proof.

10. Periodical Payments.—A standard provision relative to periodical payments of indemnity for loss of time on account of disability shall be in the following form, and may be omitted from any policy not providing for such indemnity. The insurer shall insert in the first blank space of the form appropriate language to designate the proportion of accrued indemnity it may desire to pay, which proportion may be all or any part not less than one-half, and in the second blank space shall insert any period of time not exceeding sixty days:

Upon request of the insured and subject to due proof of loss accrued indemnity for loss of time on account of disability will be paid at the expiration of each during the continuance of the period for which the insurer is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity Payments.—A standard provision relative to indemnity payments may be in either of the two following forms: Form (A) to be used in policies which designate a beneficiary, and Form (B) to be used in policies which do not designate any beneficiary other than the insured:

(A) Indemnity for loss of life of the insured is payable to the beneficiary, if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.

(B) All the indemnities of this policy are payable to the insured.

12. Cancellation of Policy by Insured.—A standard provision providing for cancellation of the policy at the instance of the insured shall be in the following form: If the insured shall at any time change his occupation to one classified by the insurer as less hazardous than that stated in the policy, the insurer, upon written request of the insured, and surrender of the policy, will cancel the same and return to the insured the unearned premium.

13. Rights of Beneficiary.—A standard provision relative to the rights of the beneficiary under the policy shall be in the following form and may be omitted

from any policy not designating a beneficiary: Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. Limiting Time of Action.—A standard provision limiting the time within which suit may be brought upon the policy shall be as follows: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. Time Limitations.—A standard provision relative to time limitations of the policy shall be as follows: If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law. (1911, c. 209, s. 1; 1913, c. 91, s. 3; C. S., s. 6479.)

Action on Policy Not Delivered through Error.—Where a policy of accident insurance has been issued before the accident in suit, and its delivery by error or oversight of the insurer has been delayed beyond that time, and the premiums have been paid, the action thereon may be maintained. *Clark v. Federal Life Ins. Co.*, 193 N. C. 166, 136 S. E. 291 (1927).

Time Limit on Amputation.—An accident policy stipulated that to recover for the loss of a foot it must have been amputated within thirty days from the date of the accident. It was held that the stipulation was enforceable, whatever the insured's reason for a delay in amputating the foot when not consented to by the insurer. *Clark v. Federal Life Ins. Co.*, 193 N. C. 166, 136 S. E. 291 (1927).

Recovery for either Loss of Time or Foot.—Where an accident insurance policy creates liability for loss of time and a foot, but restricts the right of the insured to recover loss on only one of them, the provision is valid and the insured may not recover for both in his action. *Clark v. Federal Life Ins. Co.*, 193 N. C. 166, 136 S. E. 291 (1927).

Waiver of Prompt Payment of Premiums.—If the insured is not required to pay his premiums promptly, and is injured when the premiums are not paid, he can recover for injuries received, for the act of the insurer in allowing the payments to get behind amounts to a waiver. *Moore v. General Accident, etc., Corp.*, 173 N. C. 532, 92 S. E. 362 (1917).

Waiver of Proof of Loss, etc.—Where an insurer denies all liability under its policy of accident insurance, covering the death of the insured, and refuses to proceed with the investigation respecting it, its action is a waiver of its requirements as to proof of death and the policy clause forbidding the bringing of any suit upon it

until after three months from filing of the proof. *Moore v. General Accident, etc., Corp.*, 173 N. C. 532, 92 S. E. 362 (1917).

Reasonable Notice of Claim.—In *Nelson v. Jefferson Standard Life Ins. Co.*, 199 N. C. 443, 154 S. E. 752 (1930), it was said that the General Assembly realizing that a hard and fast rule should not always be applied inserted subsection 5, relative to reasonable notice, to meet varying contingencies that might arise. *Rand v. Home Ins. Co.*, 206 N. C. 760, 174 S. E. 749 (1934).

Notice to Be Given by Beneficiary.—Where under the provisions of a policy of accident insurance certain benefits are to be paid to the insured, with the distinct provision that in case of accident resulting in death a certain sum is to be paid a beneficiary, the latter, during the lifetime of the insured, is not required to give the ten days' notice of the injury which resulted in his death, but only the notice provided for from the time of the latter event; the interpretation of the policy being that the assured and the beneficiary shall each give notice of the event upon which his claim depends. *Moore v. General Accident, etc., Corp.*, 173 N. C. 532, 92 S. E. 362 (1917).

Double Indemnity—Fault of Insured.—Where a policy of life insurance gives double indemnity if the death of the insured has been caused by "external, violent, and accidental means," no recovery can be had of the extra indemnity when such death is caused by the killing of the insured by a third person, and the insured was in the wrong in commencing the fight, and the aggressor, under such circumstances as would render a homicide likely as a result of his own misconduct. *Clay v. State Ins. Co.*, 174 N. C. 642, 94 S. E. 289 (1917).

A policy provision that insurer will pay a certain sum when insured has become

wholly disabled by bodily injuries and permanently, continuously, and wholly prevented thereby from pursuing any and all gainful occupations, will be construed as expressed, and the liability of the insurer thereunder will not be extended so as to include a total disability of the insured to

perform his trade or vocation when other gainful occupations are still open to him. *Buckner v. Jefferson Standard Life Ins. Co.*, 172 N. C. 762, 90 S. E. 897 (1916).

Cited in *Gorham v. Pacific Mut. Life Ins. Co.*, 214 N. C. 526, 200 S. E. 5 (1938).

§ 58-252. Certain provisions forbidden in policy.—No such policy shall be issued or delivered which contains any provision (1) relative to cancellation at the instance of the insurer; or (2) limiting the amount of indemnity to a sum less than the amount stated in the policy and for which the premium has been paid; or, (3) providing for the deduction of any premium from the amount paid in settlement of claim; or, (4) relative to other insurance by the same insurer; or, (5) relative to the age limits of the policy; or (6) relative to violation of law; or (7) relative to intoxicating liquor or narcotics; unless such provisions, which are hereby designated as optional standard provisions, shall be in the words and in the order in which they are set forth in the next section, but the insurer may at its option omit from the policy any such optional standard provisions. Such optional standard provisions if inserted in the policy shall immediately succeed the standard provisions named in this article. (1911, c. 209, s. 2; 1913, c. 91, s. 4; C. S., s. 6480; 1945, c. 385.)

Editor's Note.—The 1945 amendment or (7) relative to intoxicating liquor or inserted "or (6) relative to violation of law; narcotics."

§ 58-253. Optional standard provisions.—The optional standard provisions which may be used in the policy are as follows:

1. **Cancellation of Policy by Insurer.**—The insurer may cancel this policy at any time by written notice delivered to the insured or mailed to his last address as shown by the records of the insurer, together with cash or the insurer's check for the unearned portion of the premiums actually paid by the insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

2. **Reduction of Indemnity.**—If the insured shall carry with another company, corporation, association, or society other insurance covering the same loss without giving written notice to the insurer, then in that case the insurer shall be liable only for such portion of the indemnity promised as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premiums paid as shall exceed the pro rata for the indemnity thus determined.

3. **Deduction of Premium.**—Upon the payment of claim hereunder any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

4. **Other Insurance.**—An optional standard provision relative to other insurance by the same insurer which shall be in such one of the following forms as may be appropriate to the indemnities provided, and in the blank spaces of which the insurer shall insert such upward limits of indemnity as are specified by the insurer's classification of risks, filed as required by this article:

(A) If a like policy or policies, previously issued by the insurer to the insured, be in force concurrently herewith, making the aggregate indemnity in excess of \$....., the excess insurance shall be void, and all premiums paid for such excess shall be returned to the insured.

(B) If a like policy or policies, previously issued by the insurer to the insured, be in force concurrently herewith, making the aggregate indemnity for loss of time on account of disability in excess of \$..... weekly, the excess insurance shall be void, and all premiums paid for such excess shall be returned to the insured.

(C) If a like policy or policies, previously issued by the insurer to the insured, be in force concurrently herewith, making the aggregate indemnity for loss other

than that of time on account of disability in excess of \$., or the aggregate indemnity for loss of time on account of disability in excess of \$. weekly, the excess insurance of either kind shall be void, and all premiums paid for such excess shall be returned to the insured.

5. Age Limits.—An optional standard provision relative to the age limits of the policy, which shall be in the following form and in the blank spaces of which the insurer shall insert such number of years as it may elect: The insurance under this policy shall not cover any person under the age of years nor over the age of years. Any premium paid to the insurer for any period not covered by this policy will be returned upon request.

6. Violation of Law.—Any provision which affects the liability of the insurer because of any violation of law by the insured during the term of the policy shall be in the following form:

“The insurer shall not be liable for death, injury incurred or disease contracted, to which a contributing cause was the insured’s commission of, or attempt to commit, a felony, or which occurs while the insured is engaged in an illegal occupation.”

7. Intoxicating Liquor or Narcotics.—Any provision which affects the liability of the insurer because of the insured’s use of intoxicating liquor or narcotics during the term of the policy shall be in the following form:

“The insurer shall not be liable for death, injury incurred or disease contracted while the insured is intoxicated or under the influence of narcotics unless administered on the advice of a physician.”

Any such policy which contains either or both of the provisions specified under the foregoing paragraphs 6 and 7 need not include such provisions under the heading of “Standard Provisions.” (1911, c. 209, s. 2; 1913, c. 91, s. 4; C. S., s. 6481; 1945, c. 385.)

Editor’s Note.—The 1945 amendment added the part of the section beginning with paragraph 6.

§ 58-254. Conflicting provisions forbidden; terms in policy.—No such policy shall be issued or delivered if it contains any provision contradictory, in whole or part, of any provisions hereinbefore in this article designated as “Standard Provisions” or as “Optional Standard Provisions;” nor shall any endorsements or attached papers vary, alter, extend, be used as a substitute for, or in any way conflict with any of the “Standard Provisions” or the “Optional Standard Provisions;” nor shall such policy be issued or delivered if it contains any provision purporting to make any portion of the charter, constitution, or bylaws of the insurer a part of the policy unless such portion of the charter, constitution, or bylaws shall be set forth in full in the policy, but this prohibition shall not be deemed to apply to any statement of rates or classification of risks filed with the Commissioner of Insurance in accordance with the provisions of this article. (1911, c. 209, s. 3; 1913, c. 91, s. 5; C. S., s. 6482.)

§ 58-254.1. Industrial sick benefit insurance defined.—Industrial sick benefit insurance is hereby defined as that form of insurance for which premiums are payable weekly and which provides for the payment of a weekly indemnity on account of sickness or accident in addition to a benefit in case of death. Such death benefit shall not exceed one hundred and fifty dollars (\$150.00). There shall be a provision for the payment of weekly premium, 80% of which shall be allocated for the purchase of sick and accident coverages and 20% thereof for the purchase of death benefits. (1945, c. 385.)

§ 58-254.2. Industrial sick benefit insurance; standard provisions.—Policies issued under the industrial sick benefit plan shall contain the standard provisions contained in § 58-251 and in addition shall contain the following: (1) a provision for grace for the payment of the additional premium or assessment or

proportion thereof for such death benefits of not less than four weeks during which period the death benefit shall continue in force; (2) a provision for incontestability of the death benefit coverage after not more than two years except for (a) nonpayment of premiums, and (b) misstatement of age; (3) optional standard provision No. 1 in § 58-253 relating to the sickness and accident coverage only; (4) a provision that the death benefit is noncancellable by the company except for nonpayment of premium.

The Commissioner may approve any form of certificate to be issued under the industrial sick benefit plan which omits or modifies any of the standard provisions hereinbefore required, if he deems such omission or modification suitable for the character of such insurance and not unjust to the persons insured thereunder. (1945, c. 385.)

§ 58-254.3. Blanket accident and health insurance defined.—1. Any policy or contract of insurance against death or injury resulting from accident or from accidental means which insures a group of persons conforming to the requirements of one of the following paragraphs (a) to (f) inclusive shall be deemed a blanket accident policy. Any policy or contract which insures a group of persons conforming to the requirements of one of the following paragraphs (c), (e) or (f) against total or partial disability, excluding such disability from accident or from accidental means, shall be deemed a blanket health insurance policy. Any policy or contract of insurance which combines the coverage of blanket accident insurance and of blanket health insurance on such a group of persons shall be deemed a blanket accident and health insurance policy:

(a) Under a policy or contract issued to any railroad, steamship, motorbus or airplane carrier of passengers, which shall be deemed the policyholder, a group defined as all persons who may become such passengers may be insured against death or bodily injury either while, or as a result of, being such passengers.

(b) Under a policy or contract issued to an employer, or the trustee of a fund established by the employer, who shall be deemed the policyholder, covering any group of employees defined by reference to exceptional hazards incident to such employment, insuring such employee against death or bodily injury resulting while, or from, being exposed to such exceptional hazard.

(c) Under a policy or contract issued to a college, school or other institution of learning or to the head or principal thereof, who or which shall be deemed the policyholder.

(d) Under a policy or contract issued in the name of any volunteer fire department, which shall be deemed the policyholder, covering all of the members of such department.

(e) Under a policy or contract issued to and in the name of an incorporated or unincorporated association of persons having a common interest or calling, which association shall be deemed the policyholder, having not less than twenty-five members, and formed for purposes other than obtaining insurance, covering all of the members of such association.

(f) Under a policy or contract issued to the head of a family, who shall be deemed the policyholder, whereunder the benefits thereof shall provide for the payment by the insurer of amounts for expenses incurred by the policyholders on account of hospitalization or medical or surgical aid for himself, his spouse, his child or children not over eighteen years of age, provided, that any disability within the terms of such policy incurred by a child before his 18th birthday and continuing thereafter shall be deemed to be covered by the policy.

2. All benefits under any blanket accident, blanket health or blanket accident and health insurance policy shall be payable to the person insured, or to his designated beneficiary or beneficiaries, or to his estate, except that if the person insured be a minor, such benefits may be made payable to his parent, guardian, or other person actually supporting him, or to a person or persons chiefly dependent upon him for support and maintenance.

3. Nothing contained in this section shall be deemed to affect the legal liability of policyholders for the death of or injury to, any such member of such group. (1945, c. 385; 1947, c. 721.)

Editor's Note.—The 1947 amendment made several changes in subsection 1. It inserted in paragraph (b) the words "or the trustee of a fund established by the employer;" substituted "twenty-five" for

"fifty" in paragraph (e), inserted "provide for" in lieu of "be limited to" in paragraph (f) and added the proviso thereto. See 25 N. C. Law Rev. 437.

§ 58-254.4. Group accident and health insurance defined.—1. Any policy or contract of insurance against death or injury resulting from accident or from accidental means which covers more than one person except blanket accident policies as defined in § 58-254.3, shall be deemed a group accident insurance policy. Any policy or contract which insures against disablement, disease or sickness of the insured (excluding disablement which results from accident or from accidental means) and which covers more than one person, except blanket health insurance policies as defined in § 58-254.3, shall be deemed a group health insurance policy or contract. Any policy or contract of insurance which combines the coverage of group accident insurance and of group health insurance shall be deemed a group accident and health insurance policy. No policy or contract of group accident, group health or group accident and health insurance, and no certificates thereunder, shall be delivered or issued for delivery in this State unless it conforms to the requirements of subsection 2.

2. No policy or contract of group accident, group health or group accident and health insurance shall be delivered or issued for delivery in this State unless the group of persons thereby insured conforms to the requirements of the following paragraph:

Under a policy issued to an employer or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business, which employer or trustee shall be deemed the policyholder, covering not less than 25 employees of such employer, and covering, except as hereinafter provided, only employees of any class or classes thereof determined by conditions pertaining to employment, for amounts of insurance based upon some plan which will preclude individual selection. The premium may be paid by the employer, by the employer and employees jointly, or by the employees. If the premium is paid by the employer and employees jointly, or by the employees, the group shall comprise not less than seventy-five per cent of all employees or not less than seventy-five per cent of any class or classes of employees determined by conditions pertaining to the employment.

3. The term "employees" as used in this section shall be deemed to include, for the purposes of insurance hereunder, as employees of a single employer, the officers, managers, and employees of the employer and of subsidiary or affiliated corporations of a corporation employer, and the individual proprietors, partners, and employees of individuals and firms of which the business is controlled by the insured employer through stock ownership, contract or otherwise. The term "employer" as used herein may be deemed to include any municipal corporation or the proper officers, as such, of any unincorporated municipality, or any department of such corporation or municipality determined by conditions pertaining to the employment.

4. The benefits payable under any policy or contract of group accident, group health and group accident and health insurance shall be payable to the employees or to some beneficiary or beneficiaries designated by him, other than the employer, but if there is no designated beneficiary as to all or any part of the insurance at the death of the employee or member, then the amount of insurance payable for which there is no designated beneficiary shall be payable to the estate of the employee or member, except that the insurer may in such case, at its option, pay such insurance to any one or more of the following surviving relatives

of the employee or member: wife, husband, mother, father, child, or children, brothers or sisters; and except that payment of benefits for expenses incurred on account of hospitalization or medical or surgical aid, as provided in subsection 5, may be made by the insurer to the hospital or other person or persons furnishing such aid. Payment so made shall discharge the insurer's obligation with respect to the amount of insurance so paid.

5. Any policy or contract of group accident, group health or group accident and health insurance may include provisions for the payment by the insurer of benefits to the employee or other member of the insured group, on account of hospitalization or medical or surgical aid for himself, his spouse, his child or children, or other persons chiefly dependent upon him for support and maintenance.

6. Any policy or contract of group accident, group health or group accident and health insurance may provide for readjustment of the rate of premium based on the experience thereunder at the end of the first year or of any subsequent year of insurance thereunder, and such readjustment may be made retroactive only for such policy year. Any refund under any plan for readjustment of the rate of premium based on the experience under group policies and any dividend paid under such policies may be used to reduce the employer's contribution to group insurance for the employees of the employer, and the excess over such contribution by the employer shall be applied by the employer for the sole benefit of the employees.

7. Nothing contained in this section shall be deemed applicable to any contract issued by any corporation defined in chapter 57 of the General Statutes of North Carolina. (1945, c. 385; 1947, c. 721.)

Editor's Note.—Prior to the 1947 amendment the second paragraph of subsection 2 down to the third comma read as follows: "Under a policy issued to an employer

which employer shall be deemed the policyholder covering not less than 50 employees of such employer." See 25 N. C. Law Rev. 437.

§ 58-254.5. Group or blanket accident and health insurance; approval of forms and filing of rates.—No policy of group or blanket accident, health or accident and health insurance shall be delivered or issued for delivery in this State unless the form of the policy contracts including the master policy contract, the individual certificates thereunder, the applications for the contract, and a schedule of the premium rates pertaining to such form or forms, have been filed with and the forms approved by the Commissioner. (1945, c. 385.)

§ 58-254.6. Definition of franchise accident and health insurance.—Accident and health insurance on a franchise plan is hereby declared to be that form of accident and health insurance issued to five or more employees of any corporation, copartnership or individual employer or any governmental corporation, agency or department thereof, or ten or more members of any trade or professional association or of a labor union or of any other association having had an active existence for at least two years where such association or union has a constitution or bylaws and is formed in good faith for purposes other than that of obtaining insurance, where such persons, with or without their dependents, are issued the same form of an individual policy varying only as to amounts and kinds of coverage applied for by such persons, under an arrangement whereby the premiums on such policies may be paid to the insurer periodically by the employer, with or without pay roll deductions, or by the association for its members, or by some designated person acting on behalf of such employer or association. The provisions of this section shall not be construed so as to repeal §§ 58-254.3 and 58-254.4 or any parts thereof. (1947, c. 721.)

Editor's Note.—For brief comment on this section, see 25 N. C. Law Rev. 438.

ARTICLE 27.

General Regulations.

§ 58-255. **False statement in application.**—The falsity of any statement in the application for any policy covered by this subchapter shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer. (1913, c. 91, s. 6; C. S., s. 6483.)

§ 58-256. **Waiver by insurer.**—The acknowledgment by any insurer of the receipt of notice given under any policy covered by this subchapter, or the furnishing of forms for filing proofs of loss, or the acceptance of such proofs, or the investigation of any claim thereunder, shall not operate as a waiver of any of the rights of the insurer in defense of any claim arising under such policy. (1913, c. 91, s. 7; C. S., s. 6484.)

§ 58-257. **Alteration of application.**—No alteration of any written application for insurance by erasure, insertion, or otherwise, shall be made by any person other than the applicant without his written consent, and the making of any such alteration without the consent of the applicant shall be a misdemeanor. If such alteration shall be made by any officer of the insurer, or by any employee of the insurer, with the insurer's knowledge or consent, then such act shall be deemed to have been performed by the insurer thereafter issuing the policy upon such altered application. (1913, c. 91, s. 8; C. S., s. 6485.)

§ 58-258. **Construction of policy.**—A policy issued in violation of this subchapter shall be held valid, but shall be construed as provided in this subchapter, and when any provision in such a policy is in conflict with any provision of this subchapter, the rights, duties, and obligations of the insurer, the policyholder, and the beneficiary shall be governed by the provisions of this subchapter. (1913, c. 91, s. 9; C. S., s. 6486.)

§ 58-259. **Provisions of laws of other states.**—The policies of insurance against accidental bodily injury or sickness issued by an insurer not organized under the laws of this State may contain, when issued in this State, any provision which the law of the state, territory, or district of the United States under which the insurer is organized, prescribed for insertion in such policies; and the policies of insurance against accidental bodily injury or sickness issued by an insurer organized under the laws of the State may contain, when issued or delivered in any other state, territory, district, or country, any provisions required by the laws of the state, territory, district, or country in which the same are issued, anything in this subchapter to the contrary notwithstanding. (1911, c. 209, s. 4; 1913, c. 91, s. 10; C. S., s. 6487.)

§ 58-260. **Discrimination forbidden.**—Discrimination between individuals of the same class in the amount of premiums or rates charged for any policy of insurance covered by this subchapter, or in the benefits payable thereon, or in any of the terms or conditions of such policy, or in any other manner whatsoever, is prohibited. (1913, c. 91, s. 11; C. S., s. 6488.)

§ 58-260.1. **Notice of nonpayment of premium required before forfeiture.**—No insurance company doing business in this State and issuing health and/or accident insurance policies, other than contracts of group insurance or disability and/or accidental death benefits in connection with policies of life insurance, the premium for which is to be collected in weekly, monthly, or other periodical installments by authority of a pay roll deduction order executed by the assured and delivered to such insurance company or the assured's employer authorizing the deduction of such premium installments from the assured's salary or wages, shall, during the period for which such policy is issued, declare for-

feited or lapsed any such policy hereafter issued or renewed until and unless a written or printed notice of the failure of the employer to remit said premium or installment thereof stating the amount or portion thereof due on such policy and to whom it must be paid, has been duly addressed and mailed to the person who is insured under such policy at least fifteen days before said policy is canceled or lapsed. (1909, c. 884; C. S., s. 6465; 1929, c. 308, s. 1; 1931, c. 317; 1945, c. 379.)

Editor's Note.—Prior to the 1945 amendment this section was a part of § 58-207.

§ 58-261. Certain policies of insurance not affected.—1. Nothing in this subchapter shall apply to or affect any policy of liability or workmen's compensation insurance.

2. Nothing in this subchapter shall apply to or in any way affect contracts supplemental to contracts of life or endowment insurance where such supplemental contracts contain no provisions except such as operate to safeguard such insurance against lapse or to provide special benefits therefor in the event that the insured shall be totally, or totally and permanently disabled by reason of accidental bodily injury or by sickness, nor to contracts issued as supplements to life insurance contracts or contracts of endowment insurance, and intended to increase the amount insured by such life or endowment contracts in the event that the death or disability of the insured shall result from accidental bodily injuries: Provided, that no such supplemental contracts shall be issued or delivered to any person in this State unless and until a copy of the form thereof has been submitted to and approved by the Commissioner of Insurance under such reasonable rules and regulations as he shall make concerning the provisions in such contracts, and their submission to and approval by him.

3. Nothing in this subchapter shall apply to or in any way affect fraternal benefit societies.

4. The provisions of this subchapter contained in clause (5) of § 58-250, and clauses two, three, eight, and twelve of § 58-251, may be omitted from railroad ticket policies sold only at railroad stations or at railroad ticket offices by railroad employees. (1911, c. 209, s. 5; 1913, c. 91, s. 12; C. S., s. 6489; 1921, c. 136, s. 5; 1945, c. 385; 1947, c. 721.)

Editor's Note.—The 1945 amendment substituted near the beginning of subsection 2 the words "special benefits" for the words "a special surrender value." It also inserted in subsequent parts of the subsection the words "or totally" and "or disability." The 1947 amendment struck from subsection 1 the former provision relating to general or blanket policy of insurance.

§ 58-262. Punishment for violation.—Any company, association, society, or other insurer or any officer or agent thereof, which or who issues or delivers to any person in this State any policy in willful violation of the provisions of this subchapter, shall be punished by a fine of not more than five hundred dollars for each offense, and the Commissioner of Insurance may revoke the license of any company, corporation, association, society, or other insurer of another state or country, or of the agent thereof, which or who willfully violates any provision of this subchapter. (1911, c. 209, s. 6; 1913, c. 91, s. 13; C. S., s. 6490.)

SUBCHAPTER VII.

FRATERNAL ORDERS AND SOCIETIES.

ARTICLE 28.

Fraternal Orders.

§ 58-263. General insurance law not applicable.—Nothing in the general insurance laws, except such as apply to fraternal orders or fraternal so-

cieties, shall be construed to extend to benevolent associations, incorporated under the laws of this State that only levy an assessment on the members to create a fund to pay the family of a deceased member and make no profit therefrom, and do not solicit business through agents. Such benevolent associations providing death benefits in excess of three hundred dollars to any one person, or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, shall be known as "fraternal benefit societies;" and those providing benefits of three hundred dollars or less shall be known as "fraternal orders." (1899, c. 54, s. 87; 1901, c. 706, s. 2; Rev., s. 4794; 1913, c. 46; C. S., s. 6491.)

Cross Reference.—As to other assessment insurance, see § 58-105 et seq.

Editor's Note.—See 12 N. C. Law Rev. 374.

Williams v. Supreme Conclave, 172 N. C. 787, 90 S. E. 888 (1916), and *Wilson v. Supreme Conclave*, 174 N. C. 628, 94 S. E. 443 (1917), were decided in regard to policies issued before the enactment of this statute, which makes it clear that fraternal and assessment orders shall be governed by their own rules and regulations as authorized by the state of their origin. *Hollingsworth v. Supreme Council*, 175 N. C. 615, 96 S. E. 81 (1918), discussing the application of the statute and altering the rule as applied in former cases.

Fraternal Benefit Associations and Or-

ders.—This section groups benevolent associations incorporated under the laws of this State into "fraternal benefit associations" and "fraternal orders." *Gay v. Woodmen of the World*, 179 N. C. 210, 102 S. E. 195 (1920).

Representations in Application or Policy.

—Section 58-30, providing that statements in an application for a policy of insurance shall be deemed representations which will not prevent a recovery on the policy unless material or fraudulent, is not applicable to a fraternal order as defined in § 58-264, but does apply to a fraternal benefit association incorporated under the laws of another state. *Gay v. Woodmen of the World*, 179 N. C. 210, 102 S. E. 195 (1920).

§ 58-264. **Fraternal orders defined.**—Every incorporated association, order, or society doing business in this State on the lodge system, with ritualistic form of work and representative form of government, for the purpose of making provision for the payment of benefits of three hundred dollars or less in case of death, sickness, temporary or permanent physical disability, either as the result of disease, accident, or old age, formed and organized for the sole benefit of its members and their beneficiaries, and not for profit, is hereby declared to be a "fraternal order." Societies and orders which do not make insurance contracts or collect dues or assessments therefor, but simply pay burial or other benefits out of the treasury of their orders, and use their funds for the purpose of building homes or asylums for the purpose of caring for and educating orphan children and aged and infirm people in this State, shall not be considered as "fraternal orders" or "fraternal benefit societies" under this subchapter; and such order or association paying death or disability benefits may also create, maintain, apply, or disburse among its membership a reserve or emergency fund as may be provided in its constitution or bylaws; but no profit or gain may be added to the payments made by a member. (1899, c. 54, s. 88; 1901, c. 706, s. 3; Rev., s. 4795; 1907, c. 936; 1913, c. 46; C. S., s. 6492.)

Cross Reference.—See § 58-263 and note.

Cited in *Brenizer v. Royal Arcanum*, 141 N. C. 409, 53 S. E. 835 (1906).

§ 58-265. **Funds derived from assessments and dues.**—The fund from which the payment of benefits, as provided for in § 58-264, shall be made, and the fund from which the expenses of such association, order or society shall be defrayed, shall be derived from assessments or dues collected from its members. Such societies or associations shall be governed by the laws of the state governing fraternal orders or societies, and are exempt from the provisions of all general insurance laws of this State, and no law hereafter passed shall apply

to such societies unless fraternal orders or societies are designated therein. (1899, c. 54, s. 89; 1901, c. 706, s. 2; Rev., s. 4796; 1913, c. 46; C. S., s. 6493.)

Assessments Governed by Charter and Bylaws.—A fraternal society or association is governed by its own charter and bylaws and an assessment in accordance with its own laws is valid. *Hollingsworth v. Supreme Council*, 175 N. C. 615, 96 S. E. 81 (1918).

The funds received from assessment are trust funds for orphans and widows and are not subject to use for any other purpose, therefore attachment will not lie. *Brenizer v. Royal Arcanum*, 141 N. C. 409, 53 S. E. 835 (1906).

Where the constitution of a foreign fraternal insurance society provided for the creation of a fund to be raised from assessments upon its members for the benefit of widows and orphans of deceased members, any money paid to such fund is impressed with the qualities of a trust for the special purposes expressed, and such fund in the hands of a local collector, which he was bound to pay over the society's treasurer, is not subject to an attachment by a creditor of the society. *Brenizer v. Royal Arcanum*, 141 N. C. 409, 53 S. E. 835 (1906).

§ 58-266. Appointment of member as receiver or collector; appointee as agent for order or society; rights of members.—Assessments and dues referred to in §§ 58-264 and 58-265 may be collected, receipted, and remitted by a member or officer of any local or subordinate lodge of any fraternal order or society when so appointed or designated by any grand, district, or subordinate lodge or officer, deputy, or representative of the same, there being no regular licensed agent or deputy of said grand lodge charged with said duties; but any person so collecting said dues or assessments shall be the agent or representative of such fraternal order or society, or any department thereof, and shall bind them by their acts in collecting and remitting said amounts so collected. Under no circumstances, regardless of any agreement, bylaws, contract, or notice, shall said officer or collector be the agent or representative of the individual member from whom any such collection is made; nor shall said member be responsible for the failure of such officer or collector to safely keep, handle, or remit said dues or assessments so collected, in accordance with the rules, regulations, or bylaws of said society; nor shall said member, regardless of any rules, regulations, or bylaws to the contrary, forfeit any rights under his certificate of membership in said fraternal benefit society by reason of any default or misconduct of any said officer or member so acting. (1921, c. 139; C. S., s. 6493(a).)

Waiver of Provisions of Certificate and Bylaws.—Where plaintiff's evidence showed that it had been the custom of defendant mutual benefit association's collecting agents to collect dues within thirty days after the due date, that defendant's home office knew of this custom, and that insured made payment of the dues for the preceding month within thirty days of the due date and died prior to the customary time for the collection of dues for the following month, it was held that the evidence

was sufficient to be submitted to the jury on the question of defendant's waiver of the provisions of its certificate and bylaws, requiring certificate of good health before reinstating a policy upon payment of premium after the due date, and upon the verdict of the jury plaintiff was entitled to judgment for the amount of the policy, less the dues for the month not paid. *Shackelford v. Sovereign Camp, W. O. W.*, 209 N. C. 633, 184 S. E. 691 (1936).

§ 58-267. Meetings of governing body; principal office; separation of races.—Any such society or order incorporated and organized under the laws of this State may provide for the meeting of its supreme legislative or governing body in any other state, province, or territory wherein such society has subordinate lodges, and all business transacted at such meetings is as valid in all respects as if the meetings were held in this State; but the principal business office of such society shall always be kept in this State. No fraternal order or society or beneficiary association shall be authorized to do business in this State under the provisions of this article, whether incorporated under the laws of this or any other state, province, or territory, which associates with, or seeks in this State

to associate with, as members of the same lodge, fraternity, society, association, the white and colored races with the objects and purposes provided in this article. (1899, c. 54, s. 91; Rev., s. 4797; 1913, c. 46; C. S., s. 6494.)

§ 58-268. Conditions precedent to doing business.—Any such fraternal, beneficiary order, society, or association as defined by this chapter, chartered and organized in this State or organized and doing business under the laws of any other state, district, province, or territory, having the qualifications required of domestic societies of like character, upon satisfying the Commissioner of Insurance that its business is proper and legitimate and so conducted, may be admitted to transact business in this State upon the same conditions as are prescribed by this chapter for admitting and authorizing foreign insurance companies to do business in this State, except that such fraternal orders shall not be required to have the capital required of such insurance companies. (1899, c. 54, s. 92; 1901, c. 706, s. 2; 1903, c. 438, s. 9; Rev., s. 4798; 1913, c. 46; C. S., s. 6495.)

Cited in *Brenizer v. Royal Arcanum*, 141 Arlinton, 157 N. C. 640, 73 S. E. 122 N. C. 409, 53 S. E. 835 (1906); *State v.* (1911).

§ 58-269. Certain lodge systems exempt.—The following beneficial orders or societies shall be exempt from the requirements of this chapter, and shall not be required to pay any license tax or fees nor make any report to the Commissioner of Insurance, unless the assessment collected for death benefits by the supreme lodge amount to at least three hundred dollars in one year: Beneficial fraternal orders, or societies incorporated under the laws of this State, which are conducted under the lodge system which have the supreme lodge or governing body located in this State, and which are so organized that the membership consists of members of subordinate lodges; that the subordinate lodges accept for membership only residents of the county in which such subordinate lodge is located; that each subordinate lodge issues certificates, makes assessments, and collects a fund to pay benefits to the widows and orphans of its own deceased members and their families, each lodge independently of the others, for itself and independently of the supreme lodge; that each lodge controls the fund for this purpose; that in addition to the benefits paid by each subordinate lodge to its own members, the supreme lodge provides for an additional benefit for such of the members of the subordinate lodges as are qualified, at the option of the subordinate lodge members; that such organization is not conducted for profit, has no capital stock, and has been in operation for ten years in this State.

The Commissioner of Insurance may require the chief or presiding officer, or the secretary, to file annually an affidavit that such organization is entitled to this exemption. (1911, c. 199; C. S., s. 6496.)

§ 58-270. Fraternal benefit society defined.—Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which makes provision for the payment of benefits as hereafter prescribed in this article, is declared to be a fraternal benefit society. (1913, c. 89, s. 1; C. S., s. 6497.)

Applied in *Equitable Trust Co. v. Widows' Fund of Oasis, etc., Temples*, 207 N. C. 534, 177 S. E. 799 (1935).

§ 58-271. Lodge system defined.—A society having a supreme governing or legislative body and subordinate lodges or branches, by whatever name known, into which members are elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches are required by the laws of such

society to hold regular or stated meetings at least once in each month, is deemed to be operating on the lodge system. (1913, c. 89, s. 2; C. S., s. 6498.)

§ 58-272. **Representative form of government defined.**—A society is deemed to have a representative form of government when it provides in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: Provided, that the elective members constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws; and provided further, that the meetings of the supreme or governing body, and the election of officers, representatives, or delegates, are held as often as once in four years. The members, officers, representatives, or delegates of a fraternal benefit society shall not vote by proxy. (1913, c. 89, s. 3; C. S., s. 6499.)

§ 58-273. **Organization.**—1. Application.—Ten or more persons, citizens of the United States, and a majority of whom are citizens of this State, who desire to form a fraternal benefit society, as defined by this article, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation in which shall be stated:

a. The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this State as to mislead the public or lead to confusion.

b. The purpose for which it is formed—which shall not include more liberal powers than are granted by this article: Provided, that any lawful social, intellectual, educational, charitable, benevolent, moral, or religious advantages may be set forth among the purposes of the society—and the mode in which its corporate powers are to be exercised.

c. The names, residences, and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

2. Papers and Bond Filed.—Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor, and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the Commissioner of Insurance, conditioned upon the return of the advance payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the Commissioner of Insurance, who may require such further information as he deems necessary.

3. Preliminary License.—If the purposes of the society conform to the requirements of this article, and all provisions of law have been complied with, the Commissioner of Insurance shall so certify to the Secretary of State and upon his issuing the articles of incorporation shall furnish the incorporators a preliminary license authorizing the society to solicit members as hereinafter provided.

4. Completion of Organization.—Upon receipt of such license from the Commissioner of Insurance the society may solicit members for the purpose of completing its organization, and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been

secured upon at least five hundred lives for at least one thousand dollars each, or the largest amount written on any one person, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established ten subordinate lodges or branches into which said five hundred applicants have been initiated; nor until there has been submitted to the Commissioner of Insurance under oath of the president and secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation contracted, when valued for death benefits upon the basis of the National Fraternal Congress Table of Mortality, as adopted by the National Fraternal Congress, August twenty-third, one thousand eight hundred and ninety-nine, or any higher standard, at the option of the society, and for disability benefits by tables based upon reliable experience, and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent per annum; nor until it shall be shown to the Commissioner of Insurance by the sworn statement of the treasurer, or corresponding officer of such society, that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars. Such advanced payments shall be credited to the mortuary or disability fund on account of such applicants, and no part thereof may be used for expenses, but such payments shall be held in trust and returned to the applicants if the organization is not completed within one year as hereinafter provided.

5. License Issued.—The Commissioner of Insurance may make such examination and require such further information as he deems advisable, and, upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to such society a certificate or license to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate.

6. One-Year Limit.—No preliminary certificate or license granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the Commissioner of Insurance, upon cause shown unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided; and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of such preliminary certificate, or at the expiration of such extended period, unless the society shall have completed its organization and commenced business as herein provided.

7. Discontinuance.—When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void. (1913, c. 89, s. 11; C. S., s. 6500.)

§ 58-274. Constitution and bylaws.—Each society shall have power to make a constitution and bylaws for the government of the society, the admission of its members, the management of its affairs, and the fixing and readjusting of the rates of contribution of its members from time to time; it shall have the power to change or amend such constitution and bylaws, and it shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society. (1913, c. 89, s. 11; C. S., s. 6501.)

§ 58-275. Amendments to constitution and bylaws.—Every society transacting business under this article shall file with the Commissioner of In-

insurance a duly certified copy of all amendments of or additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof. (1913, c. 89, s. 19; C. S., s. 6502.)

Failure to File Copy of Amendments.—preme Conclave, 174 N. C. 628, 94 S. E. 443 (1917).
As to suspension of member where copy of amendments not filed, see *Wilson v. Su-*

§ 58-276. Waiver of the provisions of the laws.—The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof, and on all beneficiaries of members. (1913, c. 89, s. 17; C. S., s. 6503.)

Editor's Note.—See *Shackelford v. Sovereign Camp, W. O. W.*, 209 N. C. 633, 184 S. E. 691 (1936), where a distinction is made between waiver by local agents, prohibited by this section, and a custom of dealing established over a period of years to the knowledge of the home office.

§ 58-277. Place of meeting; location of office.—Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province, or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this State; but its principal office shall be located in this State. (1913, c. 89, s. 15; C. S., s. 6504.)

§ 58-278. No personal liability for benefits.—Officers and members of the supreme, grand, or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society; but the same shall be payable only out of the funds of such society and in the manner provided by its laws. (1913, c. 89, s. 16; C. S., s. 6505.)

§ 58-279. Qualifications for membership.—Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society: Provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional medical examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. (1913, c. 89, s. 6; C. S., s. 6506.)

§ 58-280. Benefits.—1. Every society transacting business under this article shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident, or old age, and for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits: Provided, the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all or such portion of the face value of his certificate as the laws of the society may provide; but nothing contained in this article shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life, which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and

charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four per cent per annum; but this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions, and to contracts affected by such readjustment.

2. Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American Experience Table and four per cent interest, may grant to its members extended and paid-up protection, or such withdrawal equities as its constitution and laws may provide; but such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. (1913, c. 89, s. 4; C. S., s. 6507.)

§ 58-281. Beneficiaries.—The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member, or, with the consent of the society, any charitable institution maintained by the society; and if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules and regulations of the society, and no beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of the member. Any society may, by its laws, limit the scope of beneficiaries within the above classes.

Provided, however, that any member or insured named in any contract or certificate of insurance issued by any beneficial fraternal order, lodge, society, or other insurance association, who has neither lawful spouse nor offspring, shall have the right, without regard to the amount payable thereunder, to have the death benefit provided for in any such contract or certificate of insurance made payable, or to have the named beneficiary changed, to the estate of such member or insured, or to his or her executors or administrators, and to make a testamentary disposition of the proceeds thereof, or to have such death benefit made payable, or to have the named beneficiary changed, to a trustee to be named by such member or insured, and to impress the proceeds in the hands of such trustee with a trust, the terms and provisions of the charter, rules, bylaws and regulations of any such beneficial fraternal order, lodge, society, or other insurance association, to the contrary notwithstanding: Provided further, that in case a husband or wife is designated as beneficiary and subsequently comes absolutely divorced from the member or insured, such divorce shall automatically annul the designation. (1913, c. 89, s. 5; C. S., s. 6508; 1931, c. 161; 1937, c. 178.)

Editor's Note.—See 13 N. C. Law Rev. 95.

The 1931 amendment inserted in the first sentence the words "or with the consent of the society, any charitable institution maintained by the society."

The 1937 amendment added the second paragraph. In permitting the insured to designate his estate as beneficiary, the amendment brings fraternal insurance more closely in line with old line insurance. It perhaps renders the proceeds of such a policy available to creditors of a de-

ceased insured and permits wider use of fraternal insurance for investment purposes. In rare instances it will allow a member of an order, who has no near relatives or dependents, to take out such insurance where he heretofore has been prevented from so doing. In destroying the rights of a divorced wife as beneficiary, this section does for an insured what he might unintentionally have neglected to do. The provision permitting the naming of a trustee as beneficiary seems designed to counteract the effects of

the recent case of *Equitable Trust Co. v. Widows' Fund of Oasis, etc., Temples*, 207 N. C. 534, 177 S. E. 799 (1935), holding invalid an attempt to name as beneficiary a corporate trustee. As amended, however, the section does not make it clear whether the trustee may be a corporation, or whether he must be a natural person. And it leaves unclear whether the beneficiaries of the trust must be relatives or dependents of the insured. If not, the amendment gives the insured *carte blanche*, by the device of a trust, to name any beneficiary he desires. Such is not in keeping with the usual purpose of fraternal benefit insurance. 15 N. C. Law Rev. 357.

Legal dependent means something more than one who is deriving support from another. It imports one who has the right to invoke the aid of the law to require support. And the status of a wife living with her husband as being his legal dependent, entitled in law to his support, is recognized by our statutes. *Junior Order United American Mechanics v. Tate*, 212 N. C. 305, 193 S. E. 397, 113 A. L. R. 1514 (1937).

Payment of Dues Does Not Create Lien against Certificate.—Where insured's wife was named beneficiary, and after her death insured's brother, who became the beneficiary under the terms of the certificate as insured's nearest blood relation, kept the certificate in force until the death of the insured a short time thereafter, it was held that under the terms of the certificate the insured's brother was entitled to the proceeds thereof, to the exclusion of the wife's nephew who claimed under the will of the wife, the payment of dues or premiums alone being insufficient to create a lien against the certificate, or the proceeds thereof, and the wife at no time having any vested interest as the named beneficiary which she could bequeath by will. *Sorrell v. Sovereign Camp, W. O. W.*, 209 N. C. 226, 183 S. E. 400 (1936).

A contract in the form of a life insurance policy with a mutual benefit society, which contract stipulates that insured agrees that the society is a fraternal benefit society as defined by § 58-270, is a fraternal benefit contract, not an insurance policy, and governed by this section. *Equitable Trust*

Co. v. Widows' Fund of Oasis, etc., Temples, 207 N. C. 534, 177 S. E. 799 (1935).

Right to Change Beneficiary.—Within the restrictions of this section, the beneficiary may be changed by the mere will of the member and without the beneficiary's consent. In such case the right of the beneficiary is not property, but a mere expectancy, dependent on the will of the member to whom the certificate is issued. For this reason the beneficiary's interest in the certificate and contract evidenced thereby differs totally from the interest of a beneficiary named in an ordinary life insurance policy containing no provision for the designation of a new beneficiary. *Pollock v. Hardy*, 150 N. C. 211, 63 S. E. 940 (1909).

Same—One Disqualified to Take.—Where the assured has named his wife as beneficiary and afterwards substitutes the name of another, disqualified to take under the statute, such attempted change is not a revocation of the provisions of the policy first issued and leaves it in force. *Andrews v. Most Worshipful Grand Lodge*, 189 N. C. 697, 128 S. E. 4 (1925).

Bigamous Wife's Right to Recover.—A fraternal assessment benefit association having a representative form of government may, by its contract and constitution, confine the beneficiaries to certain blood relatives, wife, affianced wife, persons dependent upon the member, etc., in conformity with the laws of the state wherein it has its head organization; and where such beneficiary sues upon a policy, claiming as the wife of the deceased member, and it appears that in fact the marriage was bigamous, she may not recover, though the certificate states she was his wife. *Applebaum v. United Commercial Travelers*, 171 N. C. 435, 88 S. E. 722 (1916).

Trustee as Beneficiary.—Prior to the 1937 amendment, an incorporated trust company, authorized by a trust agreement to collect the proceeds of life insurance policies on the life of the trustor upon his death, could not be named beneficiary in a fraternal benefit contract on the trustor's life. *Equitable Trust Co. v. Widows' Fund of Oasis, etc., Temples*, 207 N. C. 534, 177 S. E. 799 (1935). See Editor's Note, *supra*.

§ 58-282. Benefit certificates.—Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter, or articles of incorporation or, if a voluntary association, the articles of association, the constitution and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member; and copies of the same certified by the secretary of the

society, or corresponding officer, shall be received in evidence of the terms and conditions thereof. Any changes, additions, or amendments to the charter or articles of incorporation, or articles of association if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership. (1913, c. 89, s. 7; C. S., s. 6509.)

Cross Reference.—See note to § 58-263.

Alteration of Constitution or Bylaws Impairing Vested Rights.—A general consent of a policyholder in an assessment fraternal benefit society that the society may thereafter alter or amend its constitution or bylaws does not authorize the society to make such changes therein as will impair the vested right of its members and policyholders arising under their contract of insurance with the society. *Wilson v. Supreme Conclave*, 174 N. C. 628, 94 S. E. 443 (1917).

Same—Recovery on Canceled Policy.—Where a fraternal benefit society has issued a policy to a member, and has changed its plan of business so as to impair the vested rights of the insured under his contract, and refuses to accept the proper premium, and declares the policy void, the insured may maintain his action to recover of the insurer the principal sum of money he has paid on his policy, and simple interest thereon. *Wilson v. Supreme Conclave*, 174 N. C. 628, 94 S. E. 443 (1917).

Suspension of Members Where Changes in Bylaws Not Filed.—Where a fraternal benefit insurance society is required to file a certified copy of changes made in its constitution and bylaws with the Insurance Commissioner within 90 days (see § 58-275) and fails to do so, it may not, while thus in default, suspend a member for non-compliance therewith. *Wilson v. Supreme Conclave*, 174 N. C. 628, 94 S. E. 443 (1917).

Proof of Forfeiture of Benefits.—A stipulation in an endowment policy in a fraternal order requiring the member to be in a good standing at the time of his death must be construed in reference to provisions in the charter and bylaws of the order, that the member can only be suspended for failure to pay his dues for six months, of which notice shall be given him; and an order of suspension made in

his absence will not have the effect of suspending him from benefits when there is no evidence that he had failed to pay his dues for the stated period or that notice had been given in accordance with the constitution and bylaws. *Lyons v. Knights of Pythias*, 172 N. C. 408, 90 S. E. 423 (1916), distinguishing *Wilkie v. National Council J. O. U. A. M.*, 151 N. C. 527, 66 S. E. 579 (1909).

False Representations of Insured.—Where an insurance policy in a fraternal order is issued in violation of certain restrictions contained in its constitution and bylaws, and there is evidence tending to show that this fact was known at the time to the applicant, and the policy was issued by reason of false and material statements on the part of the applicant, the order is not estopped, as a conclusion of law, from resisting payment of the policy because of the fact that its agent also knew that the applicant's statements were false. *Robinson v. Brotherhood*, 170 N. C. 545, 87 S. E. 537 (1916).

Nonpayment of Dues.—In an action upon a life insurance certificate in a fraternal order the burden of proof is upon the defendant to show nonpayment of dues or other matters to avoid the certificate, when the certificate has been put in evidence and the death has been shown. *Wilkie v. National Council, J. O. U. A. M.*, 147 N. C. 637, 61 S. E. 580 (1908); *Harris v. National Council, J. O. U. A. M.*, 168 N. C. 357, 84 S. E. 405 (1915).

Waiver of Defects in Policy.—A policy in the insurance department of a fraternal order cannot be recovered on when issued by a local agent contrary to its rules and regulations as contained in its constitution and bylaws, unless the defect has been waived by the order or it is in some way estopped from insisting on the forfeiture. *Robinson v. Brotherhood*, 170 N. C. 545, 87 S. E. 537 (1916).

§ 58-283. Benefits not subject to debts.—No money or other benefit, charity or relief or aid to be paid, provided, or rendered by any such society or association for the relief of employees including railroad and other relief associations shall be liable to attachment, garnishment, or other process, or be seized, taken, appropriated, or applied by any legal or equitable process or opera-

tion of law to pay any debt or liability of a member or beneficiary or any other person who may have a right thereunder, either before or after payment. (1913, c. 89, s. 18; C. S., s. 6510; 1925, c. 83.)

Editor's Note.—See 3 N. C. Law Rev.

130.

§ 58-284. Certificates of insurance to members.—Any fraternal benefit society authorized to do business in this State which shall accumulate and maintain the reserves, on all certificates hereafter issued, required by the American Experience Table of Mortality, with Craig's or Buttolph's Extension thereof, or the Standard Industrial Table of Mortality, with an interest assumption of not more than three and one-half per centum per annum, or the American Men Ultimate Table of Mortality, with Bowerman's Extension thereof, with an interest assumption of not more than three and one-half per centum per annum, or some higher standard, may accept members in such manner and upon such showing of eligibility, and issue to its members such forms of certificates in such amounts and payable to such beneficiaries as may be authorized by the society; and such society may issue benefit certificates of insurance to any such members in an amount or amounts not exceeding five thousand (\$5,000.00) dollars on the aggregate without medical examination, upon health and character information satisfactory to the society. The provisions of this section shall apply to children under sixteen years of age of members of such society.

This section shall not affect or apply to any organization or society which limit their membership to persons engaged in one or more hazardous occupations in the same or similar lines of business, or in any way affect or repeal any law that now applies to such organizations or societies. (1941, c. 74.)

Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 491.

§ 58-285. Funds provided.—1. Any society may create, maintain, invest, disburse, and apply an emergency, surplus, or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in subsection two of § 58-280. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed shall be derived from periodical or other payments by the members of the society and accretions of said funds. But no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this State which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August twenty-third, one thousand eight hundred and ninety-nine, or any higher standard, with interest assumption not more than four per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent per annum.

2. Deferred payments or installments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. (1913, c. 89, s. 8; C. S., s. 6511.)

§ 58-286. Investment of funds.—Every society shall invest its funds only in securities permitted by the laws of this State for the investment of the as-

sets of life insurance companies: Provided, that any foreign society permitted or seeking to do business in this State, which invests its funds in accordance with the laws of the state in which it is incorporated where it has such laws, shall be held to meet the requirements of this article for the investment of funds. (1913, c. 89, s. 9; C. S., s. 6512.)

Cross References.—As to investment in bonds guaranteed by the United States, see § 53-44. As to investment in bonds or notes secured by mortgages insured by the Federal Housing Administration, see §

53-45. See also § 53-60 as to investments in federal farm loan bonds, and § 142-29 as to investment in refunding bonds of North Carolina.

§ 58-287. Application of funds.—Every provision of the laws of the society for payment by its members, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses. (1913, c. 89, s. 10; C. S., s. 6513.)

§ 58-288. Powers of existing societies retained; reincorporation.—Any society now engaged in transacting business in this State may exercise all of the rights conferred by this article, and all the rights, powers, and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this article, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided by law. (1913, c. 89, s. 12; C. S., s. 6514.)

§ 58-289. Mergers and transfers.—No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and is filed with the Commissioner of Insurance of this State, together with a sworn statement of the financial condition of each of the societies, by its president and secretary or corresponding officers, and a certificate duly verified under oath of said officers of each of the contracting societies that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of the societies.

Upon the submission of such contract, financial statements, and certificates, the Commissioner of Insurance shall examine the same, and if he shall find such financial statements to be correct and the contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of the societies, he shall approve the merger or transfer, issue his certificate to that effect, and thereupon the contract of merger or transfer shall be of full force and effect.

In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the Commissioner of Insurance. (1913, c. 89, s. 13; C. S., s. 6515.)

As to partial repeal of section, see note under § 58-303.

§ 58-290. Accident societies may be licensed.—Any fraternal benefit society heretofore organized and incorporated, and operating within the definition set forth in this article, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this article, and shall have all the privileges and be subject to all the provisions and regulations of this article, except the provisions requiring medical examinations, valuations of benefit cer-

tificates, and that the certificate shall specify the amount of benefits. (1913, c. 89, s. 27; C. S., s. 6517.)

§ 58-291. Certain societies not included.—Nothing contained in this article shall be construed to affect or apply to societies which limit their membership to any one hazardous occupation, nor to an association of local lodges of a society now doing business in this State which provides death benefits not exceeding five hundred dollars to any one person or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, nor to any contracts of reinsurance business on such plan in this State, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house, or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or for disability benefits of more than one hundred and fifty dollars to any one person in any one year. The Commissioner of Insurance may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this article. (1913, c. 89, s. 26; C. S., s. 6518; 1925, c. 70, s. 2.)

Service on Resident Secretary Valid.—Personal service on resident secretary of fraternal insurance association allowed to do business in the State without a license under this section and §§ 58-15, and 58-251,

held valid service on the association in action on policy. *Winchester v. Grand Lodge of Brotherhood of Railroad Trainmen*, 203 N. C. 735, 167 S. E. 49 (1932).

§ 58-292. Reports to Commissioner of Insurance.—1. Annual Report.—Every society transacting business in this State shall annually, on or before the first day of March, file with the Commissioner of Insurance, in such form as he may require, a statement, under oath of its president and secretary or corresponding officers, of its condition and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the Commissioner may deem necessary to a proper exhibit of its business and plan of working. The Commissioner may at other times require any further statement he may deem necessary to be made relating to such society.

2. Valuation of Certificates.—In addition to the annual report herein required, each society shall annually report to the Commissioner a valuation of its certificates in force on December thirty-first, last preceding, excluding those issued within the year for which the report is filed, in cases where the contributions for the first year in whole or in part are used for current mortality and expenses. Such report of valuation shall show, as contingent liabilities, the present mid-year value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and the net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

3. Valuation Ascertained.—Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the Department of Insurance of the home state of the society, and shall be filed with the Commissioner within ninety days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August twenty-third, one thousand eight hundred and ninety-nine, or, at the option of the society, any higher table; or, at its option, it may use a table based upon the society's own experience of at least twenty years and covering not less than one hundred

thousand lives with interest assumption not more than four per centum per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society: Provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience, and in such case a separation of the funds shall not be required.

4. Test of Solvency.—The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities.

5. Report Mailed to Members.—A report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June first of each year; or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper, and the issue containing the same mailed to each beneficiary member of the society. (1913, c. 89, s. 20; C. S., s. 6519.)

§ 58-293. **Additional or increased rates.**—The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws, additional, increased, or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per cent per annum. (1913, c. 89, s. 20; C. S., s. 6520.)

§ 58-294. **Provisions to insure future security.**—If the valuation of the certificates, as hereinbefore provided, on December thirty-first, one thousand nine hundred and seventeen, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of efficiency as shown in the valuation as of December thirty-first, one thousand nine hundred and seventeen. If at any succeeding triennial valuation such society does not show at least the same condition, the Commissioner shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein, the Commissioner may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of this article, or in the case of a foreign society, its license may be canceled in the manner provided in this article.

Any such society, shown by any triennial valuation, subsequent to December thirty-first, one thousand nine hundred and seventeen, not to have maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December thirty-first, one thousand nine hundred and seventeen, or thereafter, as to all new members admitted, to be subject, so far as stated rates of contributions are concerned, to the provisions of this article, applicable in the organization of new societies: Provided, that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the new members may be placed in a separate class and their cer-

tificates valued as an independent society in respect of contributions and funds. (1913, c. 89, s. 20(a); C. S., s. 6521.)

§ 58-295. Valuation on accumulation basis; tabular basis.—In lieu of the requirements of the two preceding sections, any society accepting in its laws the provisions of this section may value its certificates on a basis herein designated “accumulation basis,” by crediting each member with the net amount contributed for each year, and with interest at approximately the net rate earned and by charging him with his shares of the losses for each year, herein designated “cost of insurance,” and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this State, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death, less the credit to the member. Except as specifically provided in its articles or laws or contracts, no charge shall be carried forward from the first valuation hereunder against any member of any past share of losses exceeding the contributions and credit. If, after the first valuation, any member’s share of losses for any year exceeds his credit, including the contribution for the year, the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contribution especially created or required for such purpose.

Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained, and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificates issued, rerated, or readjusted on a basis providing for adequate rates with adequate reserves to mature such certificates upon assumptions for mortality and interest recognized by the law of this State, shall be valued on such basis, herein designated the “Tabular Basis”: Provided, that if on the first valuation under this section a deficiency in reserve shall be shown for any such certificate, the same shall be valued on the accumulation basis.

Whenever, in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve; or from increased contributions or by an increase in the number of assessments applied to the society as a whole or to classes of members as may be specified in its laws. Savings from a lower amount of death losses may be returned in like manner as may be specified in its laws.

If the laws of the society so provide, the assets representing the reserves of any separate class of members may be carried separately for such class as if in an independent society, and the required reserve accumulation of such class so set apart shall not thereafter be mingled with the assets of other classes of the society.

A table showing the credits to individual members for each age and year of entry and showing opposite each credit the tabular reserve required on the whole life or other plan of insurance specified in the contract, according to assumptions for mortality and interest recognized by the law of this State and adopted by the society, shall be filed by the society with each annual report, and also be furnished to each member before July first of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the credit for such member and giving the tabular reserve and level rate required for a transfer carrying out the plan of insurance specified in the contract. No table or statement need be made or furnished where the reserves are maintained on the tabular basis.

For this purpose individual bookkeeping accounts for each member shall not be required, and all calculations may be made by actuarial methods.

Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis and the reserves on the tabular

basis pursuant to its laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in the manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society. (1913, c. 89, s. 20(b); C. S., s. 6522.)

§ 58-296. Examination of domestic societies.—The Commissioner of Insurance, or any person he may appoint, shall have power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employees or other persons in relation to the affairs, transactions, and condition of the society.

The expense of such examination shall be paid by the society examined upon statement furnished by the Commissioner of Insurance, and the examination shall be made at least once in three years. (1913, c. 89, s. 21; C. S., s. 6523.)

§ 58-297. Proceedings for dissolution.—When after examination the Commissioner of Insurance is satisfied that any domestic society has failed to comply with any provision of this article, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently; or whenever any domestic society, after the existence of one year or more, shall have a membership of less than four hundred (or shall determine to discontinue business), the Commissioner of Insurance may present the facts relating thereto to the Attorney General who shall, if he deem the circumstances warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, it shall be enjoined from carrying on any further business, and a receiver shall be appointed to take possession of its books, papers, moneys, and other assets and immediately, under the direction of the court, proceed to close its affairs and distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the Attorney General against any such society until after notice has been duly served on its chief executive officers and a reasonable opportunity given to it, on a date to be named in the notice, to show cause why such proceedings should not be commenced. (1913, c. 89, s. 21; C. S., s. 6524.)

§ 58-298. Proceedings only by Attorney General.—No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this State unless the same is made by the Attorney General. (1913, c. 89, s. 22; C. S., s. 6525.)

§ 58-299. Examination of foreign societies.—The Commissioner of Insurance or any person whom he may appoint may examine any foreign society transacting or applying for admission to transact business in this State. The Commissioner may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employees and other persons in relation to the affairs, transactions, and condition of the society. He may, in his discretion, accept in lieu of such examination the examination of the insurance department of the state, territory, district, province, or country where such society is organized. The actual expenses of examiners making any such examination shall be paid by the society upon statement furnished by the Commissioner of Insurance.

If any such society or its officers refuse to submit to such examination or to comply with the provisions of the section relative thereto, its authority to write new business in this State shall be suspended or license refused until satisfactory

evidence is furnished the Commissioner relating to its condition and affairs, and during such suspension the society shall not write new business in this State. (1913, c. 89, s. 23; C. S., s. 6526.)

§ 58-300. No adverse publications.—Pending, during, or after an examination or investigation of any such society, either domestic or foreign, the Commissioner of Insurance shall make public no financial statement, report, or finding, nor shall he knowingly permit to become public any financial statement, report, or finding affecting the status, standing, or rights of any such society, until a copy thereof has been served upon the society, at its home office, nor until the society has been afforded a reasonable opportunity to answer any such financial statement, report, or finding, and to make such showing in connection therewith as it may desire. (1913, c. 89, s. 24; C. S., s. 6527.)

§ 58-301. Revocation of license.—When the Commissioner of Insurance on investigation is satisfied that any foreign society transacting business under this article has exceeded its powers, or has failed to comply with any provisions of this article, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require the society, on a date named, to show cause why its license should not be revoked. If on the date named in the notice such objections have not been removed to the satisfaction of the Commissioner, or the society does not present good and sufficient reasons why its authority to transact business in this State should not at that time be revoked, he may revoke the authority to continue business in this State. All decisions and findings of the Commissioner made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in this article. (1913, c. 89, s. 25; C. S., s. 6528.)

§ 58-302. Criminal offenses.—Any person, officer, member, or examining physician of any society authorized to do business under this article who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail for not less than thirty days nor more than one year, or both, in the discretion of the court.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this State, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized as herein provided, to do business as herein defined in this State, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any society, or any officer, agent, or employee thereof, neglecting or refusing to comply with, or violating, any of the provisions of this article, the penalty for which neglect, refusal, or violation is not specified in this section, shall be fined not exceeding two hundred dollars upon conviction thereof. (1913, c. 89, s. 28; C. S., s. 6529.)

Cross Reference.—As to penalties for using funds of insurance companies for political purposes, see § 163-206.

§ 58-303. Merger, consolidation or reinsurance of fraternal risks with licensed life insurance companies or with other fraternal orders or benefit societies.—No fraternal order or society organized under the laws of this State to do the business of life, accident, or health insurance shall consolidate or merge with any other fraternal order or society, or with a life insurance

company, or reinsure its risks, or any part thereof with any other fraternal order or society, or with a life insurance company, or assume or reinsure the whole or any portion of the risks of any other fraternal order or society, except with a fraternal order or society, or a life insurance company, licensed to transact business in North Carolina and subject to the provisions of G. S. § 58-304. (1921, c. 60, s. 1; C. S., s. 6529(a); 1949, c. 1080, s. 1.)

Editor's Note.—The 1949 amendment rewrote this section. The amendatory act, which also rewrote § 58-304 and inserted § 58-304.1, provides in § 4 thereof: "All laws

and clauses of laws, and in particular the provisions of G. S. § 58-289, in conflict with this act are repealed to the extent of such conflict."

§ 58-304. Contracts approved by boards of directors or governing bodies of parties to same; approval by Commissioner of Insurance.—

When any fraternal order or society shall propose to consolidate or merge its business or to enter into a contract of reinsurance with any other fraternal order or society or with a life insurance company, or to assume or reinsure the whole or any portion of the risks of any other fraternal order or society, the proposed contract in writing setting forth the terms and conditions of the proposed consolidation, merger, or reinsurance shall be submitted to the boards of directors or to the governing bodies of each of said parties to said contract at a meeting called for that purpose by notice given in writing ten days prior thereto, and if approved by a majority vote of the said boards of directors, or governing bodies, said contract as so approved shall be submitted to the Commissioner of Insurance of this State for his approval, and the parties to said contract shall at the same time submit a sworn statement showing their financial condition as of the 31st day of December next preceding the date of such contract. Provided, that the Commissioner of Insurance may, within his discretion, require such financial statement to be submitted as of the last day of the month next preceding the date of such contract. The Commissioner of Insurance shall thereupon consider such contract of consolidation, merger, or reinsurance, and if satisfied that the interests of the certificate and policyholders of each of the parties are properly protected and that the contract will be in the public interest, and that such contract is just and equitable to the certificate and policyholders of each of the parties, and that no reasonable objection exists thereto, he shall approve said contract as submitted. In case the parties corporate to such contract shall have been incorporated in separate states, or territories, such contract shall be submitted as herein provided to the Commissioner of Insurance of each of such incorporating states, or territories, to be considered and approved separately by each of said Commissioners of Insurance. If the Commissioner of Insurance approves such contract of consolidation, merger, or reinsurance, he shall issue a certificate to that effect, and thereupon the said contract of consolidation, merger, or reinsurance shall be in full force and effect. In case such contract is not approved it shall be inoperative, and the fact of the submission and its contents shall not be disclosed by the Commissioner of Insurance. (1921, c. 60, s. 2; C. S., s. 6529(b); 1949, c. 1080, s. 2.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 58-304.1. Application of §§ 58-155.1 to 58-155.35, inclusive.—The provisions of G. S. §§ 58-155.1 to 58-155.35, inclusive, shall apply, where pertinent, to all fraternal orders and societies doing business in this State. (1949, c. 1080, s. 3.)

§ 58-305. Expenses; compensation to officers or employees of contracting parties and State employees.—All necessary and actual expenses and compensation incident to the proceedings provided in this law shall be paid as provided by such contract of consolidation, merger, or reinsurance: Provided, however, that no brokerage or commission shall be included in such expenses and compensation or shall be paid to any person by either of the parties to any such

contract in connection with the negotiation therefor or execution thereof, nor shall any compensation be paid to any officer or employee of either of the parties to such contract for directly or indirectly aiding in effecting such contract of consolidation, merger, or reinsurance. An itemized statement of all such expenses shall be filed with the Commissioner of Insurance, subject to approval, and when approved the same shall be binding on the parties thereto. Except as fully expressed in the contract of consolidation, merger or reinsurance, or itemized statement of expenses, as approved by the Commissioner of Insurance, or commissioners, as the case may be, no compensation shall be paid to any person or persons, and no officer or employee of the State shall receive any compensation, directly or indirectly, for in any manner aiding, promoting, or assisting any such consolidation, merger, or reinsurance. (1921, c. 60, s. 3; C. S., s. 6529(c).)

§ 58-306. Violation of law a felony.—Any person violating the provisions of §§ 58-303, 58-304, and 58-305 shall be guilty of a felony, and upon conviction shall be liable to a fine of not more than five thousand dollars, or to imprisonment for not more than five years, or to both fine and imprisonment. (1921, c. 60, s. 4; C. S., s. 6529(d).)

§ 58-307. Appointment of Commissioner of Insurance as process agent.—Every foreign fraternal benefit society except labor organizations which limit their admission to membership to persons engaged in one or more hazardous occupations in the same or similar lines of business now transacting business in this State shall, within thirty days after the passage of this section, and every such society hereafter applying for admission shall, before being licensed, appoint in writing the Commissioner of Insurance and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society, and that the authority shall continue in force so long as any liability remains outstanding in this State. Copies of such appointment, certified by said Commissioner of Insurance, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall be made in duplicate upon the Commissioner of Insurance, or in his absence upon the person in charge of his office, and shall be deemed sufficient service upon said society. When legal service against any such society is served upon said Commissioner of Insurance he shall forthwith forward by registered mail one of the duplicate copies, prepaid and directed to its secretary or corresponding officer. No such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense in less than thirty days from the date of mailing the copy of such service to such society. Legal process shall not be served upon any such society except in the manner provided therein. As a condition precedent to a valid service of process and to the duty of the Commissioner in the premises, the plaintiff shall pay to the Commissioner of Insurance at the time of service the sum of one (\$1.00) dollar, which the plaintiff shall recover as taxable costs if he prevails in his action. (1939, c. 130.)

Cross Reference.—As to other ways in which a foreign insurance company may be served with a copy of process, see §§ 1-97, 55-38.

ARTICLE 29.

Whole Family Protection.

§ 58-308. Insurance on children.—Any fraternal order or fraternal benefit society authorized to do business in this State and operating on the lodge plan may provide in its constitution and bylaws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of one and sixteen years at next birthday, for

whose support and maintenance a member of such society is responsible. The society may at its option organize and operate branches for such children and membership in local lodges, and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society. The total benefits payable as above provided shall in no case exceed the following amounts at ages at next birthday at time of death, respectively, as follows: one year, twenty dollars; two years, fifty dollars; three years, seventy-five dollars; four years, one hundred dollars; five years, one hundred twenty-five dollars; six years, one hundred fifty dollars; seven years, two hundred dollars; eight years, two hundred fifty dollars; nine years, three hundred dollars; ten years, four hundred dollars; eleven years, five hundred dollars; twelve years, six hundred dollars; thirteen years, seven hundred dollars; fourteen years, eight hundred dollars; fifteen years, nine hundred dollars; sixteen years, one thousand dollars.

Provided, any fraternal benefit society which shall accumulate and maintain the reserves required by a table of mortality not lower than the American Experience Table of Mortality, with an interest assumption of not more than four per cent, may accept members at such ages, and children under sixteen years of age, in such manner and upon such showing of eligibility, and issue to its members, and children under sixteen years of age, such forms of certificates, payable to such beneficiaries, and for such amounts, as its constitution and laws may provide. Children under sixteen years of age shall have no voice or vote. (1917, c. 239, s. 1; C. S., s. 6530; 1931, c. 38; 1937, c. 208.)

Editor's Note.—Prior to the 1931 amendment the ages were set at from two to eighteen and the amounts from \$34 to \$600. The 1937 amendment added the proviso and the last sentence.

§ 58-309. Medical examination; certificates and contributions.—No benefit certificate as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the laws of the society, nor shall any such benefit certificate be issued unless the society shall simultaneously put in force at least five hundred such certificates, on each of which at least one assessment has been paid, nor where the number of lives represented by such certificate falls below five hundred. The death benefit contributions to be made upon such certificate shall be based upon the "Standard Mortality Table" or the "English Life Table Number Six," and a rate of interest not greater than four per cent per annum, or upon a higher standard; but contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the bylaws; and extra contributions shall be made if the reserves hereafter provided for become impaired. (1917, c. 239, s. 2; C. S., s. 6531.)

§ 58-310. Reserve fund; exchange of certificates.—Any society entering into such insurance agreements shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions as provided in § 58-309, and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society, and shall not be liable for nor used for the payment of the debts and obligations of the society other than the benefits herein authorized. A society may provide that when a child reaches the minimum age for initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society: Provided, that such surrender will not reduce the number of lives insured in the branch below five hundred; and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to the credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original

certificate, nor the person who paid the contributions, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership. (1917, c. 239, s. 3; C. S., s. 6532.)

§ 58-311. Separation of funds.—An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the Commissioner of Insurance by any society availing itself of the provisions hereof. The separation of assets, funds, and liabilities required hereby shall not be terminated, rescinded, or modified, nor shall the funds be diverted for any use other than as specified in the preceding section, as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in any liquidation, reinsurance, merger, or other change in the condition or the status of the society. (1917, c. 239, s. 4; C. S., s. 6533.)

§ 58-312. Payments to expense or general fund.—Any society shall have the right to provide in its laws and the certificate issued hereunder for specified payments on account of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society, as its constitution and bylaws may provide. (1917, c. 239, s. 5; C. S., s. 6534.)

§ 58-313. Continuation of certificates.—In the event of the termination of membership in the society by the person responsible for the support of any child on whose account a certificate may have been issued as provided herein, the certificate may be continued for the benefit of the estate of the child, provided the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child who shall assume the payment of the required contributions. (1917, c. 239, s. 6; C. S., s. 6535.)

ARTICLE 30.

General Provisions for Societies.

§ 58-314. Appointment of trustees to hold property.—The lodges of Masons, Odd Fellows, Knights of Pythias, camps of Woodmen of the World, councils of the Junior Order of United American Mechanics, orders of the Elks, Young Men's Christian Associations, Young Women's Christian Associations, societies for the care of orphans and indigent children, societies for the rescue of fallen women, and any other benevolent or fraternal orders and societies, may appoint from time to time suitable persons trustees of their bodies or societies, in such manner as they deem proper, which trustees, and their successors, shall have power to receive, purchase, take, and hold property, real and personal, in trust for such society or body. The trustees shall have power, when instructed so to do by resolution adopted by the society or body which they represent, to mortgage or sell and convey in fee simple any real or personal property owned by the society or body; and the conveyances so made by the trustees shall be effective to pass the property in fee simple to the purchaser or to the mortgagee or trustee for the purposes in such conveyance or mortgage expressed. If there shall be no trustee, then any real or personal property which could be held by such trustees shall vest in and be held by such charitable, benevolent, religious, or fraternal orders and societies, respectively, according to such intent. (1907, c. 22; 1915, cc. 149, 186; C. S., s. 6536; 1923, c. 257.)

Wrongfully Suspended Members Enjoining Sale of Lodge Property.—Where a local lodge existed under the constitution and bylaws of the supreme lodge requiring written notice to be given to its members

before suspension, and certain members were suspended without such notice being given, a resolution passed at a subsequent meeting of the local lodge authorizing a sale of its property by trustees was in-

valid, and the sale was enjoined at the suit Tyler v. Howell, 192 N. C. 433, 135 S. E. of such wrongfully suspended members. 133 (1926).

§ 58-315. **Unauthorized wearing of badges, etc.**—Any person who fraudulently and willfully wears the badge or button of any secret or fraternal organization or society, either in the identical form or in such near resemblance thereto as to be a colorable imitation thereof, or who fraudulently and willfully uses the name of any such order or organization, the titles of its officers, or its insignia, ritual, or ceremonies, unless entitled to wear or use the same under the constitution and bylaws, rules and regulations of such secret or fraternal organization or society, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of fifty dollars or imprisonment for thirty days, in the discretion of the court. (1907, c. 968; 1911, c. 37; 1915, c. 252; C. S., s. 6537.)

ARTICLE 31.

Nonprofit Life Benefit Association.

§§ 58-316 to 58-340: Repealed by Session Laws 1945, c. 379.

Chapter 59. Partnership.

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ARTICLE 1.

Uniform Limited Partnership Act.

§ 59-1. **Limited partnership defined.**—A limited partnership is a partnership formed by two or more persons under the provisions of § 59-2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership. (1941, c. 251, s. 1.)

Editor's Note.—For comment on this article, see 19 N. C. Law Rev. 503.

§ 59-2. **Formation.**—(1) Two or more persons desiring to form a limited partnership shall

(a) Sign and swear to a certificate, which shall state

I. The name of the partnership,

II. The character of the business,

III. The location of the principal place of business,

IV. The name and place of residence of each member; general and limited partners being respectively designated,

V. The term for which the partnership is to exist,

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(b) File for record the certificate in the office of the clerk of the superior court.

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1). (1941, c. 251, s. 2.)

§ 59-3. Business which may be carried on.—A limited partnership may carry on any business which a partnership without limited partners may carry on. (1941, c. 251, s. 3.)

§ 59-4. Character of limited partner's contribution.—The contributions of a limited partner may be cash or other property, but not services. (1941, c. 251, s. 4.)

§ 59-5. A name not to contain surname of limited partner; exceptions.—(1) The surname of a limited partner shall not appear in the partnership name, unless

(a) It is also the surname of a general partner, or

(b) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner. (1941, c. 251, s. 5.)

§ 59-6. Liability for false statements in certificate.—If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false

(a) At the time he signed the certificate, or

(b) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in § 59-25, subsection (3). (1941, c. 251, s. 6.)

§ 59-7. Limited partner not liable to creditors.—A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. (1941, c. 251, s. 7.)

Cross Reference.—As to nature of liability of general partner, see § 59-45.

§ 59-8. Admission of additional limited partners.—After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of § 59-25. (1941, c. 251, s. 8.)

§ 59-9. Rights, powers and liabilities of a general partner.—A general partner shall have all the rights and powers and be subject to all the restric-

tions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

- (a) Do any act in contravention of the certificate,
- (b) Do any act which would make it impossible to carry on the ordinary business of the partnership,
- (c) Confess a judgment against the partnership,
- (d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,
- (e) Admit a person as a general partner,
- (f) Admit a person as a limited partner, unless the right so to do is given in the certificate,
- (g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate. (1941, c. 251, s. 9.)

§ 59-10. Rights of a limited partner.—(1) A limited partner shall have the same rights as a general partner to

- (a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,
- (b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and
- (c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in §§ 59-15 and 59-16. (1941, c. 251, s. 10.)

§ 59-11. Status of person erroneously believing himself a limited partner.—A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income. (1941, c. 251, s. 11.)

§ 59-12. One person both general and limited partner.—(1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner. (1941, c. 251, s. 12.)

§ 59-13. Loans and other business transactions with limited partner.—(1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim

- (a) Receive or hold as collateral security any partnership property, or
- (b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are

not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership. (1941, c. 251, s. 13.)

§ 59-14. Relation of limited partners inter se.—Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing. (1941, c. 251, s. 14.)

§ 59-15. Compensation of limited partner.—A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners. (1941, c. 251, s. 15.)

§ 59-16. Withdrawal or reduction of limited partner's contribution.—(1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and

(c) The certificate is canceled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution

(a) On the dissolution of a partnership, or

(b) When the date specified in the certificate for its return has arrived, or

(c) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

(3) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(4) A limited partner may have the partnership dissolved and its affairs wound up when

(a) He rightfully but unsuccessfully demands the return of his contribution, or

(b) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph (1) (a) and the limited partner would otherwise be entitled to the return of his contribution. (1941, c. 251, s. 16.)

§ 59-17. Liability of limited partner to partnership.—(1) A limited partner is liable to the partnership

(a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(b) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the condition stated in the certificate.

(2) A limited partner holds as trustee for the partnership

(a) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

(b) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return. (1941, c. 251, s. 17.)

§ 59-18. Nature of limited partner's interest in the partnership.—A limited partner's interest in the partnership is personal property. (1941, c. 251, s. 18.)

§ 59-19. Assignment of limited partner's interest.—(1) A limited partner's interest is assignable.

(2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(5) An assignee becomes a substituted limited partner when the certificate is approximately amended in accordance with § 59-25.

(6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

(7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under §§ 59-6 and 59-17. (1941, c. 251, s. 19.)

Cross Reference.—As to assignment of general partner's interest, see § 59-57.

§ 59-20. Effect of retirement, death or insanity of a general partner.—The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

(a) Under a right so to do stated in the certificate, or

(b) With the consent of all members. (1941, c. 251, s. 20.)

§ 59-21. Death of limited partner.—(1) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

(2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner. (1941, c. 251, s. 21.)

§ 59-22. Rights of creditors of limited partner.—(1) On due application to a court of competent jurisdiction by any judgment creditor of a limited

partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

(2) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.

(4) Nothing in this article shall be held to deprive a limited partner of his statutory exemption. (1941, c. 251, s. 22.)

§ 59-23. Distribution of assets.—(1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners,

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(c) Those to limited partners in respect to the capital of their contributions,

(d) Those to general partners other than for capital and profits,

(e) Those to general partners in respect to profits,

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims. (1941, c. 251, s. 23.)

§ 59-24. When certificate shall be canceled or amended.—(1) The certificate shall be canceled when the partnership is dissolved or all limited partners cease to be such.

(2) A certificate shall be amended when

(a) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,

(b) A person is substituted as a limited partner,

(c) An additional limited partner is admitted,

(d) A person is admitted as a general partner,

(e) A general partner retires, dies or becomes insane, and the business is continued under § 59-20,

(f) There is a change in the character of the business of the partnership,

(g) There is a false or erroneous statement in the certificate,

(h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,

(i) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or

(j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them. (1941, c. 251, s. 24.)

§ 59-25. Requirements for amendment and for cancellation of certificate.—(1) The writing to amend a certificate shall

(a) Conform to the requirements of § 59-2, subsection (1) (a) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

(b) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by

the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs (1) and (2) as a person who must execute the writing refuses to do so, may petition the superior court to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the clerk of the superior court in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(5) A certificate is amended or canceled when there is filed for record in the office of the clerk of the superior court where the certificate is recorded

(a) A writing in accordance with the provisions of paragraph (1), or (2) or

(b) A certified copy of the order of court in accordance with the provisions of paragraph (4).

(6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this article. (1941, c. 251, s. 25.)

§ 59-26. **Parties to actions.**—A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership. (1941, c. 251, s. 26.)

§ 59-27. **Name of article.**—This article may be cited as the Uniform Limited Partnership Act. (1941, c. 251, s. 27.)

§ 59-28. **Rules of construction.**—(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article.

(2) This article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This article shall not be so construed as to impair the obligations of any contract existing when the article goes into effect, nor to affect any action on proceedings begun or right accrued before this article takes effect. (1941, c. 251, s. 28.)

§ 59-29. **Rules for cases not provided for in this article.**—In any case not provided for in this article the rules of law and equity, including the law merchant, shall govern. (1941, c. 251, s. 29.)

§ 59-30. **Provisions for existing limited partnerships.**—(1) A limited partnership formed under any statute of this State prior to March 15, 1941, may become a limited partnership under this article by complying with the provisions of § 59-2; provided the certificate sets forth

(a) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership formed under any statute of this State prior to the adoption of this article, until or unless it becomes a limited partnership under this article, shall continue to be governed by the provisions of existing law, ex-

cept that such partnership shall not be renewed unless so provided in the original agreement. (1941, c. 251, s. 30.)

Editor's Note.—Section 31 of act from which this article was codified repealed §§ 3258-3276 of the Consolidated Statutes, as amended, except in so far as said sec-

tions affected limited partnerships existing on March 15, 1941, when the act became effective.

ARTICLE 2.

Uniform Partnership Act.

Part 1. Preliminary Provisions.

§ 59-31. **Name of article.**—This article may be cited as Uniform Partnership Act. (1941, c. 374, s. 1.)

Editor's Note.—The Uniform Partnership Act became effective March 15, 1941.

For comment on the enactment, see 19 N. C. Law Rev. 499.

§ 59-32. **Definition of terms.**—In this article, "court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any State insolvent act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real property" includes land and any interest or estate in land. (1941, c. 374, s. 2.)

§ 59-33. **Interpretation of knowledge and notice.**—(1) A person has "knowledge" of a fact within the meaning of this article not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances show bad faith.

(2) A person has "notice" of a fact within the meaning of this article when the person who claims the benefit of the notice:

(A) States the fact to such person, or

(B) Delivers through the mail, or by other means of communication a written statement of the fact to such person or to a proper person at his place of business, or residence. (1941, c. 374, s. 3.)

§ 59-34. **Rules of construction.**—(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article.

(2) The law of estoppel shall apply under this article.

(3) The law of agency shall apply under this article.

(4) This article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This article shall not be construed so as to impair the obligations of any contract existing when the article goes into effect, nor to affect any action or proceedings begun or right accrued before this article takes effect. (1941, c. 374, s. 4.)

§ 59-35. **Rules for cases not provided for in this article.**—In any case not provided for in this article the rules of law and equity, including the law merchant, shall govern. (1941, c. 374, s. 5.)

Part 2. Nature of a Partnership.

§ 59-36. **Partnership defined.**—(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this State, or any

statute adopted by authority, other than the authority of this State, is not a partnership under this article, unless such association would have been a partnership in this State prior to the adoption of this article; but this article shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith. (1941, c. 374, s. 6.)

Cross Reference.—As to limited partnerships, see §§ 59-1 to 59-30.

Cited in *Dwiggins v. Parkway Bus Co.*, 230 N. C. 234, 52 S. E. (2d) 892 (1949).

§ 59-37. Rules for determining the existence of a partnership.—In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by § 59-46 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

- (a) As a debt by installments or otherwise,
- (b) As wages of an employee or rent to a landlord,
- (c) As an annuity to a widow or representative of a deceased partner,
- (d) As interest on a loan, though the amount of payment vary with the profits of the business,

(e) As the consideration for the sale of a goodwill of a business or other property by installments or otherwise. (1941, c. 374, s. 7.)

Cross Reference.—For provisions that a lessor and lessee are not partners, see §§ 42-1 and 74-1.

Applied in *Eggleston v. Eggleston*, 228 N. C. 668, 47 S. E. (2d) 243 (1948).

§ 59-38. Partnership property.—(1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears. (1941, c. 374, s. 8.)

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-39. Partner agent of partnership as to partnership business.—(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(a) Assign the partnership property in trust for creditors, or on the assignee's promise to pay the debts of the partnership,

(b) Dispose of the goodwill of the business,

(c) Do any other act which would make it impossible to carry on the ordinary business of a partnership,

(d) Confess a judgment,

(e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction. (1941, c. 374, s. 9.)

Service of Summons on One Partner.—

Under the Uniform Partnership Act it is not necessary that all members of an alleged partnership should be served with summons. A partnership is represented by the partner who is served, and as to him a judgment in the action in which he is served would be binding on him individually, and as to the partnership property. But as to a partner not served with summons, the judgment would not be binding

on him individually. Nevertheless even after judgment such partner could be brought in and made a party. The court may, before or after judgment, direct the bringing in of new parties to the end that substantial justice may be done. See § 1-73. *Dwiggins v. Parkway Bus Co.*, 230 N. C. 234, 52 S. E. (2d) 892 (1949).

Cited in *Pappas v. Crist*, 223 N. C. 265, 25 S. E. (2d) 850 (1943).

§ 59-40. Conveyance of real property of the partnership.—(1)

Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of § 59-39, or unless such property has been conveyed by the grantee of a person claiming through such grantee to holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of § 59-39.

(3) Where title to real property is in the name of one or more, but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of § 59-39, unless the purchaser or his assignee, is a holder for value, without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of § 59-39.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property. (1941, c. 374, s. 10.)

§ 59-41. Partnership bound by admission of partner.—An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this article is evidence against the partnership. (1941, c. 374, s. 11.)

Cross Reference.—As to admission after the statute of limitations has run, see § 1-27.

§ 59-42. Partnership charged with knowledge of or notice to partner.—Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner. (1941, c. 374, s. 12.)

§ 59-43. Partnership bound by partner's wrongful act.—Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. (1941, c. 374, s. 13.)

Where one partner is sued individually for a tort committed by him in the course of the partnership business, a judgment would be binding upon him individually, and as to the partnership property, but not as against the other partner individually,

though the court even after judgment may direct that such other partner be brought in and made a party. *Dwiggins v. Parkway Bus Co.*, 230 N. C. 234, 52 S. E. (2d) 892 (1949). See § 59-45 and note.

§ 59-44. Partnership bound by partner's breach of trust.—The partnership is bound to make good the loss:

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership. (1941, c. 374, s. 14.)

§ 59-45. Nature of partner's liability.—All partners are liable

(a) Jointly and severally for everything chargeable to the partnership under §§ 59-43 and 59-44.

(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract. (1941, c. 374, s. 15.)

Cross References.—As to liability of limited partner, see §§ 59-6 and 59-7. As to personal liability of corporate manager of partnership, see § 55-60. As to procedure in action against partners, see §§ 1-72 and 1-113.

Section States Common Law.—The common-law rule of joint and several liability of partners for a tort committed by one of the members of the partnership is incorporated in the Uniform Partner-

ship Act, embraced in this article. *Dwiggins v. Parkway Bus Co.*, 230 N. C. 234, 52 S. E. (2d) 892 (1949).

Each partner is jointly and severally liable for a tort committed by one partner in the course of the partnership business, and the injured person may sue all members of the partnership or any one of them at his election. *Dwiggins v. Parkway Bus Co.*, 230 N. C. 234, 52 S. E. (2d) 892 (1949). See note to § 59-43.

§ 59-46. Partner by estoppel.—(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation. (1941, c. 374, s. 16.)

§ 59-47. Liability of incoming partner.—A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property. (1941, c. 374, s. 17.)

Part 4. Relations of Partners to One Another.

§ 59-48. Rules determining rights and duties of partners.—The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(e) All partners have equal rights in the management and conduct of the partnership business.

(f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(g) No person can become a member of a partnership without the consent of all the partners.

(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners. (1941, c. 374, s. 18.)

Cross Reference.—As to rights and liabilities of limited partners, see §§ 59-10 to 59-17.

§ 59-49. Partnership books.—The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them. (1941, c. 374, s. 19.)

§ 59-50. **Duty of partners to render information.**—Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability. (1941, c. 374, s. 20.)

§ 59-51. **Partner accountable as a fiduciary.**—(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner. (1941, c. 374, s. 21.)

Cross Reference.—As to criminal liability for appropriation of partnership funds by partner, see §§ 14-97 and 14-98.

§ 59-52. **Right to an account.**—Any partner shall have the right to a formal account as to partnership affairs:

- (a) If he is wrongfully excluded from the partnership business or possession of its property by his copartners,
- (b) If the right exists under the terms of any agreement,
- (c) As provided by § 59-51,
- (d) Whenever other circumstances render it just and reasonable. (1941, c. 374, s. 22.)

§ 59-53. **Continuation of partnership beyond fixed term.**—(1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership. (1941, c. 374, s. 23.)

Part 5. Property Rights of a Partner.

§ 59-54. **Extent of property rights of a partner.**—The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management. (1941, c. 374, s. 24.)

§ 59-55. **Nature of a partner's right in specific partnership property.**—(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this article and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them,

or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner, or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin. (1941, c. 374, s. 25.)

Cross Reference.—As to survivor in joint tenancy for partnership purposes, see § 41-2.

§ 59-56. Nature of partner's interest in the partnership.—A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property. (1941, c. 374, s. 26.)

§ 59-57. Assignment of partner's interest.—(1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners. (1941, c. 374, s. 27.)

Cross Reference.—As to assignment of a limited partner's interest, see § 59-19.

§ 59-58. Partner's interest subject to charging order.—(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this article shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership. (1941, c. 374, s. 28.)

Cross Reference.—As to right of creditors of limited partner, see § 59-22.

Part 6. Dissolution and Winding Up.

§ 59-59. Dissolution defined.—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be as-

sociated in the carrying on as distinguished from the winding up of the business. (1941, c. 374, s. 29.)

§ 59-60. Partnership not terminated by dissolution.—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed. (1941, c. 374, s. 30.)

§ 59-61. Causes of dissolution.—Dissolution is caused: (1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specific term or particular undertaking,

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner, unless the partnership agreement provides otherwise;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under § 59-62. (1941, c. 374, s. 31; 1943, c. 384.)

Editor's Note.—The 1943 amendment added to subsection (4) the words "unless the partnership agreement provides otherwise."

statute it was held that the death of a partner worked a dissolution of the firm. *Bank v. Hollingsworth*, 135 N. C. 556, 47 S. E. 618 (1904); *Walker v. Miller*, 139 N. C. 448, 52 S. E. 125 (1905).

Death of Partner.—Even prior to the

§ 59-62. Dissolution by decree of court.—(1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under §§ 59-57 and 59-58:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued. (1941, c. 374, s. 32.)

§ 59-63. General effect of dissolution on authority of partner.—Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy or death of a partner;
or

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where § 59-64 so requires,

(2) With respect to persons not partners, as declared in § 59-65. (1941, c. 374, s. 33.)

§ 59-64. Right of partner to contribution from copartners after dissolution.—Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy. (1941, c. 374, s. 34.)

§ 59-65. Power of partner to bind partnership to third persons after dissolution.—(1) After dissolution a partner can bind the partnership except as provided in paragraph (3)

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1) (b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1) (b) (II).

(4) Nothing in this section shall affect the liability under § 59-46 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business. (1941, c. 374, s. 35.)

§ 59-66. Effect of dissolution on partner's existing liability.—(1)

The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts. (1941, c. 374, s. 36.)

§ 59-67. Right to wind up.—Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court. (1941, c. 374, s. 37.)

§ 59-68. Rights of partners to application of partnership property.—(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interest in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under § 59-66, subsection (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have:

(I) All the rights specified in paragraph (1) of this section, and

(II) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2) (a) (II) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph (2)

(b) all the rights of a partner under paragraph (1), subject to clause (2) (a) (II), of this section,

(II) If the business is continued under paragraph (2) (b) of this section, the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and

paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the goodwill of the business shall not be considered. (1941, c. 374, s. 38.)

§ 59-69. Rights where partnership is dissolved for fraud or misrepresentation.—Where partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership. (1941, c. 374, s. 39.)

§ 59-70. Rules for distribution.—In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are

(I) The partnership property,

(II) The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this section.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than partners,

(II) Those owing to partners other than for capital and profits,

(III) Those owing to partners in respect of capital,

(IV) Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this section to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by § 59-48, subsection (a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this section.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this section, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this section.

(h) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against the separate property shall rank in the following order:

(I) Those owing to separate creditors,

(II) Those owing to partnership creditors,

(III) Those owing to partners by way of contribution. (1941, c. 374, s. 40.)

Cross Reference.—As to distribution of assets of limited partnership, see § 59-23. **Applied in** *Benson v. Roberson*, 226 N. C. 103, 36 S. E. (2d) 729 (1946).

§ 59-71. Liability of persons continuing the business in certain cases.—(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of § 59-68, subsection (2) (b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of the partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership. (1941, c. 374, s. 41.)

§ 59-72. Rights of retiring partner or estate of deceased partner when the business is continued.—When any partner retires or dies, and the business

is continued under any of the conditions set forth in § 59-71, subsections (1), (2), (3), (5), (6), or § 59-68, subsection (2) (b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by § 59-71, subsection (8). (1941, c. 374, s. 42.)

§ 59-73. Accrual of actions.—The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary. (1941, c. 374, s. 43.)

ARTICLE 3.

Surviving Partners.

§ 59-74. Surviving partner to give bond.—Upon the death of any member of a partnership, the surviving partner shall, within thirty days, execute before the clerk of the superior court of the county where the partnership business was conducted, a bond payable to the State of North Carolina, with sufficient surety conditioned upon the faithful performance of his duties in the settlement of the partnership affairs. The amount of such bond shall be fixed by the clerk of the court; and the settlement of the estate and the liability of the bond shall be the same as under the law governing administrators and their bonds. (1915, c. 227, ss. 1, 2, 3; C. S., s. 3277.)

Cross Reference.—As to death of partner working dissolution of partnership, see § 59-61 and note.

The purpose of this section is limited to the protection of those who are interested in the property or estate administered by the surviving partner, who is required to account to them and pay over their interest in case there is a surplus after paying the partnership debts. It is a trust relationship in which only they have a legal interest. Therefore, the objection that the surviving partner has not filed the bond is not available to one who is merely a

debtor of the estate. *Coppersmith v. Upton*, 228 N. C. 545, 46 S. E. (2d) 565 (1948).

The giving of a bond cannot be regarded as a condition precedent to the maintenance of an action by a surviving partner, for the following section provides an alternative remedy upon failure of the surviving partner to give bond. *Coppersmith v. Upton*, 228 N. C. 545, 46 S. E. (2d) 565 (1948).

Applied in *Reel v. Boyd*, 198 N. C. 214, 151 S. E. 192 (1930).

§ 59-75. Effect of failure to give bond.—Upon the failure of the surviving partner to execute the bond provided for in § 59-74, the clerk of the superior court shall, upon application of any person interested in the estate of the deceased partner, appoint a collector of the partnership, who shall be governed by the same law governing an administrator of a deceased person. (1915, c. 227, s. 4; C. S., s. 3278.)

Cross Reference.—As to the law governing an administrator of a deceased person, see chapter 28.

Quoted in *Coppersmith v. Upton*, 228 N. C. 545, 46 S. E. (2d) 565 (1948).

§ 59-76. Surviving partner and personal representative to make inventory.—When a member of any partnership dies the surviving partner,

within sixty days after the death of the deceased partner, together with the personal representative of the deceased partner, shall make out a full and complete inventory of the assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities thereof, a copy of which inventory and schedule shall be retained by the surviving partner, and a copy thereof shall be furnished to the personal representative of the deceased partner. (1901, c. 640; Rev., s. 2540; C. S., s. 3279.)

Property Vests in Surviving Partner.—

The surviving partner has the closing up of partnership affairs, the reduction of personal property to cash and the settlement of partnership affairs, and, under Revisal § 1579 (now § 41-2), the title to personal property vests at once in the surviving partner and not in the personal representative of the deceased partner. *Sherrod v. Mayo*, 156 N. C. 144, 72 S. E. 216 (1911). As to joint tenancy in partnership property, see § 41-2.

Impressed with a Trust.—The death of a partner, in the absence of any stipulation in the articles of partnership to the contrary, works an immediate dissolution, and the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner. *Walker v. Miller*, 139 N. C. 448, 52 S. E. 125 (1905).

After the dissolution of a firm by the death of one of the partners, it is the duty of the surviving partner to settle up the joint estate in the manner most conducive to the interest of all persons interested. *Calvert v. Miller*, 94 N. C. 600 (1886).

It is the right and duty of a surviving partner to close up the affairs of the firm. He has the right, therefore, to receive and to collect the debts and assets of the partnership, and apply the same toward the payment of the debts and liabilities of the firm. *Weisel v. Cobb*, 114 N. C. 22, 18 S. E. 943 (1894); *Hodgin v. Peoples' Nat. Bank*, 124 N. C. 540, 32 S. E. 887 (1899); *Hodgin v. Bank*, 128 N. C. 110, 111, 38 S. E. 294 (1901).

Creation of New Debts.—A surviving partner has no right to create or contract new debts binding upon the partnership, except to the extent of purchasing new material and making new debts so far as may be necessary to work up unfinished material and sell the same. *Howell v. Boyd Mfg. Co.*, 116 N. C. 806, 22 S. E. 5 (1895).

Power to Renew or Indorse Note.—A surviving partner has no power after dissolution to renew or indorse a firm note in the name of the firm. *Bank v. Hollingsworth*, 135 N. C. 556, 47 S. E. 618 (1904).

A surviving partner who, more than two years after dissolution of the firm, indorsed a note in the firm name for the renewal of notes outstanding similarly indorsed, was individually liable on such indorsement, though it did not bind the firm. *Bank v. Hollingsworth*, 135 N. C. 556, 47 S. E. 618 (1904).

Injunction When There Is Danger of Misapplication of Funds.—In case of danger of misapplication by the surviving partner of partnership funds, the court would certainly, in behalf of the representatives of a deceased partner, interfere and restrain by injunction the surviving partner from such acts, or grant other proper relief; and there is no reason why they should not interfere in behalf of a creditor in such a case. *Hodgin v. Bank*, 128 N. C. 110, 38 S. E. 294 (1901).

When Surviving Partner Is Agent of Executor.—Where one of the members of a firm was constituted its general managing agent by the articles of partnership, and upon the death of one partner his executor consented to a continuance of the business, it was held that the manager became the agent of the executor as well as of the other surviving member, and a demand and refusal to account are necessary to terminate the agency and put the statute of limitations in operation. *Patterson v. Lilly*, 90 N. C. 82 (1884).

When Property Held in Common.—An arrangement between distributees and legatees to permit their property with the consent and co-operation of the representatives of the deceased partners to remain in common and to be used for their joint benefit, adopting the name of the old firm, constitutes a partnership. *Walker v. Miller*, 139 N. C. 448, 52 S. E. 125 (1905).

Personal Property Exemptions.—A surviving partner of an insolvent firm is not entitled to have his personal property exemptions paid out of the partnership assets. *Southern Commission Co. v. Porter*, 122 N. C. 692, 30 S. E. 119 (1898).

Competency of Witness.—In an action for goods sold to a firm, the testimony of one partner, who admitted his liability by failing to answer, that the goods were furnished by the plaintiff on the order of the firm, is not competent as against the

executor of the deceased partner or against the firm. *Fertilizer Co. v. Rippy*, 124 N. C. 643, 32 S. E. 980 (1899); *Moore v. Palmer*, 132 N. C. 969, 44 S. E. 673 (1903).

A surviving partner, who assigns partnership property of an insolvent firm to pay his own debts pro rata with those of the firm, cannot be allowed to testify that he did not thereby intend to defraud the firm creditors. *Southern Commission Co.*

v. Porter, 122 N. C. 692, 30 S. E. 119 (1898).

When Representative Not Subject to Suit.—The representative of a deceased partner cannot be sued while there is a surviving partner. *Burgwin v. Hostler*, 1 N. C. 167 (1799).

Cited in *Bank v. Hodgin*, 129 N. C. 247, 39 S. E. 959 (1901).

§ 59-77. When personal representative may take inventory; receiver.—If the surviving partner neglect or refuse to have such inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of § 59-76. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law. (1901, c. 640, s. 2; Rev., s. 2541; C. S., s. 3280.)

Where the surviving partner of a firm is appointed receiver of the firm, he cannot maintain an action against one who, as surety for the accommodation of the deceased partner indorsed the latter's note, which was discounted by the firm, if it appears that the assets of the partnership are sufficient to pay its debts and leave a surplus against the deceased partner's share of which the note can be charged. *Patton v. Carr*, 117 N. C. 176, 23 S. E. 182 (1895).

Receiver Appointed When Assignee of Surviving Partner Holds for Indefinite Term.—Where an assignment was made by a surviving partner of an insolvent firm, and the assignee was empowered to continue the business for an indefinite term, a receiver might be appointed to administer the partnership fund among the creditors though the deed of assignment was not set aside. *Southern Commission Co. v. Porter*, 122 N. C. 692, 30 S. E. 119

(1898). As to fraudulent assignment, see note to § 59-79.

Duty of Assignee to Charge Interest.—Where the surviving partner of a firm conveyed the assets to an assignee to settle the estate, it was the duty of the assignee, notwithstanding a contrary custom existing in the town where the business has been conducted, to charge and collect interest on all good overdue accounts from the end of a year after dissolution of the partnership, and he is liable to the surviving partner for his failure to do so. *Weisel v. Cobb*, 118 N. C. 11, 24 S. E. 782 (1896).

Assignee Liable for Interest.—The assignee of a surviving partner is chargeable with interest on the partnership moneys kept by him after twelve months from the time he assumed the trust until he disbursed it. *Weisel v. Cobb*, 118 N. C. 11, 24 S. E. 782 (1896).

§ 59-78. Notice to creditors.—Every surviving partner, within thirty days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner within twelve months from the date of first publication of such notice. The notice shall be published once a week for four weeks in a newspaper (if there be any) published in the county where the partnership existed. If there should be no newspaper published in the county, then the notice shall be posted at the courthouse and four other public places in the county. (1901, c. 640, s. 3; Rev., s. 2542; C. S., s. 3281.)

Where a dissolution of a firm occurs by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the

surviving partners for any future contracts made in the name of the firm. *Bank v. Hollingsworth*, 135 N. C. 556, 47 S. E. 618 (1904).

§ 59-79. Debts paid pro rata; liens.—All debts and demands against a

copartnership, where one partner has died, shall be paid pro rata, except debts which are a specific lien on property belonging to the partnership. (1901, c. 640, s. 4; Rev., s. 2543; C. S., s. 3282.)

Debts Created by Surviving Partner.—

While a surviving partner cannot enter into contracts, or create liabilities which will bind the estate of his deceased partner, yet he is not bound to sacrifice the interests of the firm, and if he contracts debts, bona fide, for the interest of the common property, he may pay them out of the common fund. *Calvert v. Miller*, 94 N. C. 600 (1886).

Creditors Advancing Funds to Market Product.—Where a surviving partner has purchased materials and contracted new debts to complete unfinished products and placed the finished article on the market, the creditors advancing the necessary funds are entitled to pay out of assets of the partnership. *Howell v. Boyd Manufacturing Co.*, 116 N. C. 806, 22 S. E. 5 (1895).

Personal Debt as Set-Off.—In an action brought by a surviving partner for a debt, a debt due from him may be pleaded as a set-off. *Hogg v. Ashe*, 2 N. C. 471 (1797).

But a defendant cannot avail herself of a debt due to her by a deceased member of the firm, though the contract between the latter and the defendant was that the debt, being for the board of his partner, should be paid out of the assets of the store in which the plaintiff and the defendant were partners. *Norment v. Johnston*, 32 N. C. 89 (1849).

Prior Encumbrance of Surviving Partner.—The claims of a surviving partner upon the proceeds of sale of the deceased partner's half of the real estate (here mill property), to reimburse him to the amount of half the expenditures incurred in the

conduct of the joint business and improvements put upon the property, constitute a prior encumbrance and must be paid, to the postponement of creditors of the deceased partner. *Mendenhall v. Benbow*, 84 N. C. 646 (1881).

Assignment Fraudulent as to Creditors.

—An assignment by a surviving partner of an insolvent firm for an indefinite term, the assignee to have the right to employ servants and to replenish the stock, and out of the proceeds to pay firm debts, and also the individual debts of the survivor pro rata, is fraudulent as against creditors. *Southern Commission Co. v. Porter*, 122 N. C. 692, 30 S. E. 119 (1898).

When Bank May Not Apply Deposits to Debts.

—When a bank knew that the plaintiff was the only surviving partner of a firm, and that he was making deposits as such, it had no right to apply them to the payment of a debt created by the partnership before its dissolution, without the consent of the depositor. *Hodgin v. National Bank*, 125 N. C. 503, 34 S. E. 709 (1899).

Accommodation Indorser of Note for Member of Firm.

—A note executed by a member of a partnership to a third party who, as surety for the accommodation of the maker, indorses it and receives no benefit from it, cannot be subject to an action at law against the indorser by the firm, nor in case of the death of the maker of the note can the surviving partner maintain an action on the note against the accommodation indorsers unless the firm is insolvent. *Patton v. Carr*, 117 N. C. 176, 23 S. E. 182 (1895).

§ 59-80. Effect of failure to present claim in twelve months.—In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the surviving partner shall not be chargeable for any assets that he may have paid in satisfaction of any debts before such action was commenced, nor shall any costs be recovered in such action against the surviving partner. (1901, c. 640, s. 5; Rev., s. 2544; C. S., s. 3283.)

§ 59-81. Procedure for purchase by surviving partner.—1. **Appraisal of Property.**—The surviving partner may, if he so desire, make application to the clerk of the superior court of the county in which the partnership existed, after first giving notice to the executor or administrator of the time of the hearing of such application, for the appointment of three judicious, disinterested appraisers, one of whom may be named by the surviving partner, one by the representative of the deceased partner's estate, and the third named by the two appraisers selected, whose duty it shall be to make out under oath a full and complete inventory and appraisal of the entire assets of the partnership, including real estate if there be any, together with a schedule of the debts and liabilities

ties thereof, and to deliver the same to the surviving partner; they shall also deliver a copy to the executor or administrator, and file a copy with the clerk of the court.

2. **Surviving Partner May Purchase.**—The surviving partner may, with the consent of the executor or administrator of the deceased partner and the approval of the clerk of the superior court by whom such executor or administrator was appointed, purchase the interest of such deceased partner in the partnership assets at the appraised value thereof, including the good will of the business, first deducting therefrom the debts and liabilities of the partnership, for cash or upon giving to the executor or administrator his promissory note or notes, with good approved security, and satisfactory to the executor or administrator, for the payment of the interest of such deceased partner in the partnership assets.

3. **Surviving Partner to Give Bond.**—In case the surviving partner shall avail himself of the privilege of purchasing such interest as provided for in this section, he shall give bond to the executor or administrator with surety for the payment of the debts and liabilities of the partnership, and for the performance of all contracts for which the partnership is liable.

4. **Sale of Real Estate.**—In case of such sale of the real estate belonging to the partnership, the title to the real estate so purchased shall not pass until the sale thereof has been reported to and confirmed by the clerk of the superior court of the county in which the partnership was located, in a special proceeding to which the widow and heirs at law or devisees of the deceased partner are duly made parties. (1901, c. 640, s. 6; Rev., s. 2545; 1911, c. 12; C. S., s. 3284.)

§ 59-82. **Surviving partner to account and settle.**—In case the surviving partner shall not avail himself of the privilege of purchasing the interest of the deceased partner, he shall, within twelve months from the date of the first publication of notice to creditors, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner, and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court, and in no case to exceed five per cent out of the share of the deceased partner. (1901, c. 640, s. 7; Rev., s. 2546; C. S., s. 3285; 1947, c. 781.)

Editor's Note.—The 1947 amendment struck out the words "death of the deceased partner" and inserted in lieu thereof the words "date of the first publication of notice to creditors".

There can be no division of partnership property until all the accounts have been taken and the clear interest of each partner ascertained. *Baird v. Baird*, 21 N. C. 524 (1837); *Mendenhall v. Benbow*, 84 N. C. 646 (1881).

Presumption of Equal Interest.—In the absence of evidence to the contrary, each partner is presumed to be equally interested in the joint business. *State v. Brower*, 93 N. C. 344 (1885).

If an agreement for a common or special partnership appears to have existed between parties for the purchase of property, with intent to sell the same for the profit of the parties, and no express agreement be proved adjusting the division or share of the profits, the law extends the con-

cern to all the goods purchased by either of the parties; and the parties are entitled to share the profits, without regard to the payments or advances made by either for the purpose of effecting the purchase, if there be no contract as to the amount of the advances to be made by them respectively. *Taylor v. Taylor*, 6 N. C. 70 (1811).

Note Arising Out of Partnership Business.—In stating an account between an executor and the surviving partner of the testator, it is not error to charge the surviving partner with the value of a note due the testator of the plaintiff individually, if such note arose from or grew out of the business of the partnership business. *Royster v. Johnson*, 73 N. C. 474 (1875).

Compensation.—Within the limitation of this section, a surviving partner is entitled to reasonable compensation for his services in settling up the partnership business. *Royster v. Johnson*, 73 N. C. 474 (1875).

In *Weisel v. Cobb*, 118 N. C. 11, 24 S. E. 782 (1896), two and one-half per cent commissions on receipts and disbursements were allowed under the circumstances of the case.

§ 59-83. Accounting compelled.—In case any surviving partner fails to come to a settlement with the executor or administrator of the deceased partner within the time prescribed by law, the clerk of the superior court may, at the instance of such executor, administrator or other person interested in such deceased partnership estate, cite the surviving partners to a final settlement as provided for by law in the case of executors and administrators. (1901, c. 640, s. 8; Rev., s. 2547; C. S., s. 3286.)

Cross Reference.—As to compelling account by executors and administrators, see §§ 28-118 and 28-122.

§ 59-84. Settlement otherwise provided for.—When the original articles of partnership in force at the death of any partner or the will of a deceased partner make provision for the settlement of the deceased partner's interest in the partnership, and for a disposition thereof different from that provided for in this chapter, the interest of such deceased partner in the partnership shall be settled and disposed of in accordance with the provisions of such articles of partnership or of such will. (1901, c. 640, s. 6; Rev., s. 2545; C. S., s. 3287.)

ARTICLE 4.

Business under Assumed Name Regulated.

§ 59-85. Certificate filed; contents.—No person shall hereafter carry on, conduct or transact business in this State under assumed name, or under any designation, name or style other than the real name of the individual owning, conducting or transacting such business, unless such person shall file in the office of the clerk of the superior court of the county in which such person owns, conducts or transacts, or intends to own, conduct or transact such business, or maintain an office or place of business, a certificate setting forth the name under which such business owned is or is to be conducted or transacted, and the true or real full name of the person owning, conducting or transacting the same, with the home and postoffice address of such person. The certificate shall be executed and duly acknowledged by the person so owning, conducting or intending to conduct such business: Provided, that the selling of goods by sample or through traveling agents or traveling salesman, or by means of orders forwarded by the purchaser through the mails, shall not be construed for the purpose of this section as conducting or transacting business so as to require the filing of such certificates. (1913, c. 77, s. 1; C. S., s. 3288.)

Cross Reference.—As to prohibition of use of title "certified public accountant" by partnership or association unless all members qualified, see § 93-4.

Statute Is Highly Penal.—Chapter 77, Laws of 1913, codified as §§ 59-85 through 59-88, is of a highly penal character, and its meaning will not be extended by interpretation to include cases that do not come clearly within its provision. *Jennette v. Coppersmith*, 176 N. C. 82, 97 S. E. 54 (1918); *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629 (1925).

And the courts will not lend their aid

Liability for Loss.—Where the surviving partner has acted in good faith in a fiduciary character he is not chargeable with loss. *Thompson v. Rogers*, 69 N. C. 361 (1873).

to extend a highly penal statute, although it is within the police power, unless the case comes within the letter of the law, and also within its meaning and palpable design. It is just as clearly the policy of the law that it will not lend its aid in enforcing a claim founded on its own violation. *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629 (1925).

The intent of the statute is to prevent fraud or imposition upon those dealing with a business conducted under an assumed name, and to afford them means for knowing the status and responsibility

of the concern with which they deal. *Price v. Edwards*, 178 N. C. 493, 101 S. E. 33 (1919).

The statute was enacted as a police regulation to protect the general public from fraud and imposition. *Courtney v. Parker*, 173 N. C. 479, 92 S. E. 324 (1917); *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629 (1925).

The statute manifestly is for the protection of creditors of persons who fail to comply with its provisions, or of others who do business with them. The consequences of a violation are prescribed by § 59-88. They seem to be limited to punishment as a misdemeanor, for it is expressly provided that failure to comply with this section, shall not prevent a recovery in a civil action by the person who shall violate the statute. *Farmers' Bank, etc., Co. v. Murphy*, 189 N. C. 479, 127 S. E. 527 (1925).

The statute does not apply between partners who are presumed to know the status and responsibility of the partnership; and a surviving partner may maintain his action against the heirs of the dead one to recover his share in the assets of a partnership in a legitimate business, notwithstanding the business had been conducted in the name solely of the dead

partner, and the requirements of the statute had not been complied with. *Price v. Edwards*, 178 N. C. 493, 101 S. E. 33 (1919).

Where a partnership in a legitimate business has been conducted in the name of one of the partners alone, as between themselves the statute does not apply; and an action of the silent partner to recover his share of the assets from the other is not founded upon any wrong avoiding his recovery. *Price v. Edwards*, 178 N. C. 493, 101 S. E. 33 (1919).

Where a partnership is being conducted under the surname of the proprietors in such manner as to afford a reasonable and sufficient guide to a correct knowledge of the individuals composing the firm, the statute does not apply. *Befarah v. Spell*, 176 N. C. 193, 96 S. E. 949 (1918).

In *Jennette v. Coppersmith*, 176 N. C. 82, 97 S. E. 54 (1918), it was held that the title of the plaintiffs' firm, *Jennette Bros.*, afforded a reasonable and sufficient guide to correct knowledge of the individuals composing the firm, and therefore did not come clearly within the doctrine of "assumed" names within the meaning of this statute.

Cited in *Patterson v. Southern Ry. Co.*, 214 N. C. 38, 198 S. E. 364 (1938).

§ 59-86. Index of certificates kept by clerk.—The several clerks of the superior court of this State shall keep an alphabetical index of all persons filing certificates provided for herein, and for the indexing and filing of such certificates they shall receive a fee of twenty-five cents. A copy of such certificates duly certified to by the clerk in whose office the same shall be filed shall be presumptive evidence in all courts of law in this State of the facts therein contained. (1913, c. 77, s. 2; C. S., s. 3289.)

§ 59-87. Corporations and limited partnerships not affected.—This article shall in no way affect or apply to any corporation created and organized under the laws of this State, or to any corporation organized under the laws of any other state and lawfully doing business in this State, nor shall it in any manner affect the right of any persons to form limited partnerships as provided by the laws of this State. (1913, c. 77, s. 3; C. S., s. 3290.)

§ 59-88. Violation of article misdemeanor; recovery in civil action.—Any person owning, carrying on or conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars or imprisonment in the county jail for a term of not exceeding thirty days: Provided, however, that the failure of any person or persons owning, carrying on, or conducting or transacting business as aforesaid, to comply with the provisions of this article shall not prevent a recovery by said person or persons in any civil action brought in any of the courts of this State. (1913, c. 77, s. 4; 1919, c. 2; C. S., s. 3291.)

Nature and Purpose of Section.—See note to § 59-85.

Contracts in Violation of Statute Not

Void.—It is clear that the legislature intended, by adding the proviso to this section, that the punishment should be

confined to the fine or imprisonment set out, but that contracts made by persons carrying on or conducting or transacting business in violation of § 59-85 should not be void. *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629 (1925). See *Real Estate Co. v. Sasser*, 179 N. C. 497, 103 S. E. 73 (1920);

Farmers' Bank, etc., Co. v. Murphy, 189 N. C. 479, 127 S. E. 527 (1925).

The proviso had the effect of changing the decision in *Courtney v. Parker*, 173 N. C. 479, 92 S. E. 324 (1917). See *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629 (1925).

§ 59-89. Person trading as "company" or "agent" to disclose real parties.—If any person shall transact business as trader or merchant, with the addition of the words "factor," "agent," "& Company" or "& Co.," or shall conduct such business under any name or style other than his own, except in case of a corporation, and fail to disclose the name of his principal or partner by a sign placed conspicuously at the place wherein such business is conducted, then all the property, stock of goods and merchandise, and choses in action purchased, used and contracted in the course of such business shall, as to creditors, be liable for the debts contracted in the course of such business by the person in charge of same. Provided, this section shall not apply to any person transacting business under license as an auctioneer, broker, or commission merchant; in all actions under this section it is incumbent on such trader or merchant to prove compliance with the same. (1905, c. 443; Rev., s. 2118; C. S., s. 3292.)

Cross Reference.—As to running of statute of limitations against undisclosed partner, see § 1-28.

Chapter 60.

Railroads and Other Carriers.

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ARTICLE 1.*General Provisions.*

§ 60-1. **Application to existing railroads; special charters.**—All existing railroad corporations within this State shall respectively have and possess all the powers and privileges contained in this chapter; and they shall be sub-

ject to all the duties, liabilities and provisions of this chapter not inconsistent with their charters. This chapter shall govern and control, anything in any special act of Assembly creating a railroad corporation to the contrary notwithstanding, unless in the act of the General Assembly creating the corporation the section or sections of this chapter intended to be repealed shall be specially referred to by number and, as such, specially repealed. (1871-2, c. 138, s. 45; Code, ss. 701, 1982; Rev., s. 2566; C. S., s. 3412.)

To What Charters Applicable.—This section governs and controls all charters granted after its enactment. *Durham, etc., R. Co. v. Richmond, etc., R. Co.*, 106 N. C. 16, 10 S. E. 1041 (1890).

This section is subject to any subsequent legislation, and is only useful in construing the meaning of subsequent legislation when it is doubtful. It cannot have the effect to prevent antagonistic legislation at a subsequent date. *Watauga, etc., R. Co. v. Ferguson*, 169 N. C. 70, 85 S. E. 156 (1915).

No Repeal of General Railroad Act by Implication.—"This provision very plainly shows that it was the intention of the legislature that the general railroad act should apply, and that its important provisions should not be repealed, either by implication or by hasty legislation. It is but an affirmation of the principle that the repeal by implication of a general law by a private statute is not favored. But the statute goes a step further, and prescribes

a rule of construction under which the private act, even if it be inconsistent with the provisions of the general law, shall not repeal them 'unless they are specially referred to by number, and, as such, specially repealed.'" *Durham, etc., R. Co. v. Richmond, etc., R. Co.*, 106 N. C. 16, 27, 10 S. E. 1041 (1890).

Consequently a provision of a charter that the railroad shall have the power to condemn land under the "same rules and regulations as are prescribed for the North Carolina Railroad Company," is invalid. *Durham, etc., R. Co. v. Richmond, etc., R. Co.*, 106 N. C. 16, 10 S. E. 1041 (1890), cited as conclusive in *Livermon v. Roanoke, etc., R. R. Co.*, 109 N. C. 52, 13 S. E. 734 (1891).

Cited in *Land v. Wilmington & Weldon R. Co.*, 107 N. C. 72, 12 S. E. 125 (1890); *Rumbough v. Southern Improvement Co.*, 106 N. C. 461, 11 S. E. 528 (1890).

§ 60-2. Roads not to be established unless authorized by law.—If any person or corporation, not being expressly authorized thereto, shall make or establish any canal, turnpike, tramroad, railroad or plankroad, with the intent that the same shall be used to transport passengers other than such persons, or the members of such corporation, or to transport any productions, fabrics or manufactures other than their own, the person or corporation so offending, and using the same for any such purpose, shall forfeit and pay fifty dollars for every person and article of produce so transported.

This section shall not apply to any narrow-gauge railroad, tramroad or toll road made and established and maintained solely by the owner of the lands upon which said road may be, the principal business of which is the transportation of logs, lumber and articles for the owners of such railroad or tramroad: Provided, that the Utilities Commission shall have power to authorize lumber companies, having logging roads, to transport all kinds of commodities other than their own and passengers and to charge therefor reasonable rates to be approved by said Commission. (R. C., c. 61, s. 37; 1874-5, c. 83; Code, s. 1717; 1901, c. 282; Rev., s. 2598; 1907, c. 531; 1911, c. 160; 1915, c. 6; C. S., s. 3413; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Setting Up Statutory Prohibition as Defense against Damages for Failure to Build Railroad.—A lumber company having purchased timber at a price less than its value, in consideration of the benefits to be derived by the vendors from a standard-gauge railroad it contracted to build, is liable in damages to the vendors for the difference between the price paid and the actual value of the timber, upon its

failure to build the railroad. And in an action for such damages the lumber company cannot avail itself of the defense that it was prohibited by this section from building a standard-gauge railroad; for if the stipulation to construct the railroad is invalid, the plaintiffs, though they should be particeps criminis, are not in pari delicto. *Herring v. Cumberland Lumber Co.*, 159 N. C. 382, 74 S. E. 1011 (1912).

§ 60-3. Conductor and certain other employees to wear badges.—Every conductor, baggage-master, engineer, brakeman or other servant of any railroad corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the title of the corporation by which he is employed. No conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge shall have authority to meddle or interfere with any passenger, his baggage or property. (1871-2, c. 138, s. 30; Code, s. 1958; Rev., s. 2604; C. S., s. 3414.)

Cross Reference.—As to badge of railroad police, see § 60-85.

§ 60-4. Actions for penalties to be in name of State.—All penalties imposed by this chapter may, unless otherwise provided, be sued for in the name of the State. (Code, s. 1976; 1885, c. 221; Rev., s. 2647; C. S., s. 3415.)

Cross Reference.—As to venue of actions against railroads, see § 1-81.

The penalty prescribed by § 60-112 for failure to transport within a reasonable time is given directly to the party ag-

grieved, and an action therefor is not required to be brought in the name of the state. *Robertson v. Atlantic, etc., R. Co.*, 148 N. C. 323, 62 S. E. 413 (1908).

§ 60-5. Discrimination in charges misdemeanor.—If any common carrier shall directly or indirectly by special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of law than it charges, demands or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; or shall make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever; or shall subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such common carrier shall be upon conviction thereof fined not less than one thousand nor more than five thousand dollars for each and every offense. (1899, c. 164, s. 13; Rev., s. 3749; C. S., s. 3416; 1947, c. 781.)

Cross References.—As to failure to receive and forward freight, see §§ 60-111 and 60-112. As to rules of Utilities Commission to prevent discrimination, see § 62-56. As to discrimination between connecting lines, see § 62-143.

Editor's Note.—The 1947 amendment struck out the words "person or corporation" formerly appearing in the last clause of this section and inserted in lieu thereof the words "common carrier."

Section Is Remedial.—"The statutes enacted for the enforcement of the duties of common carriers, imposing penalties, are not intended to simply penalize railroads, but to secure prompt, efficient service to all and not a favored few." *Garrison v. Southern R. Co.*, 150 N. C. 575, 585, 64 S. E. 578 (1909).

Declaratory of Common Law.—This section is declaratory of the common law and secures to every person the right to

participate in the use of the facilities furnished, or which it is its duty to furnish, by a common carrier upon terms of equality, in regard to price, and otherwise, and free from unlawful discrimination. *Lumber Co. v. Atlantic Coast Line R. Co.*, 141 N. C. 171, 53 S. E. 823 (1906).

Recovery of Excess Charges.—Where a higher freight charge was paid than that charged other shippers, the payment is not to be considered voluntary, and the excess may be recovered back upon account for money had and received, and it is not necessary that at the time of payment there should have been any protest. *Lumber Co. v. Atlantic Coast Line R. Co.*, 141 N. C. 171, 53 S. E. 823 (1906).

What Constitutes Unlawful Discrimination.—A common carrier is guilty of unlawful discrimination by the principles of the common law, and the terms of this section when it charges one person for

service rendered a larger sum than is charged another person for like service under substantially similar conditions. *Lumber Co. v. Atlantic Coast Line R. Co.*, 141 N. C. 171, 53 S. E. 823 (1906).

A carrier cannot rightfully charge one shipper \$2.50 per 1,000 feet for hauling his logs if it, at the same time, for the same service, under substantially similar circumstances, carried logs for other persons at \$2.10 per 1,000 feet in consideration of the shipment of the manufactured products over its railroad. *Lumber Co. v. Atlantic Coast Line R. Co.*, 141 N. C. 171, 53 S. E. 823 (1906).

Discriminatory Embargoes Prohibited.—A common carrier cannot place an embargo on its customer or patron so as to discriminate against him or those deal-

ing with him, and for such unjust discrimination the carrier is indictable under this section. *Garrison v. Southern R. Co.*, 150 N. C. 575, 64 S. E. 578 (1909).

Allegations.—There are discriminations which require more explicit allegations, as for instance, illegal rebates upon freight charges and the like, but as the common carrier for hire, the allegation that it gave a person named undue preference by transporting him free *ex vi termini* alleges discrimination. *State v. Southern Ry. Co.*, 125 N. C. 666, 34 S. E. 527 (1899).

Applied in *Lumber Co. v. Atlantic, etc., R. Co.*, 136 N. C. 479, 48 S. E. 813 (1904); *Atlantic Coast Line R. Co. v. West Paving Co.*, 228 N. C. 94, 44 S. E. (2d) 523 (1947).

§ 60-6. Discrimination by rebate or reduced charges, misdemeanor.

—Any railroad company doing business in the State, or officer or agent thereof, who shall give to any person or shipper any advantage over another person or shipper under like circumstances, by way of any rebate or reduced rate not authorized by law or by the North Carolina Utilities Commission, or which shall make charges for shipments of freight in violation of the law as to railroad freight rates, contained in article 8 of the chapter Utilities Commission, or shall willfully discriminate in the matter of service in favor of one person or corporation against another in like circumstances, shall be guilty of a misdemeanor, and such railroad company shall, upon conviction, be fined not less than one hundred dollars and such officer or agent shall be fined or imprisoned or both, in the discretion of the court; and any shipper or consignee of any freight in the State of North Carolina who shall knowingly accept any rebate or other consideration or services from any railroad company which is not allowed or given other shippers or consignees under like or similar circumstances, and which is not allowed by law, shall be guilty of a misdemeanor, and fined or imprisoned in the discretion of the court. (1907, c. 217, s. 2; C. S., s. 3417; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1947, c. 781.)

Cross Reference.—As to person allowing or accepting rebate, see § 60-116.

Editor's Note.—The 1947 amendment substituted the words "railroad company" for the word "corporation" formerly ap-

pearing near the middle of the section.

Applied in *Atlantic Coast Line R. Co. v. West Paving Co.*, 228 N. C. 94, 44 S. E. (2d) 523 (1947).

§ 60-7. Discrimination against connecting lines and violation of certain rules of the Utilities Commission misdemeanor.

—If any common carrier shall not afford all reasonable, proper and equal facilities for the interchange of traffic between its respective lines and for the forwarding and delivering of passengers and freights to and from its several lines and those connecting therewith, or shall discriminate in its rates and charges against such connecting lines, or if any connecting line shall not make as close connection as practicable for the convenience of the traveling public, or shall not obey all rules and regulations made by the Utilities Commission relating to trackage, it shall be punished by a fine of not less than five hundred dollars nor exceeding five thousand dollars for each and every offense. (1899, c. 164, s. 21; Rev., s. 3751; C. S., s. 3418; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Cross Reference.—See § 62-143.

§ 60-8. Discrimination against the Atlantic and North Carolina Railroad misdemeanor; venue.

—If any railroad in North Carolina shall dis-

criminate against the freights received from the Atlantic and North Carolina Railroad, or shall make rates by which, either directly or indirectly, by rebates or otherwise, freights may be delivered at less rates when received from other points than from points along the Atlantic and North Carolina Railroad in proportion to distance hauled, it shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars for each and every violation thereof. An indictment for the misdemeanor may be found and tried in the courts where the goods were either shipped or delivered, but the court in which the indictment for the offense is first found shall have exclusive jurisdiction. (1889, c. 358; Rev., s. 3750; C. S., s. 3419.)

ARTICLE 2.

Incorporation, Officers, and Stock of Railroad.

§ 60-9. Articles of association; contents; signature; filing.—Any number of persons, not less than six, at least one of whom shall be a citizen and resident of this State, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is to be constructed or maintained and operated, the length of such road as near as may be, and the name of each county in this State through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than five thousand dollars for every mile of road constructed or proposed to be constructed, and the number of shares of which the capital stock shall consist, and the names and places of residence of six directors of the company, at least one of whom shall be a citizen and resident of this State, upon whom legal process may be served, who shall manage its affairs for the first year, or until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in the company. On compliance with the provisions of § 60-10, such articles of association may be filed in the office of the Secretary of State, who shall indorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to railroad corporations by this chapter. The articles of association of any company formed under the provisions of this chapter, or the charter of any railroad company formed under a special act, may be amended as provided in §§ 55-30 and 55-31 and said §§ 55-30 and 55-31 are hereby made to apply to railroad companies: Provided, no amendment may be made changing the nature of the company's business, extending its corporate existence or authorizing any powers other than those authorized by this chapter. Provided further, that the capital stock provision or provisions of this section shall not apply to any railroad corporation chartered for the purpose of leasing a railroad already in existence and in operation, and such railroad company so chartered shall have a paid-in capital stock of not less than five thousand dollars (\$5,000.00). (1871-2, c. 138; Code, s. 1932; 1905, c. 187; Rev., s. 2548; 1907, c. 472, ss. 1, 2; C. S., s. 3420; 1921, c. 117; 1939, c. 60.)

Cross References.—As to requirement of certificate of convenience and necessity for construction and operation of utilities, see § 62-101. As to amendments of charter of railroad, see also § 60-11.

Editor's Note.—The 1921 amendment

added the last sentence with the proviso thereto relative to amendments of articles of association. And the 1939 amendment added the second proviso.

Sections Providing Method of Creation—Continuing Franchise.—In referring to §§ 1932-1934 of the Code of 1883, from which §§ 60-9, 60-10 and 60-12 were derived, the federal court held that the legislature has manifested a clear and positive intention that railroad corporations shall not be created by the action of associated persons otherwise than as provided in such sections. These sections refer only to the mode and manner of creating railroad corporations, and not to the methods of continuing the existence and operation of railroad franchises in the hands of purchasers at judicial sales. *Bradley v. Ohio*

R., etc., Ry. Co., 78 F. 387 (1896); 119 N. C., Appx., 918 (1897).

Effect of Noncompliance.—The filing and recording by the Secretary of State of articles of association of a proposed railroad company, if not such as required by law, is a nullity. *Kinston, etc., R. Co. v. Stroud*, 132 N. C. 413, 43 S. E. 913 (1903).

Articles of Incorporation May Be Declared Void in Condemnation Proceeding.—Where the articles of incorporation of a railroad company are upon their face void, though not subject to collateral attack, the trial court will so declare in a proceeding to condemn land by right of eminent domain claimed thereunder. *Kinston, etc., R. Co. v. Stroud*, 132 N. C. 413, 43 S. E. 913 (1903).

§ 60-10. Prerequisites of filing; stock subscription; affidavit of directors; payment of fees.—Such articles of association shall not be filed and recorded in the office of the Secretary of State until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and five per cent paid thereon in good faith, and in cash, to the directors named in the articles of association; nor until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors named in such articles, that the amount of stock required by this section has been in good faith subscribed and five per cent paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association, which affidavit shall be recorded with the articles of association, as aforesaid; nor until said directors shall pay the taxes and fees provided for under the chapter Corporations, Article 14, entitled Taxes and Fees. (1871-2, c. 138, s. 2; Code, s. 1933; 1905, c. 168; Rev., s. 2549; C. S., s. 3421.)

Cross Reference.—See note to § 60-9.

§ 60-11. Amendment of charter by railroad; changing value of and issuing stock without par value.—Any railroad company heretofore or hereafter organized under the laws of this State, whether under a special act, or otherwise, may, in the manner provided by § 55-31, as heretofore amended, amend its certificate of incorporation, articles of association or charter, for the purpose of increasing or decreasing its capital stock, changing its name, changing the par value of the shares of its capital stock, creating one or more classes of common or preferred stock, creating shares of stock with or without nominal or par value, or for any purpose authorized by statutes now in force relating to the amendment of certificates of incorporation, articles of association or charters of corporations: Provided, however, that in case of a consolidated railroad company, heretofore or hereafter organized under a special act or general laws of this State and of any other state or states, a new class or classes of stock may be created upon authorization by vote of such amount of the outstanding capital stock, in no case less than a majority thereof, as may be prescribed by the provisions of the agreement of consolidation in pursuance of which such consolidated company was formed. (1929, c. 261.)

Cross Reference.—As to exchange by a corporation of par value shares of stock for no par value shares, see § 55-80.

§ 60-12. Copy of articles evidence of incorporation.—A copy of any articles of association filed and recorded in pursuance of this article and of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed

thereto, and certified to be a copy by the Secretary of State, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated. (1871-2, c. 138, s. 3; Code, s. 1934; Rev., s. 2550; C. S., s. 3422.)

Cross Reference.—See note to § 60-9.

§ 60-13. Opening of subscription books.—When such articles of association and affidavit are filed and recorded in the office of the Secretary of State, the directors named in such articles of association may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company in such places and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole of the capital stock is subscribed. (1871-2, c. 138, s. 4; Code, s. 1935; Rev., s. 2551; C. S., s. 3423.)

§ 60-14. How stock paid for; forfeiture for nonpayment.—The directors may require the subscribers to the capital stock of the company to pay the amounts by them respectively subscribed in such manner and in such installments as they may deem proper. If any stockholder shall neglect to pay any installment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock and all previous payments thereon forfeited for the use of the company, but they shall not declare it so forfeited until they shall have caused a notice in writing to be served on him personally, or the same to be deposited in the post office, properly directed to him at the post office nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in such notice, and that if he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the company, which notice shall be served as aforesaid at least sixty days previous to the day on which payment is required to be made. (1871-2, c. 138, s. 7; Code, s. 1938; Rev., s. 2554; C. S., s. 3424.)

Cross Reference.—As to construction companies taking stock in railroad as payment, see § 55-64.

§ 60-15: Repealed by Session Laws 1943, c. 543.

§ 60-16. Stockholders' liability for unpaid stock and to laborers; notice.—Each stockholder of any such company shall be individually liable to the creditors of such company to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of any such company shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days' service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such execution shall be the amount recoverable with costs against such stockholder. Before such laborer or servant shall charge such stockholders for such thirty days' service he shall give them notice in writing within twenty days after the performance of such service that he intends to hold them liable, and shall commence such action therefor within thirty days after the return of such execution unsatisfied as above mentioned; and every such stockholder, against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in such corporation in ratable proportion to the amount of the stock they shall respectively hold with himself. (1871-2, c. 138, s. 10; Code, s. 1940; Rev., s. 2556; C. S., s. 3426.)

§ 60-17. Liability of trustees and other fiduciaries holding stock.—No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall

be personally subject to any liability as stockholder of such company. The estates in the hands of such executor, administrator, guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate or the ward or person interested in such trust fund would have been if he had been living and competent to act and hold the same stock in his own name, and a person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly. (1871-2, c. 138, s. 11; Code, s. 1941; Rev., s. 2557; C. S., s. 3427.)

§ 60-18. Directors and presidents.—There shall be a board of six directors, one of whom shall be elected president, of every corporation formed under this article, to manage its affairs. The directors shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the bylaws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the bylaws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting, if a majority of the stockholders present shall require it. (1871-2, c. 138, s. 5; Code, s. 1936; Rev., s. 2552; C. S., s. 3428.)

§ 60-19. Appointment of officers and agents.—The president and directors shall appoint a treasurer and secretary and such other officers and agents as shall be prescribed by the bylaws. (1871-2, c. 138, s. 6; Code, s. 1937; Rev., s. 2553; C. S., s. 3429.)

§ 60-20. Officials to account to successors.—The president and directors of the several railroads, and all persons acting under them, are hereby required upon demand to account with the president and directors elected or appointed to succeed them, and shall transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company. (1870-1, c. 72, ss. 1, 3; Code, s. 2001; Rev., s. 2648; C. S., s. 3430.)

Cross References.—As to criminal liability for failure to account to successors, see § 14-253. As to embezzlement by officers of a railroad, see §§ 14-94 and 14-95.

ARTICLE 3.

County Subscriptions in Aid of Railroads.

§ 60-21. Counties may subscribe stock.—The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company when necessary to aid in the construction of any railroad in which the citizens of the county may have an interest. (1868-9, c. 171, s. 1; Code, s. 1996; Rev., s. 2558; C. S., s. 3431.)

Cross References.—As to incorporated town encouraging building of railroads, see § 158-1. As to township subscriptions, see § 60-26 and note.

Editor's Note.—As this section appeared in the Code of 1883 it permitted subscription when necessary to aid in the completion of any railroad. This phrase-

ology was the cause of some litigation as it was doubtful whether the section was applicable only to those railroads which were partially completed or whether it extended to all such companies. The Supreme Court of North Carolina adhered consistently to the former view, while the federal courts adopted the latter. The deci-

sions of the federal courts were made statutory by the substitution in the Revisal of 1905, of the word "construction" for the word "completion." For the North Carolina cases prior to this substitution see *Com'rs v. Snuggs*, 121 N. C. 394, 28 S. E. 539 (1897); *Com'rs v. Payne*, 123 N. C. 432, 31 S. E. 711 (1898); *Graves v. Commissioners*, 135 N. C. 49, 47 S. E. 134 (1904). For the controlling federal cases see *Com'rs v. Coler*, 113 F. 705 (1902); *Wilkes County v. Coler*, 190 U. S. 107, 47 L. Ed. 971, 23 S. Ct. 738 (1903); *Stanly County v. Coler*, 190 U. S. 437, 23 S. Ct. 811, 47 L. Ed. 1126 (1903).

Interest of Citizens of County.—The same state and federal cases which were in conflict upon the question of whether this section referred to all railroads or only those partially completed (see Editor's Note above) were also at variance upon the sufficiency of interest requisite to authorize the subscription. The State cases maintained the position that the in-

terest must be direct and in and of the county subscribing, while the federal cases were decided on the theory that a public interest would suffice. The best statement of this rule is found in *Coler v. Commissioners*, 89 F. 257 (1898) where it is said: "The section does not require the citizens to have a direct pecuniary interest in the road, but a public interest, such as is created by the building of a railroad into the county, and the fixing of one of the termini therein, is sufficient to fulfill the condition and authorize a subscription to its stock by the county, and the issuance of bonds and levying of taxes to carry out the same."

Burden of Proving Validity.—Where the recitals in railroad bonds are that they were issued under a particular act of the legislature, the burden of validating them, as made under this section, is on the party alleging their validity. *Graves v. Commissioners*, 135 N. C. 49, 47 S. E. 134 (1904).

§ 60-22. Election on question of county aid.—The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered of record, which record shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. If a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company: Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper. (1868-9, c. 171, s. 2; Code, s. 1997; Rev., s. 2559; C. S., s. 3432.)

Editor's Note. — Section 160-62 and article VII, § 7 of the Constitution require a popular vote for the contraction of debts by cities and towns except in the case of necessary expenses.

Submission of Two Subscriptions as Single Proposition.—Where the question

of subscription to two different railway corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition, at the same election and on the same ballot. *Goforth v. Rutherford Ry. Constr. Co.*, 96 N. C. 535, 2 S. E. 361 (1887).

§ 60-23. Conduct of election.—All elections ordered under General Statutes § 60-22 shall be conducted by the county board of elections under the laws and regulations provided for the election of members of the General Assembly.

The results of such elections shall be canvassed and declared by the county board of elections. (1868-9, c. 171, s. 3; Code, s. 1998; Rev., s. 2560; C. S., s. 3433; 1947, c. 781.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 60-24. Interest on bonds.—In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix

the rate of interest, not to exceed the rate of six per cent, when the principal on said bonds shall be payable and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of paying the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on such bonds. (1868-9, c. 171, s. 4; Code, s. 1999; Rev., s. 2561; C. S., s. 3434.)

No Estoppel by Payment of Interest.—The payment of interest from year to year on the bonds is not an estoppel and does

not validate them. *Commissioners v. Payne*, 123 N. C. 432, 31 S. E. 711 (1898).

§ 60-25. Collection and disposition of taxes authorized.—The taxes authorized by this article to be raised for the payment of interest or principal shall be collected by the sheriff or tax collector in like manner as ad valorem taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this article. (1868-9, c. 171, s. 5; Code, s. 2000; Rev., s. 2562; C. S., s. 3435; 1943, c. 543.)

Cross Reference.—As to collection of taxes generally, see § 105-372 et seq.

inserted the words "or tax collector" and substituted the words "ad valorem" for the words "other state."

Editor's Note.—The 1943 amendment

ARTICLE 4.

Township Subscriptions in Aid of Railroads.

§ 60-26. Townships may subscribe stock.—The board of commissioners of the several counties of the State shall have power to subscribe stock for the use and benefit of any township in their several counties, when necessary to aid in the construction of any railroad, which is now or may be hereafter incorporated under the laws of this State, in which the citizens of such county may have an interest. (1917, c. 64, s. 1; C. S., s. 3436.)

Editor's Note.—In *Graves v. Com'rs*, 135 N. C. 49, 47 S. E. 134 (1904), it was held that § 60-21 did not apply to townships and that there existed no provision authorizing the aid from townships similar to that which might be afforded by counties under § 60-21. The Supreme Court, however, has held in several cases, that, despite the absence of express statutory provisions townships may by observing the constitutional requirements, issue bonds to aid in the construction of railroads.

Wood v. Oxford, 97 N. C. 227, 2 S. E. 653 (1887); *Brown v. Commissioners*, 100 N. C. 92, 5 S. E. 178 (1888); *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69 (1890); *Wittkowsky v. Com'rs*, 150 N. C. 90, 63 S. E. 275 (1908). See also, *McCracken v. Greensboro, etc., R. Co.*, 168 N. C. 62, 84 S. E. 30 (1915). It would seem that these latter cases are made statutory by the enactment of this article in 1917.

§ 60-27. Election on question of township aid.—The board of commissioners of any county proposing to take stock, for the use and benefit of any township, as mentioned in § 60-26, shall meet and agree upon the amount to be subscribed for such township, and if a majority of the board shall vote for the proposition, this shall be entered of record, which record shall show the amount proposed to be subscribed, and for what township, to what company, and whether in bonds, money or other property; and thereupon the board shall order an election, to be held upon a notice of not less than thirty days, in each and every township for whose use and benefit such subscription is proposed to be made for the purpose of voting for or against the proposition to subscribe the amount agreed on by the board of commissioners. If a majority of the qualified voters of the township for whose use and benefit such subscription is proposed to be made shall vote in favor of the proposition, the board of county commissioners through their chairman shall have power to subscribe the amount of stock proposed by them, and submitted to the voters, for the use and benefit of such township, subject to all the rules, regulations, and restrictions of other stockholders

in such railroad company: Provided, that the township, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as it may think proper. (1917, c. 64, s. 2; C. S., s. 3437.)

§ 60-28. Conduct of election; canvass of votes.—All elections ordered under § 60-27 shall be held by the county board of elections of the county in which such township is located, under such laws and regulations as are now or may hereafter be provided for the election of members of the General Assembly. The votes of each township for whose use and benefit subscription under this article is proposed to be made shall be canvassed and the results of such election declared by the county board of elections of the county in which such township is located. (1917, c. 64, s. 3; C. S., s. 3438; 1947, c. 781.)

Editor's Note.—The 1947 amendment wrote the latter part of the second sentence in the first sentence "county board of elections" for "sheriff" and re-

§ 60-29. Bond issue; special tax.—In case the township shall authorize, at the election herein provided for, a subscription of the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent, when the principal of such bonds shall be payable, and at what place, and shall also fix the time and place for paying interest, and shall also determine the mode and manner of paying the same. The board of commissioners shall, in order to provide for the payment of the bonds and interest thereon authorized to be issued by this article, compute and levy each year at the time of levying the county taxes a sufficient tax upon the property in any township authorizing the issuing of bonds under this article to pay the interest on the bonds issued on account of and for the use and benefit of such township, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of such bonds at maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be in force for levying and collecting other county taxes. (1917, c. 64, s. 4; C. S., s. 3439; 1943, c. 543.)

Editor's Note.—The 1943 amendment appearing between the words "county" and struck out the words "and state" formerly "taxes" in the second sentence.

§ 60-30. Levy, collection, and disposition of tax.—The tax authorized by this article to be raised for the payment of interest and principal shall be levied by the board of commissioners of the county in which such township is located, at such times as is now or hereafter may be fixed for levying ad valorem county taxes, against the taxable property located in such township, in addition to the regular ad valorem county taxes assessable against such property. The tax shall be collected by the sheriff or tax collector or other collecting officer of the county in which such township is located in like manner as ad valorem taxes are collected, and shall be paid into the hands of the county treasurer, to be used by the chairman of the board of commissioners as directed by this article. (1917, c. 64, s. 5; C. S., s. 3440; 1943, c. 543.)

Cross Reference.—As to collection of taxes generally, see § 105-372 et seq. substituted the words "ad valorem" for former references to state and other taxes.

Editor's Note.—The 1943 amendment

§ 60-31. Tax to be kept separate.—The taxes levied and collected under the provisions of this article shall be kept separate and apart from all other ad valorem taxes levied and collected in the county in which such township shall be located. (1917, c. 64, s. 6; C. S., s. 3441; 1943, c. 543.)

Editor's Note.—The 1943 amendment substituted the words "ad valorem" for the words "state and county."

§ 60-32. Townships may subscribe to purchase of railroad corpora-

tions.—The board of commissioners of the several counties of the State shall have power to make subscriptions, for the use and benefit of any township in their several counties, for the purpose of purchasing or aiding in the purchase of any railroad corporation now or hereafter incorporated under the laws of this State which shall be dissolved or whose property and franchises are proposed to be sold privately or under execution, judicial decree, deed in trust, mortgage, or other conveyance, and all the provisions of this article shall apply as fully and as well to such subscriptions as they do to subscriptions to stock to aid in the construction of railroads. (1917, c. 64, s. 1; 1919, c. 130, s. 1; C. S., s. 3442.)

§ 60-33. Election on question of purchase; proxies to represent stock.—The county commissioners shall, upon the petition of one-fourth of the qualified voters of any township mentioned in § 60-32, order an election and submit the question of such subscription according to the terms of the petition. At such election five persons shall be chosen as proxies to represent such stock, if the vote shall be in favor of the subscription, in all respects as fully as if private promoters, corporators or holders of such stock. They shall be eligible to the position of director or other office in the corporation. They shall hold office until the first Monday in December following the next general election and until their successors chosen at such general election shall qualify. Such proxies shall be chosen at the general election every two years as township officers are. They shall have authority, alone, if sole purchasers, and with the proxies from other townships and others participating in the purchase, if not acting alone, to purchase such railroad property and franchise, and shall constitute a new corporation upon compliance with law as in other cases of a dissolution and sale of railroad property and franchise. (1917, c. 64, s. 2; 1919, c. 130, s. 2; C. S., s. 3443.)

§ 60-34. Increase of interest; procedure.—Whenever the board of county commissioners of any county has subscribed for the use and benefit of any township to any interest in any railroad or railroad corporation, as provided in this article, and the majority of the proxies chosen to represent the stock or interest of the township in such railroad shall certify to the board of commissioners that in their opinion the interest of the township in said railroad or railroad corporation should be increased, the board of county commissioners shall order an election to be held in such township, upon the petition of one-fourth of the qualified voters of such township, in the same manner as provided in this article, and if the majority of the qualified voters of such township shall vote in favor of the proposition contained in the petition, the county commissioners shall execute and deliver the bonds authorized, levy and collect in the township and dispose of the tax, as authorized in this article. (Ex. Sess. 1924, c. 117, s. 1.)

§ 60-35. Execution and sale of bonds for increase of interest.—Said bonds shall be executed by the chairman of the board of county commissioners of such county, attested by the clerk of said board, who shall affix the seal of the board, and deliver the same to the board of proxies representing said township.

The board of proxies shall advertise said bonds as provided by law, and faithfully apply the same to the purposes set forth in the petition for the election. (Ex. Sess. 1924, c. 117, ss. 2, 3.)

§ 60-36. Organization of proxies; report; vacancies.—The proxies chosen at each general election shall qualify and organize on the first Monday in December, elect a chairman, vice-chairman and secretary, and they shall annually in each year file with the board of county commissioners a copy of the report required by law to be made to the Interstate Commerce Commission.

Any vacancy occurring in the board of proxies shall be filled by the board of proxies until the next general election. (Ex. Sess. 1924, c. 117, ss. 4, 5.)

ARTICLE 5.

Powers and Liabilities.

§ 60-37. Powers of railroad corporations enumerated.—Every railroad corporation shall have power:

1. To Survey and Enter on Land.—To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

Cross Reference.—As to right of entry on land, see § 40-3.

Conflicting Locations.—As between two railroad companies the first location belongs to that company which first defines

and marks its route and adopts the same for its permanent location by authoritative corporate action. *Fayetteville Street Ry. v. Aberdeen & R. R. Co.*, 142 N. C. 423, 55 S. E. 345 (1906).

2. To Condemn Land under Eminent Domain.—To appropriate land and rights therein by condemnation, as provided in the chapter Eminent Domain.

Cross References.—As to condemnation by right of eminent domain, see § 40-2 et seq. As to amount of land which may be condemned, see § 40-29.

Editor's Note.—Since railroads are quasi-public corporations they are given by the State the power to take, by proper proceedings the necessary lands upon which to build their roads. Nor will the courts enjoin a railroad corporation from condemning land for a public purpose on the ground that the corporation was irregularly organized. In *Powers v. Hazelton*, etc., R. Co., 33 Ohio St. 429 (1878), it was held that a landowner could not be permitted to prove, as a defense to condemnation proceedings instituted by a regularly

organized railroad corporation, that the company was incorporated not for a public use, but for the private purposes of the corporators only, and that there was no public necessity for the road. See *Wellington*, etc., R. Co. v. *Cashie*, etc., R. Co., 114 N. C. 690, 19 S. E. 646 (1894).

Land May Be Taken from Another Railroad.—Land acquired by one railroad company under a legislative grant of the right of eminent domain, and not necessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. *North Carolina*, etc., R. Co. v. *Carolina*, etc., R. Co., 83 N. C. 489 (1880).

3. To Take Property by Grant.—To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

Editor's Note.—Railroads can acquire real estate only by statutory authority. In 1 *Elliott on Rys.*, sec. 390, the general principle is stated as follows: "The rule is well established that a railroad corporation cannot acquire and hold lands for any purposes except such as are authorized by statute. The authority must be conferred by legislation or it does not exist. It is, however, not necessary that the authority should be expressly conferred. It may be implied." See *Wallace v. Moore*, 178 N. C. 114, 100 S. E. 237 (1919).

Extending User of Right of Way.—While a railroad can use only the part of its right of way actually occupied, whenever the necessities of the company require it, it can extend its user of the right of way to the extent of the statutory right for additional tracks or other railroad purposes. *R. R. v. Olive*, 142 N. C. 257, 264, 55 S. E. 263 (1906); *Atlantic*, etc., R. Co. v. *Bunting*, 168 N. C. 579, 84 S. E. 1009 (1915); *Tighe v. Seaboard Air Line R. Co.*, 176 N. C. 239, 97 S. E. 164 (1918).

4. To Purchase and Hold Property.—To purchase and hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation.

Cross Reference.—As to adverse possession of property owned by a railroad, see § 1-44.

5. To Grade and Construct Road.—To lay out its road, not exceeding one hundred feet in width, and to construct the same; to take, for the purpose of cuttings and embankments, as much more land as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in the chapter Eminent Domain.

Cross Reference.—See § 40-29.

Change of Grade.—A railroad company has a right to change the grade of its road-

bed or to remove it to any point on its right of way. *Brinkley v. Sou. R. Co.*, 135 N. C. 654, 47 S. E. 791 (1904).

6. To Intersect with Highways and Waterways.—To construct its road across, along or upon any stream of water, watercourse, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch; but the company shall restore the stream or watercourse, street, highway, plankroad or turnpike road, thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstruction across, in or over any stream or lake navigated by steam or sailboats, at the place where any bridge or other obstructions may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any streets in any city without the assent of the corporation of such city.

Cross References.—As to the power of the Utilities Commission to regulate crossings, see § 62-50. As to the duty of railroads to construct and maintain bridges which it has necessitated building, see §§ 136-75 and 136-78; as to duty to provide cattle guards, see § 60-48.

Duty to Public.—While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. *Raper v. Wilmington, etc., R. Co.*, 126 N. C. 563, 36 S. E. 115 (1900).

Whole Street Cannot Be Appropriated.—In *Seaboard Air Line R. Co. v. Raleigh*, 219 F. 573, 581 (1914), in construing this section it is said: "It is doubtful whether the language of the section can be construed to authorize the exclusive appropriation of the street. The sidewalk is a portion of the street appropriated to the use of pedes-

trians. To construe the grant of the right to construct its road 'across, along, or upon' a street, always of much greater width than a railroad track and the crossties, as a grant of the right to occupy the entire street or sidewalk, is not permissible in the light of the recognized rule of construction of such grants of power."

Assent of City an Essential Power.—The assent to the use of the street by a railroad company is often a most essential power, necessary to be used for the benefit of the people of the city. *Griffin v. Southern R. Co.*, 150 N. C. 312, 64 S. E. 16 (1909).

When Court Cannot Review Grant.—The action of the board of aldermen in authorizing a railroad company to use a certain street for legitimate railroad purposes, the laying and use of tracks, etc., when the statutory power is given, is not reviewable by the courts at the instance of an owner of land on the street, claiming that some other street should have been so used. *Griffin v. Southern R. Co.*, 150 N. C. 312, 64 S. E. 16 (1909).

7. To Intersect with Other Railroads.—To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its connections. Every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as is provided in the chapter Eminent Domain.

Cross Reference.—As to appointment of commissioners, see § 40-11 et seq.

Railroad Decides Necessity of Intersection.—Where a railroad company has a right to condemn a way across the track of another company to manufacturing plants for a spur track to which the other company also has its siding, in competition for freight, the question whether it is necessary for the plaintiff company to build its spur is one in its discretion; and controversies as to whether the defendant could and would shift the plaintiff's cars on its own track advantageously to the plaintiff, and for a reasonable charge, are immaterial. *Virginia, etc., R. Co. v. Seaboard Air Line R. Co.*, 161 N. C. 531, 78 S. E. 68 (1913).

No Restriction of Right Except Voluntary.—A railroad company having the power of condemnation across the road of another company should exercise this right with regard to the convenience of both parties and with as little interference with the use of the other party of its own track as can be obtained without a great increase in its cost and inconvenience. But the

courts cannot restrict this right to be exercised by a railroad to cases in which the courts may approve its reasonableness or expediency. *Virginia, etc., R. Co. v. Seaboard Air Line R. Co.*, 165 N. C. 425, 81 S. E. 617 (1914).

Agreement or Condemnation Necessary for Entry.—Under this section one road cannot enter on the right of way of another for the purpose of connecting therewith without previous agreement, or condemnation proceedings. *Richmond, etc., R. Co. v. Durham, etc., Ry. Co.*, 104 N. C. 658, 10 S. E. 659 (1889).

Parol Agreement Ineffectual.—A parol agreement to allow one railroad company to extend its track on the right of way of another, for the purpose of connecting therewith, is a mere license, revocable at the will of the licensor, and will not operate as an estoppel although the licensee has entered and made valuable improvements. *Richmond, etc., R. Co. v. Durham, etc., Ry. Co.*, 104 N. C. 658, 10 S. E. 659 (1889).

8. To Transport Persons and Property.—To take and convey persons and property on its railroad by the power or force of steam, electricity or animals, or by any mechanical power, and to receive compensation therefor.

Cross References.—As to railroad's duty to transport, see § 60-75. As to power of Utilities Commission to prevent discrimination in service, see § 62-56. As to discrimination in charges, see §§ 60-5, 60-6, and 62-56.

Charter May Confer Right to Lease.—The charter of a railroad company confer-

ring the right to transport passengers and freight, and giving the power to "farm out" the right of transportation, authorizes the company to execute a valid lease of its property and franchises to another railroad company. *Hill v. Atlantic, etc., R. Co.*, 143 N. C. 539, 55 S. E. 854 (1906).

9. To Erect Stations and Other Buildings.—To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

Cross References.—As to power of Utilities Commission to regulate establishment of stations, see § 62-41 et seq. As to power of railroad companies to con-

demn land for union depots, see § 40-4. As to abandonment or relocation of station, see § 62-53.

10. To Borrow Money, Issue Bonds and Execute Mortgages.—From time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises and to secure the payment of any debt contracted by the company for the purposes aforesaid, and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the principal due or owing thereon into stock of such company at any time under such regulations as the directors may see fit to adopt.

Cross Reference.—As to control of Utilities Commission over pledge of assets, issuing securities, etc., see § 62-81 et seq.

Corporation Has Power to Issue Bonds.—A railroad corporation has power to contract debts, and every corporation possess-

ing such power must also have power to acknowledge its indebtedness under its corporate seal, i. e., to make and issue its bonds. *Commissioners v. Atlantic, etc., R. Co.*, 77 N. C. 289 (1877).

11. To Lease Rails.—To lease iron rails to any person or corporation for such time and upon such terms as may be agreed on by the contracting parties, and upon the termination of the lease by expiration, forfeiture or surrender, to take possession of and remove the rails so leased as if they had never been laid.

12. To Establish Hotels and Eating Houses.—To purchase, lease, hold, operate or maintain eating houses, hotels and restaurants for the accommodation of the traveling public along the line of its road. (1871-2, c. 138, s. 29; Code, s. 1957; 1887, c. 341; 1889, c. 518; Rev., ss. 2567, 2575; C. S., s. 3444.)

§ 60-38. **Engaging in unauthorized business.**—It shall be unlawful for any railroad company incorporated under the laws of this State, or any railroad company incorporated under the laws of any other state and operating one or more railroads in this State, to engage in any business other than the business authorized by its or their charter.

Any railroad company violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined in the discretion of the court. (Ex. Sess. 1924, c. 80.)

§ 60-39. **Power to aid in construction of connecting and branch lines.**—Any railroad or other transportation company shall have the right to aid in the construction of any railroad or branch railroad in this or an adjoining state connected with it directly or indirectly, if the construction of such railroad or branch railroad is authorized by law. (1885, c. 108, s. 1; Rev., s. 2567, subsec. 12; C. S., s. 3445.)

§ 60-40. **Power to seize fuel.**—If any railroad or other transportation company finds it necessary, in order to prevent delays in the transportation of freight or passengers, to take possession of coal, wood, or other fuel not its own property and convert it to its own use without an agreement with the owner thereof, it shall notify such owner within three days of such taking that his property has been appropriated, giving the date thereof, and shall, within a period of thirty days, pay for such coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent. Should the transportation company fail to notify the consignee or owner within such three days or pay for the coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent as above provided, within thirty days after converting the same to its own use, it shall in addition forfeit to the party aggrieved the sum of twenty-five dollars for the first day of failure to notify such consignee of the appropriation of the fuel, or its failure to pay for the same, and five dollars for each day thereafter in which it shall fail to notify such consignee or pay for the same. (1903, c. 590, s. 4; Rev., s. 2617; 1907, c. 467; C. S., s. 3446.)

§ 60-41. **Agreements for through freight and travel.**—The directors representing the stock held in the various railroad corporations are hereby authorized and empowered to enter into such agreements and terms with each other as to secure through freight and travel without the expense of transfer of freight, or breaking the bulk thereof, at different points along the lines, and for this purpose may use the road or roads and the rolling stock of such corporations or companies on such terms as may be agreed upon by them. (1866-7, c. 105; Code, s. 1995; Rev., s. 2640; C. S., s. 3447.)

§ 60-42. **Intersection with highways.**—Whenever the track of a railroad shall cross a highway, turnpike or plankroad, such highway, turnpike or plankroad may be carried under or over the track, as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad desirable, then such corporation may take such additional lands for the construction of the road, highway, turnpike or plankroad on such new line as may be deemed requisite by the directors.

Unless the land so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in the chapter Eminent Domain, and duly made by such corporation to the owners and persons interested in such land. The same when so taken shall become a part of such intersecting highway, turnpike or plankroad in such manner and by such tenure as the adjacent parts of the same highway, turnpike or plankroad may be held for highway purposes. (1871-2, c. 138, s. 26; Code, s. 1954; Rev., s. 2568; C. S., s. 3448.)

Cross References.—See § 60-37, paragraph 6, and § 60-43. As to the power of Utilities Commission to regulate crossings, see § 62-50. As to ascertaining the compensation for land taken, see § 40-11 et seq.

Cited in *Raper v. Wilmington, etc., R. Co.*, 126 N. C. 563, 36 S. E. 115 (1900); *Herndon v. Southern R. Co.*, 161 N. C. 650, 77 S. E. 683 (1913).

§ 60-43. Obstructing highways; defective crossings; failure to repair after notice misdemeanor.—Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city or town, or other public road authority having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same. If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within thirty days from and after the service of the notice, it shall be guilty of a misdemeanor and shall be punished in the discretion of the court. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense. This section shall in nowise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. (R. C., c. 61, s. 30; 1874-5, c. 83; Code, s. 1710; Rev., s. 2569; 1915, c. 250, ss. 1, 2; C. S., s. 3449.)

Cross References.—As to the power of Utilities Commission to regulate crossings, see § 62-50. As to duty of railroad to maintain bridges, see § 136-75. As to duty of railroad to provide drawbridge, see § 136-78. As to venue in action against railroad, see § 1-81.

Duty to Maintain Safe and Convenient Crossing.—While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. *Raper v. Wilmington, etc., R. Co.*, 126 N. C. 563, 36 S. E. 115 (1900).

Duty Not Restricted to Public Highway.—This section does not restrict the railroad's duty to crossings of "public highways," but uses the broader and generic term "highways," which might include any

road used by the public as a mill and church road and in going to town. *Gofforth v. Southern R. Co.*, 144 N. C. 569, 57 S. E. 209 (1907).

Same—Applies to Private Crossings.—An "established road or way" which a railroad company may not obstruct in crossing it with its tracks extends to those whose use is of a private nature, and not necessarily those dedicated to a public use, and in such instances, where the rights of a railroad and the rights of the public to the use of their roads or ways conflict, the former must give place to the latter. *Tate v. Seaboard Air Line R. Co.*, 168 N. C. 523, 84 S. E. 808 (1915).

"Negligent Construction" Defined.—By "negligent construction" is meant such an improper construction of the crossing, whether arising from negligence, indifference, or motives of economy, as unnecessarily increases the danger of using the

public highway. *Raper v. Wilmington, etc., R. Co.*, 126 N. C. 363, 36 S. E. 115 (1900). But the mere fact that a crossing is dangerous does not necessarily impute negligence to the railroad company. *Edwards v. Atlantic Coast Line R. Co.*, 129 N. C. 78, 39 S. E. 730 (1901).

Right to Assume That Crossing Is Safe.—One has the right to assume that a railroad company has discharged its duty to the public by keeping the crossing in safe condition. *Tankard v. Roanoke R., etc., Co.*, 117 N. C. 558, 23 S. E. 46 (1895).

Indictment.—An indictment charging a railroad company with obstructing a public road by the use of plank at a crossing, is fatally defective if it does not charge the manner of the misuse of the plank. *State v. Roanoke R., etc., Co.*, 109 N. C. 860, 13 S. E. 719 (1891).

It is a fatal variance in an indictment for obstructing a highway at a railroad crossing, to prove that the defendant permitted

for some time a dangerous hole to remain in the crossing. *State v. Roanoke R., etc., Co.*, 109 N. C. 860, 13 S. E. 719 (1891).

When Injury Might Have Been Caused by Defective Crossing.—Under this section it is error for the trial court to sustain a motion of nonsuit on competent evidence from which the jury could have found that, if defendant's crossing over a neighborhood road had not been negligently left in a dangerous condition, plaintiff would not have been injured by the slipping and falling thereon of the mule upon which he was riding. *Goforth v. Southern R. Co.*, 144 N. C. 569, 57 S. E. 209 (1907).

Applied in *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307 (1949).

Cited in *Bass v. Navigation Co.*, 111 N. C. 439, 18 S. E. 402 (1892); *Stone v. Seaboard Air Line R. Co.*, 197 N. C. 429, 149 S. E. 399 (1929); *Cashatt v. Brown*, 211 N. C. 367, 190 S. E. 480 (1937).

§ 60-44. Service of notice of defective crossings.—The notice required by § 60-43 may be served upon the agent of the offending railroad located nearest to the defective or dangerous crossing about which the notice is given, or it may be served upon the section master whose section includes such crossing. Such notice may be served by delivering a copy to such agent or section master, or by letter properly stamped, registered and addressed to either of such persons. (1915, c. 250, s. 1; C. S., s. 3450.)

§ 60-45. Change in location of highways.—In order to prevent the frequent crossing of such road or ways, or in cases where it may be necessary to occupy the same, the corporation may change the roads and ways so as to avoid such crossing and occupation, and to such points as may be deemed expedient. (R. C., c. 61, s. 31; 1874-5, c. 83; Code, s. 1711; Rev., s. 2570; C. S., s. 3451.)

A railroad company may make a change in a county road that does not necessarily impair its usefulness. *Brinkley v. Sou. R. Co.*, 135 N. C. 654, 47 S. E. 791 (1904).

§ 60-46. Damages due to change in location.—For any injury done to the lands of persons by taking them under § 60-45, the value thereof shall be assessed in like manner as is provided for assessing damages to real estate for taking lands under the chapter Eminent Domain. (R. C., c. 61, s. 32; 1874-5, c. 83; Code, s. 1712; Rev., s. 2571; C. S., s. 3452.)

Cross Reference.—As to manner of assessing damages when parties cannot agree, see § 40-11 et seq.

§ 60-47. Old road not to be impeded until new road is made.—Before any part of an established road or way shall be impeded by any railroad corporation, the new road or way shall be prepared and made equally good with the portion proposed to be discontinued; and then the same shall be deemed a part of the original road or way, and shall be kept up and repaired as before the change. (R. C., c. 61, s. 33; 1874-5, c. 83; Code, s. 1713; Rev., s. 2572; C. S., s. 3453.)

§ 60-48. Cattle guards and private crossings; failure to erect and maintain misdemeanor.—Every incorporated company owning, operating or constructing, or which shall hereafter own, operate or construct, or any company which shall hereafter be incorporated and shall own, operate or construct any railroad passing through and over the land of any person now enclosed, or which

may hereafter become enclosed, shall, at its own expense, construct and constantly maintain, in good and safe condition, good and sufficient cattle guards at the points of entrance upon and exit from such enclosed land, and shall also make and keep in constant repair crossings to any plantation road thereupon. Every railroad corporation which shall fail to erect and constantly maintain the cattle guards and crossings provided for by this section shall be liable to an action for damages to any party aggrieved, and shall be guilty of a misdemeanor and fined in the discretion of the court.

So far as this section relates to cattle guards, the Utilities Commission is hereby authorized, directed and empowered to adopt such good and sufficient make of cattle guard now upon the market as is best suited for turning stock. When such guard is selected, approved and authorized by the Commission any company operating in this State which shall procure, install and maintain and keep in good and safe condition on its line of road such guard so selected by the Commission shall be deemed and held in all suits, actions or proceedings in all the courts of this State to have complied with the conditions of this section in installing a good and sufficient cattle guard: Provided, that any railroad company operating in this State may make application to the Commission to adopt for its road any particular brand or make of cattle guard, and if the Commission shall approve and authorize the use of such guard, it shall, if kept and maintained in good and sufficient condition at all times by such railroad company, be deemed and held in all actions, suits or proceedings in any court of this State a good and sufficient cattle guard. (1883, c. 394, ss. 1, 2, 3; Code, s. 1975; Rev., ss. 2601, 3753; 1915, c. 127; C. S., s. 3454; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Applies to Town Lot.—This section which requires railroads to construct cattle-guards at the point of entrance upon and exit from enclosed lands, applies to a town lot as well as in the county. *Shepard v. Suffolk & C. R. Co.*, 140 N. C. 391, 53 S. E. 137 (1906).

Adoption of Stock Law.—The adoption of the stock law does not abrogate this section in a locality. *Shepard v. Suffolk & C. R. Co.*, 140 N. C. 391, 53 S. E. 137 (1906).

Joinder of Actions.—Where plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by defendant's ponding water back on plaintiff's land; the other to recover damages for a breach of duty on the

part of defendant in not putting up sufficient cattle-guards as required by this section, this was an improper joinder of causes of action, the first being for injury to property, a tort, while the second arose "upon contract" for the breach of an implied contract to perform a statutory duty. *Hodges v. Wilmington, etc., R. Co.*, 105 N. C. 170, 10 S. E. 917 (1890).

Cited in *Allen v. Wilmington, etc., R. Co.*, 102 N. C. 381, 9 S. E. 4 (1889). Concurring opinion of Avery, J., in *Allen v. Wilmington, etc., R. Co.*, 106 N. C. 515, 11 S. E. 576 (1890); *Hinkle v. Richmond, etc., R. Co.*, 109 N. C. 472, 13 S. E. 884 (1891); *Carter v. Wilmington, etc., R. Co.*, 126 N. C. 437, 36 S. E. 14 (1900).

§ 60-49. Change of route of railroad.—The directors of any railroad corporation may by a vote of two-thirds of their whole number at any time alter or change the route, or any part of the route, of their road, if it shall appear to them that the line can be improved thereby, and they shall have the same right and power to acquire title to any lands required for the purposes of the company in such altered or changed route, as if the road had been located there in the first instance; but no such alteration shall be made in any city or town after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the corporate authorities of such city or town. In case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. When any route or line is abandoned in the exercise of the power herein granted, full compensation shall be made by the company for all money, labor, bonds or material contributed to the construction of the roadbed or its superstructure by those so interested by their contribu-

tions in the abandoned route or line. All the provisions of this chapter relative to the first location and to acquiring title to land shall apply to every such new or altered portion of the route. (1871-2, c. 138, s. 25; Code, s. 1953; 1889, c. 391; 1893, c. 396, s. 3; Rev., s. 2573; C. S., s. 3455.)

Cross Reference.—As to duty of Utilities Commission to require railroads to enter towns, see § 62-52.

Authority Necessary to Change Route.—While a railroad company has no power to change its route without legislative authority, it is not necessary that this power should be given in the charter or a direct amendment thereto, but it may be given by charter or by special enactment or by the general railroad laws of the State. *Dewey v. Atlantic Coast Line R. Co.*, 142 N. C. 392, 55 S. E. 292 (1906).

Original Rights May Be Retained.—Variations in a route over which a railroad may run do not affect the identity of a corporate body that builds it, where subsequent acts are amendatory of the original charter and give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter is retained unimpaired. *Cheraw, etc., R. Co. v. Commissioners*, 88 N. C. 519 (1883).

§ 60-50. Forfeiture for failure to begin or complete railroad.—If any railroad corporation shall not within three years after its articles of association are filed and recorded in the office of the Secretary of State, or the passage of its charter, begin the construction of its road and expend thereon ten per cent of the amount of its capital, or shall not finish the road and put it in operation in ten years from the time of filing its articles of association or passage of its charter as aforesaid, its corporate existence and powers shall cease. (1871-2, c. 138, s. 43; Code, s. 1980; Rev., s. 2564; Ex. Sess. 1908, c. 142; C. S., s. 3456.)

State Must Institute Forfeiture Proceedings.—The State alone, acting through the Attorney General, may institute a proceeding against a railroad company to forfeit its charter under the provisions of this section for failure to begin construction of the railroad and complete the same within the two separate periods therein prescribed. *Brummitt v. Snow Hill Ry. Co.*, 197 N. C. 381, 148 S. E. 444 (1929).

The failure of a railroad company to organize under an act of incorporation within the time prescribed, does not prevent a valid organization thereafter, unless forfeiture has been declared in proceedings instituted by the State. *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263 (1906).

Waiver of Forfeiture.—If the legislature knowing the ground of forfeiture deals with the corporation as if it were lawfully existing it thereby waives its

When Commission Orders Change.—This section requiring that a contemplated change in the route of a railroad in a city can only be made when sanctioned by a two-thirds vote of the aldermen, only applies where the railroad of its own volition, and for its own convenience, contemplates a change of route, and not to a case where the Corporation Commission (now Utilities Commission), acting under express legislative authority and direction, requires the railroad to make the change for the convenience of the general public. *Dewey v. Atlantic Coast Line R. Co.*, 142 N. C. 392, 55 S. E. 292 (1906).

Right to Change Grade.—A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right of way. *Brinkley v. So. R. Co.*, 135 N. C. 654, 47 S. E. 791 (1904).

Cited in North Carolina, etc., R. Co. v. Central, etc., R. Co., 83 N. C. 489 (1880).

right of forfeiture. *Attorney General v. Petersburg, etc., R. Co.*, 28 N. C. 456 (1846).

Where a railroad company has not commenced the construction of its road within three years after its charter has been granted as required by this section, and thereafter by statute the legislature declares that certain bonds issued by a township to aid in the construction of the railroad shall be valid, and the county has acted in recognition of the existence of the corporation, the State by its acquiescence in the delay and by its recognizing the railroad company as an existing corporation has waived its right to insist on a forfeiture. *Brummitt v. Snow Hill Ry. Co.*, 197 N. C. 381, 148 S. E. 444 (1929).

Existence of Corporation Cannot Be Attacked in Condemnation Proceedings.—The existence of a railroad corporation cannot be attacked or questioned in an

action brought by it to condemn land for its purposes. *Wellington, etc., R. Co. v. Cashie, etc., R. Co.*, 114 N. C. 690, 19 S. E. 646 (1894).

Forfeiture for Failure to Comply with either of Time Limits.—Construing this section as to the forfeiture of the charter of a railroad company when construction of the proposed road is not commenced within three years or completed and put into operation within ten years after

its charter has been granted, to make the two provisions consistent it is held that they are not alternative, and upon the failure of a railroad to comply with either one of the provisions, the suit of the Attorney General will be maintained in the absence of acts or conduct upon the part of the sovereign that amount to a waiver of the default. *Brummitt v. Snow Hill Ry. Co.*, 197 N. C. 381, 148 S. E. 444 (1929).

§ 60-51. Secretary of State may extend time to begin railroad in certain cases.—In all cases where railroad companies have been chartered by the act of the General Assembly or the charter of any railroad company has been amended by act of the General Assembly, during or subsequent to the session of one thousand nine hundred and eleven, but where construction work has not begun in accordance with the provisions of § 60-50 or having been begun such construction work has not been completed, the Secretary of State may, in the exercise of his sound discretion, upon application of any such railroad company and the payment to the State of the same fees as provided in § 55-158, extend from time to time for periods of two years the time within which to begin or renew construction work as required by § 60-50; and the fact of extending the time by the Secretary of State, as herein provided, shall, for the period of such extension, fully and to all intents and purposes, renew corporate existence and corporate powers as fully as the same are conferred in the original charter. (1919, c. 19; C. S., s. 3457; 1921, c. 184; 1923, c. 245.)

Editor's Note.—The 1921 amendment changed this section so as to include railroads whose charters had been amended since 1911, and inserted the provision regarding construction work begun but not

completed. The 1923 amendment made the granting of any extension of time for beginning, renewing or completing work on railroads within the State discretionary with the Secretary of State.

§ 60-52. Forfeiture for preferences to shippers.—In the event of any contract having been entered into by any railroad company in this State with any person or company, whereby preferences or exclusive rights of transportation, either in priority or in arrangements, are given to such person or company, the Attorney General is hereby instructed to institute proceedings against such railroad company for a forfeiture of its charter. (1865-6, resolution ratified December 14, 1865; Code, s. 1969; Rev., s. 2563; C. S., s. 3458.)

Applied in *Atlantic Coast Line R. Co. v. West Paving Co.*, 228 N. C. 94, 44 S. E. (2d) 523 (1947).

§ 60-53. Obtaining temporary track across railroad.—Wherever any railroad line track and right of way shall lie between any body of merchantable timber or quarry or other kind or class of heavy property requiring machinery for transportation and any body of navigable water over which such property could be floated or shipped, and the owner of such timber or property shall desire to transport such property to water for purposes of floating or shipping, such property owner shall have the right to file petition before the Utilities Commission for a right to cross such railroad with any other railroad track or tramway. The procedure for the hearing of the petition shall be same as other proceedings of the Commission. The Commission shall hear the facts and if it be found reasonably necessary that the railroad track and right of way shall be crossed by a temporary railroad track the Commission shall so order and prescribe the payment of the expense and the cost. (1931, c. 448; 1933, c. 134, s. 8; 1941, c. 97.)

Cited in *Waldroup v. Ferguson*, 213 N. C. 198, 195 S. E. 615 (1938).

§ 60-54. Shelter at railroad division points required; failure to provide, a misdemeanor.—It shall be the duty of every person, firm, or corporation that may now or hereafter own, control, or operate any line of railroad in the State of North Carolina, to erect and maintain at every division point where cars are regularly taken out of trains for repairs or construction work, or where other railroad equipment is regularly made, repaired, or constructed, a building or shed with a suitable and sufficient roof over the repair and construction track or tracks so as to provide that all men or employees permanently employed in the construction and repair of cars, trucks, or other railroad equipment of whatever description shall be under shelter and protected during snows, rains, sleet, hot sunshine, and other inclement weather: Provided, the Utilities Commission shall have the power to direct the points at which sheds shall be erected, and the character of the sheds: Provided further, that such order shall only be made after a hearing of which public notice shall have been given.

Any person, firm, or corporation failing to comply with the requirements of this section shall be guilty of a misdemeanor, and for each offense shall be fined not less than one hundred dollars nor more than five hundred dollars. Each day of such failure shall constitute a separate offense. (1913, cc. 65, 117; C. S., s. 6557; 1933, c. 134; 1941, c. 97.)

§ 60-55. Railroad employees to be paid twice a month.—All persons, firms, companies, corporations, or associations owning, leasing, or operating any railroad or railroads, wholly or partially within this State, shall pay and settle with their employees engaged or employed in shops, roundhouses, or repair shops within this State at least twice in each month, which settlements shall not be less than two weeks nor more than three weeks apart, and shall, in such settlements, pay such employees the full amounts due them for their work and services up to the date of the preceding settlement, and such payment shall be made in lawful money of the United States, or by check or cash order redeemable by the maker thereof for its face value in lawful money of the United States upon demand or of presentation by the lawful holder thereof: Provided, this section shall not apply to repair shops where less than ten employees are engaged. (1915, c. 92; C. S., s. 6558.)

ARTICLE 6.

Hours of Service for Employees of Carriers.

§ 60-56. Maximum continuous service.—It shall be unlawful for any common carrier, its officers or agents, subject to this article, to require or permit any employee, subject to this article, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a period longer than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided further, the Utilities Commission may, after a full hearing in a particular

case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case. (1911, c. 112, s. 2; C. S., s. 6565; 1933, c. 134; 1941, c. 97.)

§ 60-57. Penalty for violation.—Any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be or remain on duty in violation of § 60-56 shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in suit or suits to be brought in the name of the State of North Carolina on relation of the Utilities Commission in the superior court of Wake County or of the county in which the violation of this article occurred; and it shall be the duty of the said Utilities Commission to bring such suits upon satisfactory information lodged with it; but no such suit shall be brought after the expiration of one year from date of such violation; and it shall be the duty of said Utilities Commission to lodge with the proper solicitors information of any such violations as may come to its knowledge. In all prosecutions under this article the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this article shall not apply to any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the said employee left a terminal, and which could not have been foreseen: Provided further, that the provisions of this article shall not apply to the crews of wrecking or relief trains: Provided further, this article shall not be construed to impose a penalty upon any common carrier for any act done in violation of the act of Congress, ratified March the fourth, one thousand nine hundred and seven, and entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," or any acts amendatory thereof. (1911, c. 112, s. 3; C. S., s. 6566.)

Editor's Note.—The reference to § 60-56 erroneously appeared in the original volume 56 near the beginning of this section erroneously as § 65-56.

§ 60-58. Utilities Commission to enforce article.—It shall be the duty of the Utilities Commission to execute and enforce the provisions of this article, and all powers granted to the Utilities Commission are extended to it in the execution thereof. (1911, c. 112, s. 4; C. S., s. 6567; 1933, c. 134, ss. 7, 8; 1941, c. 97.)

ARTICLE 7.

Lease, Sale, and Reorganization.

§ 60-59. Lessee of noncompeting railroad may acquire its stock; merger of lessor.—Any railroad corporation or its successors, being the lessee of the road of any other noncompeting railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered on their minutes, become ex officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof as provided by law; and whenever the whole of such capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the Secretary of State under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the corporation whose stock shall have been so surrendered or transferred shall thereupon vest in and be held and enjoyed by the corpora-

tion to whom such surrender or transfer shall have been made, and as fully and entirely, without charge or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the corporation to whom the surrender or transfer of such stock shall have been made in the corporate name of such corporation. But the property, rights, franchises and profits of every corporation so surrendered, transferred or leased shall hereafter always be liable to taxation, and shall never be exempt therefrom. The rights of any stockholder not so surrendering or transferring his stock shall not be in any way affected thereby, nor shall existing liabilities or the rights of creditors of the corporation where stock shall have been so surrendered or transferred be in any way affected or impaired by this section. (1871-2, c. 138, s. 57; Code, s. 1994; Rev., s. 2574; Ex. Sess. 1908, c. 119, s. 2; C. S., s. 3459.)

Cross References.—As to conditional sales or leases of railroad property, see § 47-24. As to taxation of leased railroad, see § 105-367.

Where a new corporation is formed out of two existing corporations, these latter ceasing thereafter to exist, the law forming the new corporation governs and controls its corporate functions and rights. *Cheraw & Salisbury R. Co. v. Commis-*

sioners, 88 N. C. 519 (1883).

An act authorizing the consolidation of certain railroad corporations upon a vote of a majority of the stockholders, and allowing a stockholder actual value for his stock in lieu of taking stock in the consolidated company, is valid. *Spencer v. Seaboard Air Line R. Co.*, 137 N. C. 107, 49 S. E. 96 (1904).

§ 60-60. Lease or merger of competing carrier declared a misdemeanor.—No railroad or other transportation company or its officers, now or hereafter doing business in this State, shall purchase, lease, absorb, take over, buy stock in, merge with or in any way secure an interest in a competing line of railroad or other transportation company, nor shall any railroad or other transportation company or its officers enter into any contract, agreement or understanding with a competing line of railroad or other transportation company calculated to defeat or which may defeat or lessen competition in this State. All such contracts, purchases or sales shall be void. Any violation of this section shall make the corporation or person so offending guilty of a misdemeanor, and on conviction the offender shall be fined in the discretion of the court. This section shall not prevent railroads independently owned and operated in this State, and not exceeding one hundred miles in length, from selling their roads and property. (Ex. Sess. 1908, c. 119, ss. 2, 3; C. S., s. 3460.)

§ 60-61. Acquisition of interest in or lease of noncompeting branch or connecting lines.—Any railroad or other transportation company may acquire and hold or guarantee, or endorse the bonds or stocks of, or may lease any railroad or branch railroad, or other transportation line in this or adjoining state connecting with it directly or indirectly. But no railroad or other transportation company or its officers shall acquire, hold or guarantee the bonds or stock of, or lease or be leased to, or purchase or buy or consolidate with or be merged into, any parallel or competing railroad or other transportation company, nor shall any railroad or other transportation company or its officers sell any of its stock or bonds to any holding or voting company or its officers, whereby such consolidation or merger may be effected, and any such purchase, contract, merger or sale shall be void. This provision shall not prevent railroads independently owned and operated in this State, and not exceeding one hundred miles in length, from selling their roads and property. (1885, c. 108, s. 2; Rev., s. 2567, subsec. 13; 1908, c. 119, ss. 1, 3; C. S., s. 3461.)

Lease Beyond Time Granted for Corporate Existence.—Where the term of a lease of property of a railroad company extends beyond the time fixed by its charter for the corporate existence of the

lessor, such a lease is valid for the period of the corporate life of the lessor, and will extend beyond that period if the charter is renewed, and the lessor's corporate existence is thereby extended, and by this

process it may endure for the full term. *Hill v. Atlantic, etc., R. Co.*, 143 N. C. 539, 55 S. E. 854 (1906).

Lessor Responsible for Torts.—The lessor of a railroad is responsible for the torts committed by the lessee in the operation of the leased road, and in the exercise of its franchise. *Mitchell v. So. R. Co.*, 176 N. C. 645, 97 S. E. 628 (1918); *Hill v. Director-General*, 178 N. C. 607, 101 S. E. 376 (1919).

Same.—Granting New Trial to Lessee Railroad.—When the lessor railroad com-

pany is sued jointly with its lessee company for damages caused by the alleged negligence of the lessee, and after the verdict the lessor moves for judgment upon the verdict, but makes no motion for a new trial, while the lessee company moves for a new trial, and both motions are refused and both defendants appeal from the judgment rendered against them, the granting a new trial to the lessee vacates the judgment as to both defendants. *Tillett v. Lynchburg, etc., R. Co.*, 115 N. C. 662, 20 S. E. 480 (1894).

§ 60-62. Purchaser at mortgage or execution sale of railroads may incorporate.—Whenever the purchaser of the real estate, track and fixtures of any railroad corporation which has heretofore been sold, or may hereafter be sold, by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court, shall acquire title to the same in the manner prescribed by law, such purchaser may associate with him any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter. Such purchaser and his associates shall thereupon be a new corporation, with all the powers, privileges and franchises and subject to all of the provisions of this chapter. (1871-2, c. 138, s. 5; Code, s. 1936; Rev., s. 2552; C. S., s. 3462.)

Cross Reference.—As to contents of articles of association, prerequisites for filing, etc., see § 60-9 et seq.

Railroad May Be Sold.—A railroad is the subject of private property, and in that character is liable to be sold, unless the sale be forbidden by the Legislature; not the franchise, but the land itself constituting the road. *State v. Rives*, 27 N. C. 297 (1844).

Corporation Not Dissolved by Sale.—A railroad corporation is not dissolved by

the sale of its road. *State v. Rives*, 27 N. C. 297 (1844).

Purchaser Takes Rights of Old Company.—On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right of way under its charter. *Barker v. So. R. Co.*, 137 N. C. 214, 49 S. E. 115 (1904).

Cited in *Saluda v. Polk County*, 207 N. C. 180, 176 S. E. 298 (1934).

§ 60-63. On dissolution or sale of railroads purchaser becomes a corporation.—When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law. (Code, s. 2005; Rev., s. 2565; C. S., s. 3463.)

Purpose of Section.—Property Associated with Franchises.—The legislative purpose, as clearly manifested in this section, is that the property of railroads must be kept in association with their franchises, to preserve value, to give credit to such corporations, to secure creditors, and keep railroads in operation for the benefit of the public, which was the primary object of the legislature in bestowing such corporate franchises. *Bradley v. Ohio R., etc., Ry. Co.*, 78 F. 387 (1896); 119 N. C. Appx., 918 (1897).

When Sale Effects Dissolution.—In order that the sale of the franchise and property of a railroad corporation under mortgage shall have the effect of a dissolution of such corporation, another cor-

poration must be provided to take its place and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist, and when it is done the new corporation will be a domestic corporation. *James v. Western North Carolina R. Co.*, 121 N. C. 523, 28 S. E. 537 (1897).

Corporate Existence Not Extinguished by Sale under Second Mortgage.—The sale of a railroad under a second mortgage and a conveyance thereunder, subject to the first mortgage upon its franchise and corporate property, did not extinguish the corporate existence of the company nor release it from liability to the public for the manner in which it is

operated. *James v. Western North Carolina R. Co.*, 121 N. C. 523, 28 S. E. 537 (1897).

Same—Rights of Purchaser—Liability of Old Corporation for Damages.—The effect of the sale of a railroad company's franchises and property under a second mortgage, subject to a first mortgage which was assumed by the purchaser, is to place the purchaser in the place of the mortgagor in its relation to the trustee of

the first mortgage, with the right to run and operate the road as agent of the mortgagor, but the old corporation was not extinguished, but is still in existence and liable for damages caused by the maladministration of its agent which liability can be enforced against the property which it allows the purchaser to use. *James v. Western North Carolina R. Co.*, 121 N. C. 523, 28 S. E. 537 (1897).

ARTICLE 8.

Liability of Railroads for Injuries to Employees.

§ 60-64. Common carrier defined; employee defined.—The term "common carrier" as used in this article, shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier. The term "employee" or "servant" as used in this article shall include any person carried on the pay roll of such railroad company and required to be on its property regardless whether such person is receiving compensation at the time or not. (1913, c. 6, s. 5; C. S., s. 3464; 1947, c. 916.)

Editor's Note.—The 1947 amendment added the definition of "employee" or "servant."

This article, regulating the liability of railroads for injuries to employees, was enacted prior to the adoption of the Workmen's Compensation Act, §§ 97-1 to 97-122. Section 97-13 expressly provides that

the Workmen's Compensation Act is not applicable to railroads or railroad employees and that this article is not repealed. According to that section, however, the exemption as to railroads does not apply to electric street railroads and their employees.

§ 60-65. Fellow-servant rule abrogated; defective machinery.—Any servant or employee of any railroad company operating in this State who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company, by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void. (1897 (Pr.), c. 56; Rev., s. 2646; 1915, c. 256; C. S., s. 3465.)

- I. Editor's Note.
- II. Fellow-Servant Rule.
- III. Assumption of Risk.

Cross References.

See §§ 60-66, 60-68. As to contributory negligence, see § 60-67. As to venue of an action against railroad, see § 1-81. As to action for death by wrongful act generally, see § 28-173.

I. EDITOR'S NOTE.

In *Hobbs v. Atlantic, etc., R. Co.*, 107 N. C. 1, 12 S. E. 124 (1890), it was held that a railroad company was not liable for injury to its servants, resulting from the negligence of a fellow servant. In that case the attention of the legislature was called to the fact that many of the

states had by legislative enactment abrogated the fellow-servant rule in so far as it applied to railroad employees. In 1897 such a statute was passed, and its constitutionality was sustained in *Hancock v. Norfolk, etc., Railway*, 124 N. C. 222, 32 S. E. 679 (1899).

In *Mott v. Southern R. Co.*, 131 N. C. 234, 237, 42 S. E. 601 (1902), it was sought to curtail and restrict this section so that it should apply only to employees engaged in operating trains, but the court held the contrary and said: "The language of the statute is both comprehensive and explicit. It embraces injuries sustained by 'any servant or employee of any railway company . . . in the course of his services or employment with said company.'"

The plaintiff was an employee and was injured in the course of his employment."

However, to come within the provisions of this section a railroad must be "operating" and not "under construction." See *Nicholson v. Railroad*, 138 N. C. 516, 51 S. E. 40 (1905); *Bailey v. Meadows Co.*, 152 N. C. 603, 68 S. E. 11 (1910).

Section 60-66 was passed after Congress had passed a similar statute applicable to employees engaged in interstate commerce. It is not as broad as this section, for it applies only to common carriers by railroad. See Editor's Note under that section. See also § 60-70 and note.

The act applies only to employees who are engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. *Gurganous v. Camp Mfg. Co.*, 204 N. C. 525, 168 S. E. 833 (1933).

Cited in *Stewart v. Blackwood Lumber Co.*, 193 N. C. 138, 136 S. E. 385 (1927); *Stamey v. Suncrest Lumber Co.*, 197 N. C. 391, 148 S. E. 436 (1929); *Hawkins v. Rowland Lumber Co.*, 198 N. C. 475, 152 S. E. 169 (1930).

II. FELLOW-SERVANT RULE.

Abrogation of Fellow-Servant Rule.—

This section is an unconditional abrogation of the kindred doctrines of fellow servant and assumption of risk as applied to railroad companies. *Coley v. North Carolina R. Co.*, 129 N. C. 407, 40 S. E. 195 (1901).

The law relating to the doctrine of fellow servants has been abrogated in regard to its application to those employed by railroad companies operating in this State. *Robinson v. Ivey & Co.*, 193 N. C. 805, 138 S. E. 173 (1927).

Section Applies to Any Department of Railroad.—The provisions of this section apply to an injury negligently inflicted by a fellow servant in any department of a railroad being operated. *Buckner v. Madison County R. Co.*, 164 N. C. 201, 80 S. E. 225 (1913).

Street Railways.—This section applies to street railways. *Hemphill v. Buck Creek Lumber Co.*, 141 N. C. 487, 54 S. E. 420 (1906); *Brookshire v. Asheville Elect. Co.*, 152 N. C. 669, 68 S. E. 215 (1910). But see § 97-13 and Editor's Note to § 60-64.

Applicable to Logging Roads.—This section has been held to apply to logging roads. *Moore v. Rawls*, 196 N. C. 125, 144 S. E. 552 (1928). See § 60-70.

Applies to Manufacturing Company Operating Spur Track.—This section applies to a manufacturing corporation which

owns and operates a spur track on its grounds as incidental to its main business, with respect to servants employed in such service. *Hairston v. United States Leather Co.*, 143 N. C. 512, 55 S. E. 847 (1906); *United States Leather Co. v. Howell*, 151 F. 444 (1907).

Does Not Apply to Railroad under Construction.—This section does not apply to an employee engaged in building a trestle for the extension of a railroad, at a point some miles from the track on which trains are being operated. *Nicholson v. Railroad*, 138 N. C. 516, 51 S. E. 40 (1905); *Bailey v. Meadows Co.*, 152 N. C. 603, 68 S. E. 11 (1910).

Kind of Employment.—The provisions of this section do not require that the servant, at the time of the injury, should be engaged in the running or operation of a train, but apply to any other kind of service, whether more or less dangerous. *Mincey v. Atlantic Coast Line R. Co.*, 161 N. C. 467, 77 S. E. 673 (1913).

Applies to All Employees.—This section operates on all employees of the company, whether in superior, equal, or subordinate positions. *Fitzgerald v. Southern R. Co.*, 141 N. C. 530, 54 S. E. 391 (1906); *Bloxham v. Stave, etc., Corp.*, 172 N. C. 37, 89 S. E. 1013 (1916).

Section Read into Contract.—Where a contract of service with the defendant railroad was made in this State, the provisions of this section must be read into the contract, and there being no evidence that the service was to be performed altogether in another state, it would seem that the relative rights and liabilities of the parties are fixed by the terms of the contract. *Miller v. Railroad*, 141 N. C. 45, 53 S. E. 726 (1906).

Injury When Duty Delegated to Another.—Where a railroad company delegated its duty of loading a car to a lumber company making a shipment, it is liable for any injury to its own employee caused by negligence of the employees of the lumber company in loading the car. *Britt v. Carolina, etc., R. Co.*, 144 N. C. 242, 56 S. E. 910 (1907).

Injury in Loading Logs.—Where a tram railroad was engaged in loading logs and a fellow servant of the plaintiff, acting in the scope of his employment in loading the logs, negligently caused one of the logs to drop upon the plaintiff and injure him, the employer was liable in damages for the negligent injury proximately caused. *Lilley v. Interstate Cooperaage Co.*, 194 N. C. 250, 139 S. E. 369 (1927).

Injury by Falling Tree.—This section applies where an employee was injured by

a tree falling upon him as he was riding on the car of defendant's logging road in the performance of his duties, a change of wind having deflected the tree from its expected course, so that it struck the tops of smaller trees and thence fell upon the plaintiff, for the engineer should reasonably have seen the danger in time to have stopped the train and avoided the injury, after the course of the falling tree had been unexpectedly deflected. *Bloxham v. Stave, etc., Corp.*, 172 N. C. 37, 89 S. E. 1013 (1916).

Defective Ladder.—Where two employees of a railroad company were instructed to do certain work requiring the use of a ladder, and a discarded ladder, which proved defective, was selected from several supplied by the company, the others being sound, and one of the employees sustained a fall because of the defect and sued for damages therefor, this section applied. *Mincey v. Atlantic Coast Line R. Co.*, 161 N. C. 467, 77 S. E. 673 (1913).

Flagman at Crossing.—Where the plaintiff was employed by a railroad to warn pedestrians of approaching trains at a public crossing and to signal the engineer, and the plaintiff was injured by the defendant's negligence when he had crossed the platform on a train and was on the lowest step of the car for the performance of his duty on the other side, the evidence was sufficient upon the question of employment to sustain a verdict in plaintiff's favor. *West v. Atlantic Coast Line R. Co.*, 174 N. C. 125, 93 S. E. 479 (1917).

Engineer Injured by Assistant's Negligence.—It was the duty of a railroad company to furnish its engineer a competent person to assist him in fixing his locomotive, when such assistance is necessary from the character of the work being done; and the company is liable in damages when the assistant fails to exercise ordinary care to prevent an injury, such failure being the proximate cause of the injury. *Horton v. Seaboard Air Line Railway*, 145 N. C. 132, 58 S. E. 993 (1907).

Employee Negligently Shot by Fellow Servant.—Where a baggage agent of a railroad company, in the course of his employment in getting some baggage checks from a drawer to a desk in the baggage room, removed a pistol which he knew to be loaded, took it in his hand, and in a careless manner opened another drawer to the desk, and in doing so caused the pistol to fire, and killed his assistant, his negligent acts were attributable to the company employing him.

Moore v. Southern R. Co., 165 N. C. 439, 81 S. E. 603 (1914).

Accident in Doing Work of a Simple Nature.—The plaintiff was employed by a railroad to replace the cross-ties under the rails of the road. While a tie was being depressed into position by his fellow servant his hand was caught between the end of the tie and the rail and injured. The plaintiff had no explanation to make of the occurrence, except "he had his hand on the tie to bear it down, and it went over and the end flew up and caught his hand." It was held that the injury was the result of an accident in doing work of a simple nature, and a recovery should have been denied as a matter of law. *Lloyd v. Southern R. Co.*, 168 N. C. 646, 85 S. E. 10 (1915).

III. ASSUMPTION OF RISK.

Editor's Note.—After the passage of a similar federal statute applying to employees engaged in interstate commerce the North Carolina legislature enacted § 60-68. It is not as broad as this section for it applies only to common carriers.

General Consideration.—The doctrine of assumption or risk is that an employee assumes the risk of accidents and injuries incident to the business properly operated. He does not assume the risk caused by the negligence of the company, in not furnishing proper appliances or in any other respect. *Horton v. Seaboard Air Line R. Co.*, 175 N. C. 472, 95 S. E. 883 (1918).

The employee assumes no risk in the proper use of defective appliances after notifying the employer, who promises to remedy the defect; but the employee must use the appliances with proper regard to their known condition, and, failing in this, he would be guilty of contributory negligence, which would bar his recovery. *Britt v. Carolina, etc., R. Co.*, 144 N. C. 242, 56 S. E. 910 (1907).

It is not the mere working in the presence of an obvious defect in an appliance furnished by the master that will constitute contributory negligence on the part of the servant; and assurances on the part of the former that needed repairs will be made will frequently relieve the latter of this charge, which might otherwise bar his recovery of damages for an injury thereby sustained by him. *Bissell v. Greenleaf-Johnson Lumber Co.*, 152 N. C. 123, 67 S. E. 259 (1910).

Defense of Assumption of Risk Eliminated.—In an action for negligence against a railroad company operating in this State, the defense of working on in the presence of a defective appliance or machine,

usually dealt with under the head of assumption of risk, has been eliminated by this section; but if, apart from the element of assumption of risk, the plaintiff in his own conduct has been careless in a manner which amounts to contributory negligence, his action fails, except in extraordinary cases. *Biles v. Seaboard Air Line R. Co.*, 143 N. C. 78, 55 S. E. 512 (1906). But see § 60-67.

Under the construction of this section the defense of assumption of risk is not available. *Moore v. Rawls*, 195 N. C. 125, 144 S. E. 552 (1928). See *Coley v. North Carolina R. Co.*, 129 N. C. 407, 40 S. E. 195 (1901).

Duty of Employer to Furnish Safe Tools.—It is the master's duty to furnish the servant such tools as are reasonably safe and suitable for the work in which he is engaged, and in general use. *Bissell v. Greenleaf-Johnson Lumber Co.*, 152 N. C. 123, 67 S. E. 259 (1910); *Eplee v. Southern R. Co.*, 155 N. C. 293, 71 S. E. 325 (1911). If he fails to do so he exposes the servant to extraordinary risks. *Moore v. Railroad*, 141 N. C. 111, 53 S. E. 745.

Acquiescence in Use of Inappropriate Appliance.—The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose. *Wallace v. Railroad*, 141 N. C. 646, 54 S. E. 399 (1906).

Obviously Defective Machinery.—The use of machinery obviously defective will not prevent a person from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a reckless indifference to probable consequences. *Coley v. North Carolina R. Co.*, 129 N. C. 407, 40 S. E. 195 (1901).

When Plaintiff Causes Own Injury.—When under instructions from his superior officer the plaintiff, in repairing a piece of machinery, with knowledge of its defects, negligently caused an injury to himself in such manner as it was his duty in repairing to prevent, he cannot recover, and this section has no application. *Mathis v. Atlantic Coast Line R. Co.*, 144 N. C. 162, 56 S. E. 864 (1907).

Liability Not Affected by Act of Shipper.—The duty of the railroad company to have a crosspiece used to keep steady lumber on flat cars secured in a reasonably safe manner for the use to which its servants customarily put it is not affected by the fact that the shipper puts it on in loading the car. *Wallace v. Railroad*, 141 N. C. 646, 54 S. E. 399 (1906).

Failure to Equip Car with Automatic Couplers.—Where the jury found that the plaintiff was injured by the negligence of the defendant in failing to have its cars equipped with automatic couplers, the only defense open to the defendant, in the absence of any evidence of recklessness, was whether plaintiff was injured in the course of his service and employment. *Hairston v. United States Leather Co.*, 143 N. C. 512, 55 S. E. 847 (1906).

Defective Coupler.—In an action for an injury alleged to have been sustained from a defective coupler, the use of a defective coupler was a violation of a positive duty, and, in connection with an express order of the superintendent to make the coupling, was continuing negligence, and the causa causans of the injury. *Liles v. Fosburg Lumber Co.*, 142 N. C. 39, 54 S. E. 795 (1906); *Sears v. Atlantic, etc., R. Co.*, 169 N. C. 446, 86 S. E. 176 (1915).

Engine without Handhold Along Pilot Beam.—Where the plaintiff's evidence showed that he was at the time of the injury at the usual position provided for the purpose on the pilot of the engine by order of his superiors and in the necessary performance of his duties, and that he was thrown and injured because the engine did not have the usual handhold along the pilot beam, and that he did not know the handhold was lacking when he got on, and was guilty of no carelessness, his right of action was established. *Biles v. Seaboard Air Line R. Co.*, 143 N. C. 78, 55 S. E. 512 (1906).

Exposed Screw on Power Drill.—A power drill furnished by a master to a servant for boring holes in iron plates, having an exposed set-screw thereon dangerous in operating the drill and which is usually covered or countersunk, is not a proper tool for the purpose, and the master is liable in damages proximately caused by the defect. *Eplee v. Southern R. Co.*, 155 N. C. 293, 71 S. E. 325 (1911).

Improper Ladder.—Where it was the custom of a railroad company to furnish ladders to its painters, and the plaintiff, a painter, had not been furnished with a proper ladder, but with an ordinary ladder that extended beyond the steep roof of the building upon which he was at work, and the ladder fell over and struck the plaintiff, causing him to fall, and the injury would not have occurred if a proper ladder or appliance had been furnished, the evidence was sufficient to take the case to the jury upon the issue of the company's actionable negligence. *Jones v. Atlantic Coast Line R. Co.*, 194 N. C. 227, 139 S. E. 242 (1927).

Defective Handcar.—Where plaintiff was injured in consequence of using a defective handcar, which he had theretofore repeatedly reported to his employer as defective, and for which a replacement had been promised, the employer was liable. *Boney v. Atlantic, etc., R. Co.*, 145 N. C. 248, 58 S. E. 1082 (1907).

Evidence.—Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. *Fitzgerald v. Southern R. Co.*, 141 N. C. 530, 54 S. E. 391 (1906).

§ 60-66. Injuries through fellow servants or defective appliances.—Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or in the case of the death of such employee, to his or her personal representative, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engine, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (1913, c. 6, s. 1; C. S., s. 3466.)

Cross References.—See § 60-65 and note. As to action for death by wrongful act generally, see § 28-173. As to venue of an action against a railroad, see § 1-81.

Editor's Note.—This section applies only to employees engaged exclusively in intrastate commerce. There is a federal statute similar in its provisions which applies to employees engaged in interstate commerce. See 45 U. S. C. § 51. Rights accruing under the latter statute may be enforced in the state courts as well as the federal courts.

There is a distinction between the State and federal statute as to the basis of the damages assessed. Under the State statute the damages are based upon the present worth of the net pecuniary value of the life of the deceased. *Ward v. North Carolina R. Co.*, 161 N. C. 179, 176 S. E. 717 (1912). Under the United States statute the damages are based upon the pecuniary loss sustained by the beneficiary. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591 (1914).

There is also a distinction as to the beneficiary. Under the State statute the jury assesses the value of the life of the decedent in solido, which is disbursed under the statute of distributions. Under the United States statute, the jury must find as to each plaintiff what pecuniary benefit each plaintiff had reason to expect from the continued life of the deceased,

Question for Jury.—Where the employee of a railroad company, in intrastate commerce, was ruptured while handling heavy baggage at the station by the unaided use of his personal strength, when the company had promised to furnish him a truck proper for the service, the use of which would have avoided the injury, it is for the jury to determine whether the defendant was negligent in failing to supply the truck, or whether the plaintiff assumed the risk in attempting to lift the trunk. *Hines v. Atlantic, etc., R. Co.*, 185 N. C. 72, 116 S. E. 175 (1923). See also, *Horton v. Seaboard Air Line R. Co.*, 175 N. C. 472, 95 S. E. 883 (1918); *Wallace v. Tallahassee Power Co.*, 176 N. C. 558, 97 S. E. 611 (1918).

and the recovery must be limited to compensation of those relatives in the proper class who are shown to have sustained such pecuniary loss. The personal representatives sue for the benefit of the next of kin. See *Horton v. Seaboard Air Line R. Co.*, 175 N. C. 472, 95 S. E. 883 (1918).

Under § 28-173 none of the amount recovered in action for death by wrongful act belongs to the estate of the deceased and none of it is liable for the payment of his debts.

The difference between § 60-65 and this section is very marked. The former applies to all railroads, while this section applies only to a common carrier by railroad. See *Williams v. Kinston Mfg. Co.*, 175 N. C. 226, 95 S. E. 366 (1918). But see § 60-70 and note.

"Common Carrier" Defined.—A common carrier is one who, by virtue of his calling, undertakes for compensation to transfer personal property from one place to another for all persons who choose to employ him. *Williams v. Kinston Mfg. Co.*, 175 N. C. 226, 95 S. E. 366 (1918).

Statute Applicable.—The federal and state courts have concurrent jurisdiction and the question of which statute will apply depends upon whether or not the employee was engaged in interstate commerce. *Renn v. Seaboard Air Line R. Co.*, 170 N. C. 128, 86 S. E. 964 (1915); *West v. Atlantic, etc., R. Co.*, 174 N. C. 125, 93

S. E. 479 (1917). See also *Capps v. Atlantic, etc., R. Co.*, 178 N. C. 558, 101 S. E. 216 (1919).

When Interstate Question Immaterial.—In an action brought by a switchman of the defendant's train crew to recover damages for alleged negligence of the defendant in providing an improper coupler on a train made up and ready to start for a destination beyond the State, the question whether the train was an interstate one, or the plaintiff was at the time engaged in interstate commerce, is not material, since the enactment of this section, which, in this respect, is substantially identical with the federal statute. *Sears v. Atlantic, etc., R. Co.*, 169 N. C. 446, 86 S. E. 176 (1915).

As to the time within which the action

must be brought, under the federal act, see *Belch v. Seaboard Air Line R. Co.*, 176 N. C. 22, 96 S. E. 640 (1918); *King v. Norfolk-Southern R. Co.*, 176 N. C. 301, 97 S. E. 29 (1918).

Effect of Nonsuit in Action under Federal Act.—A judgment as of nonsuit upon the merits of an action brought by the administratrix of an injured employee of a railroad company under the Federal Employers' Liability Act will not operate as a bar to the same cause brought under the laws of this State, §§ 60-66, 60-67, the law and facts applicable to the first not being identical with those applicable to the second. *Fuquay v. A. & W. Ry. Co.*, 199 N. C. 499, 155 S. E. 167 (1930).

Cited in *Stamey v. Suncrest Lumber Co.*, 197 N. C. 391, 148 S. E. 436 (1929).

§ 60-67. Contributory negligence no bar, but mitigates damages.—

In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (1913, c. 6, s. 2; C. S., s. 3467.)

Cross Reference.—See § 60-70 and note.

Editor's Note.—The provisions of this section apply only to employees engaged exclusively in intrastate commerce. There is a similar federal statute which applies to employees engaged in interstate commerce. See 45 U. S. C. § 53.

See 13 N. C. Law Rev. 256.

In General.—The doctrine of comparative negligence is only recognized by our courts in instances coming within the meaning of the Federal Employers' Liability Act, and this section, and then only for the purpose of mitigating the damages or as a partial defense. *Moore v. Chicago Bridge, etc., Works*, 183 N. C. 438, 111 S. E. 776 (1922).

To What Employees Section Applies.—

The section applies only to employees who are engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. *Gurganous v. Camp Mfg. Co.*, 204 N. C. 525, 168 S. E. 833 (1933).

Contributory Negligence and Assumption of Risk.—Under this section, the plaintiff was entitled to have his cause submitted to the jury, for, as herein provided, contributory negligence is no longer a bar to an action by an employee against

a railroad for injuries sustained during his employment, and the question of assumption of risk was for the jury, the burden of proof being upon the defendant. *Hines v. Atlantic Coast Line R. Co.*, 185 N. C. 72, 116 S. E. 175 (1923).

In *Hines v. Atlantic Coast Line R. Co.*, 185 N. C. 72, 75, 116 S. E. 175 (1923), it is said: "Assumption of risk is also a matter of defense analogous to contributory negligence to be passed upon by the jury who are to say whether the employee voluntarily assumed the risk; it is not enough to show merely that he worked on, knowing the danger." See *Lloyd v. Hines*, 126 N. C. 359, 35 S. E. 611 (1900); *West v. Fontana Mining Corporation*, 198 N. C. 150, 150 S. E. 884 (1929).

There is a vital difference between contributory negligence and assumption of risk, which is thus stated, 1 Labatt on Master and Servant, secs. 305 and 306, as follows: "Assumed risk is founded upon the knowledge of the employee, either actual or constructive, of the risks to be encountered, and his consent to take the chance of injury therefrom. Contributory negligence implies misconduct, the doing of an imprudent act by the injured party, or his dereliction in failing to take proper

precaution for his personal safety. The doctrine of assumed risk is founded upon contract, while contributory negligence is solely matter of conduct." This distinction has often been approved by the United States Supreme Court in cases under the Employers' Liability Act. *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 (1914).

When Jury Fails to Allow for Contributory Negligence.—Where the plaintiff's complaint demands damages in a certain amount in his action involving the issues of negligence and contributory negligence, and the application of the rule of comparative negligence under the provisions of this section, the fact that the jury has rendered a verdict for damages to the full amount demanded in the complaint under a proper instruction does not alone show that the jury had failed to follow the rule of damages prescribed in such instances, and the verdict will not in that ground be disturbed on appeal. *Brooks v. Suncrest Lumber Co.*, 194 N. C. 141, 138 S. E. 532 (1927).

Evidence Raising Issue for Jury.—In an action for a deceased employee's negligent death, the fact that it was caused by a head-on collision on defendant railroad company's trestle, in broad daylight, with another of its cars, is some evidence that the defendant's negligence proximately caused the employee's death, and raises the issue for the determination of the jury though the intestate might have been guilty of contributory negligence. *Hinnant v. Tidewater Power Co.*, 187 N. C. 288, 121 S. E. 540 (1924).

Negligence in Obtaining Improper Ladder.—The failure of a railroad company to furnish to an employee engaged in the scope of his employment in painting a station house, a proper ladder or appliance, which failure caused the injury in suit, comes within the provisions of this section, and the contributory negligence of the plaintiff is not a complete bar to his

recovery, but is only to be considered by the jury in diminution of the damages. *Jones v. Atlantic Coast Line R. Co.*, 194 N. C. 227, 139 S. E. 242 (1927).

Motion to Nonsuit.—Where plaintiff, while performing his duty, coupled a car attached to defendant's locomotive, while not in motion, and the injury was caused by the sudden movement of the locomotive by the engineer, without a signal from the plaintiff, contrary to practice, though there was evidence of contributory negligence, its establishment would not be a complete defense, under this section, and upon a motion to nonsuit, evidence that the engineer properly acted on the signal of another employee will not be considered. *Lamm v. Atlantic Coast Line R. Co.*, 183 N. C. 74, 110 S. E. 659 (1922).

Federal Statute.—The rule under the federal statute is substantially the same as that prescribed by this section. Contributory negligence is not a complete bar to the recovery of damages by an employee of a railroad company in an action brought under the Federal Employers' Liability Act, the admeasurement being that of comparative negligence by which the jury, under conflicting evidence, reduces the recovery in accordance with the relative negligence of the employee. *Moore v. Atlantic Coast Line R. Co.*, 185 N. C. 189, 116 S. E. 409 (1923); *Ballew v. Asheville, etc., R. Co.*, 186 N. C. 704, 125 S. E. 334 (1923); *Hinnant v. Tidewater Power Co.*, 187 N. C. 288, 121 S. E. 540 (1924); *Cobia v. Atlantic Coast Line R. Co.*, 188 N. C. 487, 125 S. E. 18 (1924).

Applied in *Byers v. Boice Hardwood Co.*, 201 N. C. 75, 159 S. E. 3 (1931); *Bateman v. Brooks*, 204 N. C. 176, 167 S. E. 627 (1933).

Cited in *Ingle v. Southern R. Co.*, 167 N. C. 636, 83 S. E. 744 (1914); *Stamey v. Suncrest Lumber Co.*, 197 N. C. 391, 148 S. E. 436 (1929); *Hawkins v. Rowland Lumber Co.*, 198 N. C. 475, 152 S. E. 169 (1930).

§ 60-68. Assumption of risk as defense.—In any action brought against any common carrier under or by virtue of any of the provisions of this article to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, or the death or injury was caused by negligence. (1913, c. 6, s. 3; C. S., s. 3468.)

Editor's Note.—Section 60-55 is an earlier section similar in its import. It applies to all railroads in North Carolina, while this section applies only to common carriers. See also § 60-70 and note.

Applied in *Bateman v. Brooks*, 204 N.

C. 176, 167 S. E. 627 (1933).

Cited in *Ingle v. Southern R. Co.*, 167 N. C. 636, 83 S. E. 744 (1914); *Stamey v. Suncrest Lumber Co.*, 197 N. C. 391, 148 S. E. 436 (1929).

§ 60-69. Contracts and rules exempting from liability void; set-off.

—Any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier by railroad to exempt itself from any liability created by this article, shall to that extent be void: Provided, that in any action brought against such common carrier, under and by virtue of any of the provisions of this article, such common carrier may set off therein any sum it has contributed or paid to any insurance or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which such action was brought. (1913, c. 6, s. 4; C. S., s. 3469.)

Accepting Benefit from Relief Department.—A relief department for providing hospital care for employees, contributed to by the employees and the company and under the control and management of the company, is but an agency of the company; and a stipulation in the contract with its employee that in the case of accident he must accept the benefit of the

contract and release the company from liability, is prohibited by the provisions of this section. *Barden v. Atlantic Coast Line R. Co.*, 152 N. C. 318, 67 S. E. 971 (1910); *Herring v. Atlantic Coast Line R. Co.*, 168 N. C. 555, 84 S. E. 863 (1915).

Cited in *Ingle v. Southern R. Co.*, 167 N. C. 636, 83 S. E. 744 (1914).

§ 60-70. Provisions of this article applicable to logging roads and tramroads.—The provisions in this article relating to liability for damages shall also apply to logging roads and tramroads. (1919, c. 275; C. S., s. 3470.)

Editor's Note.—Before the enactment of this section provisions of § 60-65 were held, by judicial construction, to apply to logging roads and tramroads. See *Roberston v. Greenleaf-Johnson Lumber Co.*, 154 N. C. 328, 70 S. E. 630 (1911); *Buckner v. Madison County R. Co.*, 164 N. C. 201, 80 S. E. 225 (1913).

However, in *Williams v. Kinston Mfg. Co.*, 175 N. C. 226, 95 S. E. 366 (1918), it was held that a logging road was not a common carrier within the meaning of § 60-67, and that the doctrine of comparative negligence was not applicable to actions for injuries sustained by employees of such roads. This decision seems to have engendered the legislative enactment enunciated by this section, which was passed in 1919.

The provisions of §§ 60-67 and 60-65 are applicable to tram or logging roads under the provisions of this section. *Sampson v. Jackson Bros. Co.*, 203 N. C. 413, 166 S. E. 181 (1932).

In *Lilley v. Interstate Cooperage Co.*, 194 N. C. 250, 139 S. E. 369 (1927), the rule of this section as to tram railroads was applied, and it was held that § 60-67 is operative as to such railroads.

Comparative Negligence Rule Applies.—Under this section contributory negligence is no longer a bar to injuries received in the operation of a logging road, but such negligence mitigates damages. In other words, comparative negligence is

now, under the law, applicable to logging roads. *Moore v. Rawls*, 196 N. C. 125, 144 S. E. 552 (1928), citing *McKinish v. Lumber Co.*, 191 N. C. 836, 133 S. E. 163 (1926).

The employee must be engaged in duties connected with or incidental to the operation of such roads. *Gurganous v. Camp Mfg. Co.*, 204 N. C. 525, 168 S. E. 833 (1933).

Narrow-Gauge Logging Road.—A small narrow-gauge road running through the woods and used for the purpose only of transporting logs to the defendant's saw-mill, with the cars loaded with logs pulled up a grade by means of a steam skidder, the wire cables operating around a drum upon the skidder, is a logging road within the intent and meaning of this section and an employee negligently injured by such company is not barred of his right to recover damages when caused by a fellow servant; and contributory negligence is only considered in determination of the amount of damages the injured employee has sustained. *Stewart v. Blackwood Lumber Co.*, 193 N. C. 138, 136 S. E. 385 (1927); *Brooks v. Suncrest Lumber Co.*, 194 N. C. 141, 138 S. E. 532 (1927).

Applied in *Bateman v. Brooks*, 204 N. C. 176, 167 S. E. 627 (1933).

Cited in *Stamey v. Suncrest Lumber Co.*, 197 N. C. 391, 148 S. E. 436 (1929); *Hawkins v. Rowland Lumber Co.*, 198 N. C. 475, 152 S. E. 169 (1930).

ARTICLE 9.

Construction and Operation of Railroads.

§ 60-71. Map of route to be served with summons for condemnation.—Whenever it shall become necessary to condemn any land for the purposes of a railroad, at the time that the summons for such condemnation is served there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the height of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are located. This section shall not apply to street railways. (1871-2, c. 138, s. 24; Code, s. 1952; 1893, c. 396, s. 2; 1901, c. 6, s. 3; Rev., s. 2599; C. S., s. 3471.)

Section Mandatory.—The conditions of this section must be complied with before any company can construct any part of its road. *Durham, etc., R. Co. v. Richmond, etc., R. Co.*, 106 N. C. 16, 10 S. E. 1041 (1890).

Same—Defect May Be Cured by Amendment.—The failure to serve a map

and profile with the summons in condemnation proceedings as required by this section may be cured by amendment. *State v. Wells*, 142 N. C. 590, 55 S. E. 210 (1906).

Cited in *Gastonia v. Glenn*, 218 N. C. 510, 11 S. E. (2d) 459 (1940).

§ 60-72. Map of railroad to be made and filed.—Every railroad corporation shall, within a reasonable time after its road shall be constructed, cause to be made a map and profile thereof, and of the land taken or obtained for the use thereof, and shall file the same in the office of the Utilities Commission. Every such map shall be drawn on a scale and on paper to be designated by the Utilities Commission, and shall be certified and signed by the president or engineer of such corporation. (1871-2, c. 138, s. 41; Code, s. 1977; Rev., s. 2600; C. S., s. 3472; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Purpose of Section.—By this section railroad corporations are required, within a reasonable time after their road is constructed, to file a map and profile of their route and of land condemned for its use with the Corporation Commission (now the Utilities Commission). But this is for the information of that body and is not required as a part of a correct and completed location. *Fayetteville Street Railway v. Railroad*, 142 N. C. 423, 55 S. E. 345 (1906).

Survey Unnecessary When Old Roadbed Adopted.—Where the line of a railroad is clearly defined by the existence of an old roadbed which is entered on and staked out by the agents of the company, and the route so marked is approved and adopted by the directors as its permanent

location, in such case a survey by engineers is not essential. *Fayetteville Street Railway v. Railroad*, 142 N. C. 423, 55 S. E. 345 (1906).

Profile Must Show "Fills" and "Cuts."

—The profile required to be filed must show whether there will be any "fills" or "cuts" on the land sought to be condemned. *Kinston, etc., R. Co. v. Stroud*, 132 N. C. 413, 43 S. E. 913 (1903).

Railroad Completed before Section Passed.—Where the railroad was completed through the locus in quo prior to the passage of this section, it was not necessary to the validity of the location that a map of the route should be filed. *Purifoy v. Richmond, etc., R. Co.*, 108 N. C. 100, 12 S. E. 741 (1891).

§ 60-73. Joint construction by railroads having same location.—Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, they may by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon shall be performed. Upon the making of such an agreement, the company that is not to construct the part of the line which is common to both may terminate its line at the point of intersection, and may reduce its capital to a sum of not less than five thousand dollars for each mile of the road proposed to be constructed. (1871-2, c. 138, s. 46; Code, s. 1983; Rev., s. 2602; C. S., s. 3473.)

§ 60-74. Construction of part of line in another state.—Whenever after due examination it shall be ascertained by the directors of any railroad company that a part of the line of railroad proposed to be made between any two points in this State ought to be located and constructed in an adjoining state, it may be so located and constructed by a vote of two-thirds of all the directors. The sections of such railroad within this State shall be considered a connected line, and the directors may reduce the capital specified to such amount as may be deemed proper, but not less than the amount required by law for the number of miles of railroad to be actually constructed in this State. (1871-2, c. 138, s. 47; Code, s. 1984; Rev., s. 2603; C. S., s. 3474.)

Cross Reference.—As to amount of capital required by law, see § 60-9.

§ 60-75. Carriage must be according to public schedule.—Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads and at usual stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises. (1871-2, c. 138, s. 35; Code, s. 1963; Rev., s. 2611; C. S., s. 3475.)

Cross References.—As to powers of Utilities Commission to prevent discrimination in transportation facilities, see § 62-56. As to rate regulation, see § 62-122 et seq. As to ejection of passenger refusing to pay fare or violating rules, see § 60-103.

Reaffirmance of Common-Law Rule.—The requirement to furnish accommodations within a reasonable time is but a reaffirmance of the common law, leaving the courts to say what time is reasonable. *Alsop v. Southern Exp. Co.*, 104 N. C. 278, 10 S. E. 297 (1889).

Duty to Provide Transportation.—It is the duty of a common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have been provided for. *Purcell v. Richmond, etc., R. Co.*, 108 N. C. 414, 12 S. E. 954 (1891).

Trains Need Not Stop at All Stations.—It is a reasonable regulation of a railroad that certain trains shall not stop at all stations, provided there are enough to serve the purposes of local travel. *Hutchinson v. Railroad*, 140 N. C. 123, 52 S. E. 263 (1905).

Schedule Is Offer.—Under this section, the printed schedule of trains is an offer, which is accepted by a person when he asks for a ticket, and he has the right to

be transported by the first train stopping at his destination. *Coleman v. Southern R. Co.*, 138 N. C. 351, 50 S. E. 690 (1905).

When Contract of Carriage Begins.—The contract of carriage by a common carrier begins when a passenger comes upon the carrier's premises or conveyance with the purpose of buying a ticket within a reasonable time or after having purchased a ticket; and the relation, once constituted, continues until the journey contracted for is concluded and the passenger has left or has had reasonable time to leave such premises. *Hansley v. Jamesville, etc., R. Co.*, 115 N. C. 602, 20 S. E. 528 (1894).

Carrier May Demand Prepayment of Freight.—A common carrier has a right to demand the prepayment of charges for transportation before receiving freight for shipment to one individual, although it may have an established custom to accept shipments to its other patrons without such prepayment. *Allen v. Cape Fear, etc., R. Co.*, 100 N. C. 397, 6 S. E. 105 (1888).

A common carrier may demand prepayment of freight charges before shipment to any station, and from one shipper, though this is not required of others. It should appear, however, that a plaintiff had notice of such regulation. *Randall v. Richmond, etc., R. Co.*, 108 N. C. 612, 13 S. E. 137 (1891).

Failure to Take Passenger Aboard.—Where plaintiff purchased a ticket from defendant's agent at a regular station be-

fore the time advertised for the arrival and departure of its train at that place, and was in readiness to get aboard, but the train ran by, making no effort to stop, although it had room in its cars for plaintiff, plaintiff was entitled to punitive damages, in the absence of sufficient excuse shown by defendant. *Purcell v. Richmond, etc., R. Co.*, 108 N. C. 414, 12 S. E. 954 (1891).

Carrier under No Duty to Delay Trains.—A common carrier of passengers is under no obligation to delay the departure of its trains, or to look after the safety of persons who attempt to enter them, when they have been stopped long enough to allow passengers to embark and disembark; but it may be liable for injuries incurred by one who, by the invitation or command of persons in charge of the trains, attempts to get on or off while the cars are in motion. *Browne v. Raleigh, etc., R. Co.*, 108 N. C. 34, 12 S. E. 958 (1891).

Duty to Stop Train at Passenger's Station.—A passenger on a railway train is entitled, as a matter of right, to have the train stop at a station to which he has purchased his ticket; and where his destination is a flag station at which the train fails to stop owing to the neglect of the conductor in failing to take up the passenger's ticket in time, the railroad company is answerable for the consequent damages. *Elliott v. Norfolk Southern R. Co.*, 166 N. C. 481, 82 S. E. 853 (1914).

Allowing Passenger to Board Train Which Does Not Stop at His Destination.—It is the duty of the railroad to have an agent at the gate to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into the train, without objection, with a ticket calling for a regular station as her destination, and nothing on its face to show it was not good on that train, and she not knowing that that train did not stop there, it was the duty of the defendant to stop the train at that point for her. *Hutchinson v. Railroad*, 140 N. C. 123, 52 S. E. 263 (1905).

Stepping Off Moving Train at Conductor's Suggestion.—Where a train on which plaintiff was a passenger, did not stop at the station to which he had paid his fare, and the conductor agreed that he would slow up the train at a safe place for plaintiff to alight, and the plaintiff consented to jump off and went upon the platform as the train slowed up, but seeing a "go ahead" signal from the rear, did not step for that reason; and then, feeling the increased motion of the train, he step-

ped off believing he was at a safe place and relying upon the conductor's promise to put him off at a safe place, and was injured, the evidence of the defendant's negligence was sufficient to be submitted to the jury. *Cable v. Southern R. Co.*, 122 N. C. 892, 29 S. E. 377 (1898).

Failure to Stop at Flag Station.—Where plaintiff went to a flag station on a railroad a reasonable time before the arrival of a train on which he intended to take passage and, by reason of absence of the agent and the failure of the engineer to see his signal, the train did not stop for him, the railroad is liable for the actual damages sustained by the plaintiff. *Thomas v. Southern R. Co.*, 122 N. C. 1005, 30 S. E. 343 (1898).

Same—When Punitive Damages Allowed.—It is only when the railway engineer actually sees the signal of an intended passenger at a flag station and willfully passes him by that punitive damages will be allowed in an action for damages, and the burden of showing the reckless disregard of plaintiff's rights is upon the latter. *Thomas v. Southern R. Co.*, 122 N. C. 1005, 30 S. E. 343 (1898).

Damages Where Passenger Carried by Station.—Under this section when a passenger is carried by his station, he is entitled to damages, and this, though there is no bodily harm, or actual damages. If it is done recklessly or willfully he is entitled to punitive damages. *Hutchison v. Railroad*, 140 N. C. 123, 52 S. E. 263 (1905), overruling *Smith v. Wilmington, etc., R. Co.*, 130 N. C. 304, 41 S. E. 481 (1902).

Under the well settled rules of law, and plainly under this section, a railroad company is liable for nominal damages for its negligence in failing to stop its train and conveying a passenger beyond the destination to which he had paid his fare, it being a regular station on the line. *Cable v. Southern R. Co.*, 122 N. C. 892, 29 S. E. 377 (1898).

Ejected Passenger Has Right of Action.—Under this section a passenger, ejected from a train for failure to pay again fare which he had paid once upon purchasing a ticket, has a right of action. *Sawyer v. Norfolk, etc., R. Co.*, 171 N. C. 13, 86 S. E. 166 (1915).

Same—Passenger Need Not Pay Additional Fare to Prevent Ejection.—Under this section where a passenger is about to be wrongfully ejected from a train, having paid his fare thereon, but being unable to produce his ticket, it is not incumbent on him, by paying money which the conductor has no right to exact, to avoid ejection from the train, as he is not re-

quired to buy again his right to remain on the train to his destination. *Sawyer v. Norfolk, etc., R. Co.*, 171 N. C. 13, 86 S. E. 166 (1915).

Where Conductor Fails to Return Ticket.—Where plaintiff purchased through transportation to a destination to reach which it was necessary to change, and the conductor on the first train neglected to return plaintiff's ticket, and, when the conductor of the second train asked for his fare, plaintiff, having no money, vainly attempted to borrow from men who had been on the first train with him, it was negligence on the conductor's part not to have satisfied himself by inquiring of such men whether plaintiff had been on the train with them prior to reaching the changing point, before ejecting plaintiff. *Sawyer v. Norfolk, etc., R. Co.*, 171 N. C. 13, 86 S. E. 166 (1915).

Passenger on Baggage Car.—A person who gets on a blind baggage car, having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. *McGraw v. Southern R. Co.*, 135 N. C. 264, 47 S. E. 753 (1904).

Injury Caused by Misdirection of Agent.—The plaintiff, who missed his train by misdirection of the defendant's agent and his refusal to sell him a ticket, could recover for any injury proximately caused by being put out of the station into the cold weather while waiting for the next train. *Coleman v. Southern R. Co.*, 138 N. C. 351, 50 S. E. 690 (1905).

Action May Be Bought in Tort or Contract.—A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains as required by this section may bring an action on contract, or in tort, independent of the

statute. *Purcell v. Richmond, etc., R. Co.*, 108 N. C. 414, 12 S. E. 954 (1891).

Same—Damages.—If the tort is the result of simple negligence, damages will be restricted to such as are compensatory; but if it was willful, or committed with such circumstances as show gross negligence, punitive damages may be given. *Purcell v. Richmond, etc., R. Co.*, 108 N. C. 414, 12 S. E. 954 (1891).

Where a railroad company, negligently and by reason of defective and inadequate equipment, failed to carry a passenger to whom it had sold an excursion ticket back to its starting point, but no personal injury or indignity was inflicted upon him, the passenger's right of action is *ex contractu* and not in tort, and hence exemplary or punitive damages cannot be recovered. *Purcell v. Richmond, etc., R. Co.*, 108 N. C. 414, 12 S. E. 954 (1891), which was overruled in *Hansley v. Jamesville, etc., R. Co.*, 115 N. C. 602, 20 S. E. 528 (1894), is reinstated, but the ground of the judgment is changed. *Hansley v. Jamesville, etc., R. Co.*, 117 N. C. 565, 23 S. E. 443, 53 Am. St. Rep. 600, 32 L. R. A. 551 (1895).

If a train arrives after its schedule time, or misses connection, or delays a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for the loss of time and actual expenses. *Coleman v. Southern R. Co.*, 138 N. C. 351, 50 S. E. 690 (1905).

Basis of Exemplary Damages.—The true ground for allowing exemplary damages in an action against a railroad company for damages on account of its negligence is personal injury, or (in the absence of personal injury) insult, indignity, contempt, etc., to which the law imputes bad motive towards the plaintiff. *Hansley v. Jamesville, etc., R. Co.*, 117 N. C. 565, 23 S. E. 443, 53 Am. St. Rep. 600, 32 L. R. A. 551 (1895).

§ 60-76. Arrangement of cars in passenger trains.—In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of the passenger cars, except in case of accident, or when the cars are provided with automatic couplers or brakes. If any officer or agent of a railroad company, in forming a passenger train, shall direct or knowingly suffer an arrangement of the cars different from the one herein provided for, he shall be guilty of a misdemeanor: Provided, the criminal liability hereby imposed shall not apply to officers and agents of the Wilmington Seacoast Railroad Company. (1871-2, c. 138; Code, s. 1971; 1893, c. 331; 1895, c. 212; Rev., ss. 2612, 3747; C. S., s. 3476.)

§ 60-77. Unauthorized manufacture or sale of switch-lock keys misdemeanor.—It shall be unlawful for any person to make, manufacture, sell or give away to any other person any duplicate key to any lock used by any railroad company in this State on its switches or switch tracks, except upon the writ-

ten order of that officer of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1909, c. 795; C. S., s. 3477.)

§ 60-78. Willful injury to railroad property misdemeanor.—If any person shall willfully do or cause to be done any act or acts whatever whereby any building, construction or work of any railroad corporation, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a misdemeanor. (1871-2, c. 138, s. 39; Code, s. 1974; Rev., s. 3756; C. S., s. 3478.)

Cross Reference.—See §§ 14-278, 14-279.

§ 60-79. Headlights on locomotives on main lines.—Every company, corporation, lessee, manager or receiver owning or operating a railroad in this State is hereby required to equip and maintain and use upon every locomotive in operation in railroad service on main lines in this State an electric or power headlight of at least one thousand five hundred candlepower, measured without the aid of a reflector. This section shall not apply to locomotive engines regularly used in switching cars or trains, to locomotive engines used exclusively between sunup and sundown, and to locomotive engines going to and returning from repair shops when ordered in for repairs; neither shall this section apply to independently owned and operated railroad companies in this State whose mileage of road in this State is one hundred and twenty-five miles or less, nor to railroad companies having only lines extending into this State, no one of which is one hundred miles in length in this State. The Utilities Commission may relieve from the operation of this section such locomotives and roads, or parts or sections or branches of roads, upon which the said Utilities Commission may deem electric or power headlights not advisable. Should an engine start on a trip with the headlight in good working condition, and from some unavoidable cause such headlight becomes disabled and cannot be repaired on the line of the road on which such run is being made, there shall be nothing in this section to prevent such engine from continuing on its trip, and the railroad company shall not be liable for prosecution on account of such failure to repair. Any company, corporation, lessee, manager or receiver violating the provisions of this section shall be guilty of a misdemeanor. (1909, c. 446; C. S., s. 3479; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Violation as Proximate Cause of Death.—Evidence failing to show how deceased was killed, whether walking along railroad tracks or at platform, and showing that he was intoxicated at the time, does not show that the violation of this section was the proximate cause of death. *Owens v. Southern Ry. Co.*, 33 F. (2d) 870 (1929).

Burden of Proof.—It is negligence for a railroad company not to equip its locomotives with electric headlights, with the

burden on the company to plead and prove that it had one in use at the time complained of or that its use was excepted by the statute, when relevant to the inquiry. *Barnes v. Atlantic Coast Line R. Co.*, 168 N. C. 512, 84 S. E. 805 (1915), citing *Powers v. Norfolk Southern R. Co.*, 166 N. C. 599, 82 S. E. 972 (1914). But see *McNeill v. Atlantic Coast Line R. Co.*, 167 N. C. 390, 83 S. E. 704 (1914).

§ 60-80: Repealed by Session Laws 1943, c. 543.

§ 60-81. Negligence presumed from killing livestock.—When any cattle or other livestock shall be killed or injured by the engine or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the railroad company in any action for damages against such company: Provided, that no person shall be allowed the benefit of this section unless he shall

bring his action within six months after his cause of action shall have accrued. (1856-7, c. 7; Code, s. 2326; Rev., s. 2645; C. S., s. 3482.)

Cross Reference.—As to venue of an action against railroad, see § 1-81.

Editor's Note.—Several of the earlier cases, notably *Doggett v. Richmond*, etc., R. Co., 81 N. C. 459 (1879), and *Durham v. Wilmington*, etc., R. Co., 82 N. C. 352 (1880), stated that, where the facts are known and show there was no negligence on the part of the railroad, the presumption created by this section does not apply. But it would have been more accurate to say that the prima facie case here created is rebutted where the undisputed facts show there was no negligence on the part of the defendant, than to say the statute did not apply to such a case. There is no exception in the statute. It is in terms general and applies alike to all cases of killing stock by a railroad. The rule is thus stated in the later cases. See *Hardison v. Atlantic*, etc., R. Co., 120 N. C. 492, 26 S. E. 630 (1897).

In some of the early decisions it was said that when livestock were injured by the engine or cars of a railroad company and an action thereon was brought within six months, this section raised a presumption of negligence and cast upon the defendant the burden of rebutting such presumption. *Carlton v. Wilmington*, etc., R. Co., 104 N. C. 365, 10 S. E. 516 (1889); *Bethea v. Raleigh*, etc., R. Co., 106 N. C. 279, 10 S. E. 1045 (1890). But it is now the established rule, as settled by the later and prevailing cases, that "prima facie evidence of negligence" means no more than evidence sufficient to carry the case to the jury, and to justify, but not compel, a verdict as for a negligent wrong. See *Ferrell v. Norfolk Southern R. Co.*, 190 N. C. 126, 129 S. E. 155 (1925).

Section Applies When Facts Known.—The presumption of negligence in killing livestock, when the action is brought within six months, applies where the facts are known. *Hanford v. Southern R. Co.*, 167 N. C. 277, 83 S. E. 470 (1914).

Applies When Stock under Control of Person.—The statutory presumption of negligence for killing livestock, when the action is brought within six months, is not rebutted by showing that the livestock were under the control of a person at the time. *Randall v. Richmond*, etc., R. Co., 104 N. C. 410, 10 S. E. 691 (1889).

Same—When Animal Hitched to Vehicle.—The statutory presumption of negligence of a railroad company in killing livestock, when the action is brought within six months, applies whether a horse, the sub-

ject of the action, was hitched to a buggy at the time or running at large. *Hanford v. Southern R. Co.*, 167 N. C. 277, 83 S. E. 470 (1914).

Where it is proven or admitted that cattle have been killed by the train of a railroad company within six months before the action was brought, there is a presumption that the killing was caused by the negligence of such company, and this presumption arises from the fact of killing, where the animal is hitched to a wagon or cart, as well as where it is straying at large when killed. *Randall v. Richmond*, etc., R. Co., 107 N. C. 748, 12 S. E. 605 (1890).

Does Not Apply to Fowl.—No presumption of negligence against a railroad company is raised by the mere fact of killing fowls, etc., upon its track in the operation of its trains. This section makes its prima facie evidence of negligence in respect only to "cattle or other livestock," which does not include geese or other fowl within its terms. *James v. Atlantic*, etc., R. Co., 166 N. C. 572, 82 S. E. 1026 (1914).

Does Not Apply to Dogs.—The killing of a dog by a street railway is not prima facie evidence of negligence. *Moore v. Charlotte Elect. R., etc., Co.*, 136 N. C. 554, 48 S. E. 822 (1904).

When Horses Run into Trestle.—In an action against a railroad company for damages for injuries to horses, where the evidence showed that the horses were injured by running into a trestle, and that the train was 100 yards from the trestle when they were injured, and stopped 100 feet from the trestle, this section does not apply. *Ramsbottom v. Atlantic Coast Line R. Co.*, 138 N. C. 38, 50 S. E. 448 (1905).

Plaintiff Must Prove Case.—Where a railroad train runs into, kills or injures livestock, and the owner brings his action for damages within the statutory six months, the prima facie case of negligence raised by the statute is sufficient to take the case to the jury, but does not change the burden of proving the issue of negligence from the plaintiff. *Ferrell v. Norfolk Southern R. Co.*, 190 N. C. 126, 129 S. E. 155 (1925).

How Presumption Rebutted.—In an action against a railroad company for killing certain mules of the plaintiff, where negligence is established by force of this section, it can only be rebutted by showing that by the exercise of due diligence the stock could not have been seen in time to

save them. *Pippen v. Wilmington, etc., R. Co.*, 75 N. C. 54 (1876).

This rule can only be rebutted by showing that the agents of the railroad company used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence. *Battle v. W. & W. Railroad*, 66 N. C. 343 (1872).

Same—Presumption Not Repelled.—Where plaintiff's horse had been injured on a railroad by the running of a train against it, and it was doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on track, the prima facie case of negligence made by this section was not repelled. *Clark v. Western North Carolina Railroad*, 60 N. C. 109 (1863).

Same—Instructions.—Where the killing of stock by a railroad is admitted or proven, the trial judge may instruct the jury that a certain state of facts, if believed by them, would rebut the presumption of negligence, but not that certain evidence, though uncontradicted, would do so. *Baker v. Roanoke, etc., R. Co.*, 133 N. C. 31, 45 S. E. 347 (1903).

When Owner Permits Cattle to Stray on Railroad Track.—If the owner of cattle permits them to stray off and get upon the track of a railroad and they are killed or hurt, the railroad company is not liable unless the train was being carelessly run, or by the exercise of proper care after the animals were discovered the injury could have been avoided or prevented. *Doggett v. Richmond, etc., R. Co.*, 81 N. C. 459 (1879).

Effect of Local Stock Law.—The prima facie evidence of negligence on the part of a railroad company in a suit for damages for killing stock is not impaired by a local act requiring stock to be fenced in, but the defendant must repel the presumption by satisfactory proof to the jury. *Roberts*

v. Richmond, etc., R. Co., 88 N. C. 560 (1883).

No Duty to Cut Down Weeds.—A railroad company is not negligent in failing to cut down bushes or weeds on the right of way beyond the portion over which it is exercising actual control for corporate purposes, though a horse is killed as a result of the engineer's inability to see him on account of the weeds. *Ward v. Wilmington, etc., R. Co.*, 109 N. C. 358, 13 S. E. 926 (1891).

Measure of Damages.—The measure of damages when a cow is killed by a train is the difference in the value of the cow and that of the beef. *Roberts v. Richmond, etc., R. Co.*, 88 N. C. 560 (1883).

When Judge May Direct Verdict.—This section applies to all cases of killing stock by a railroad, and while the presumption of negligence arising from the killing may be rebutted, it is only where the undisputed facts show there was no negligence that the trial judge should direct a verdict for the defendant. *Hardison v. Atlantic, etc., R. Co.*, 120 N. C. 492, 26 S. E. 630 (1897).

Defendant Not Entitled to Nonsuit.—Where a plaintiff makes a prima facie case by suing for the killing of a cow within six months, the defendant is not entitled to nonsuit on the ground that such prima facie case is rebutted by the evidence of the defendant. *Davis v. Railroad Co.*, 134 N. C. 300, 46 S. E. 515 (1904).

Applied in *Aycock v. W. & W. R. Road Co.*, 51 N. C. 231 (1858); *Wilson v. Norfolk, etc., R. Co.*, 90 N. C. 69 (1884); *Snowden v. Norfolk, etc., Railroad*, 95 N. C. 93 (1886); *Carlton v. Wilmington, etc., R. Co.*, 104 N. C. 365, 10 S. E. 516 (1889); *Coburn v. Atlantic Coast Line R. Co.*, 227 N. C. 695, 44 S. E. (2d) 200 (1947).

Cited in *State v. Divine*, 98 N. C. 778, 4 S. E. 477 (1887); *Cable v. Southern R. Co.*, 122 N. C. 892, 29 S. E. 377 (1898).

ARTICLE 10.

Railroad and Other Company Police.

§ 60-82. **Railway conductors and station agents declared special police.**—All passenger conductors of railroad trains and station or depot agents are hereby declared to be special police of the State of North Carolina, with full power and authority to make arrests for offenses committed in their presence or view, or for felony, or on sworn complaint for misdemeanor, except that the conductors shall have such power only on board of their respective trains or their railroad right of way, and the agents at their respective stations; and such conductors and agents may cause any person so arrested by them to be detained and delivered to the proper authority for trial as soon as possible. Nothing contained in the provisions of this section shall have the effect to relieve any such railroad

company from any civil liability now existing by statute or under the common law for the act or acts of such conductors, station or depot agents, in unlawfully exercising or attempting to exercise the powers herein conferred. (1907, c. 470, ss. 3, 4; C. S., s. 3483.)

Editor's Note.—For article discussing arrest without a warrant, see 15 N. C. Law Rev. 101.

Conductor Has Power of Peace Officer.

—A conductor on a railroad passenger train is held to a high degree of care in

looking after and protecting passengers on his train, and he is clothed, to some extent, with the powers of a peace officer. *Brown v. Atlantic Coast Line R. Co.*, 161 N. C. 573, 77 S. E. 777 (1913).

§ 60-83. Governor may appoint and commission police for railroad, etc., companies; civil liability of companies.—Any corporation operating a railroad on which steam or electricity is used as the motive power or any electric or water-power company or construction company or manufacturing company or motor vehicle carrier or railway express agencies may apply to the Governor to commission such persons as the corporation or company may designate to act as policemen for it. The Governor upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen. Nothing contained in the provisions of this section shall have the effect to relieve any such company from any civil liability now existing by statute or under the common law for the act or acts of such policemen, in exercising or attempting to exercise the powers conferred by this section. (1871-2, c. 138, ss. 51, 52; Code, ss. 1988, 1989; Rev., ss. 2605, 2606; 1907, c. 128, s. 1; C. S., s. 3484; 1923, c. 23; 1933, c. 61; 1943, c. 676, ss. 1, 4; 1947, c. 390.)

Cross Reference.—As to venue of action against railroad, see § 1-81.

Editor's Note.—The 1923 amendment extended this section to manufacturing companies.

The 1933 amendment added the last sentence of the section.

The 1943 amendment made this section applicable to motor vehicle carriers. It also struck out the word "railroad" before the word "company" in the third sentence. For comment on the 1943 amendment, see 21 N. C. Law Rev. 330.

The 1947 amendment made this section applicable to railway express agencies.

A railroad policeman appointed pursuant to this section, is *prima facie* a public officer, but the question of whether a particular act is done as an employee of the railroad company or as a public officer is a question to be determined from the nature of the act, whether it relates to vindication and enforcement of public justice or whether it is in the scope of duties owed to the company by reason of employment. *Tate v. Southern Ry. Co.*, 205 N. C. 51, 169 S. E. 816 (1933).

Cited in *Stanley v. Southern R. Co.*, 160 N. C. 323, 76 S. E. 221 (1912).

§ 60-84. Oath, bond, and powers of company police.—Every policeman so appointed shall, before entering upon the duties of his office, take and subscribe the usual oath. Such oath, with a copy of the commission, shall be filed with the Utilities Commission, and such policemen shall severally possess within the limits of each county in which the railroad or motor vehicle carrier for which such policemen are appointed may run or in which the company may be engaged in work or business all the powers of policemen in the several towns, cities and villages in any such county: Provided, that every policeman appointed under this and § 60-83 shall, before entering upon the duties of his office, enter into bond in the sum of five hundred dollars, payable to the State of North Carolina, conditioned for the faithful performance of the duties of his office, with good and sufficient surety, to be passed upon and accepted by and filed with the Utilities Commission. (1871-2, c. 138, s. 53; Code, s. 1990; Rev., s. 2607; 1907, c. 128, s. 2, c. 462; C. S., s. 3485; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1943, c. 676, s. 2.)

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

Editor's Note.—The 1943 amendment rewrote portions of this section appearing

before the proviso.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 330.

§ 60-85. Company police to wear badges.—Such railroad police shall, when on duty, severally wear a metallic shield with the words “Railway Police” and the name of the corporation for which appointed inscribed thereon, and this shield shall always be worn in plain view except when such police are employed as detectives. (1871-2, c. 138, s. 54; Code, s. 1991; Rev., s. 2608; C. S., s. 3486.)

Cross Reference. — As to badges of conductor and certain other railroad employees, see § 60-3.

§ 60-86. Compensation of company police.—The compensation of such police shall be paid by the companies for which the policemen are respectively appointed, as may be agreed on between them. (1871-2, c. 138, s. 55; Code, s. 1992; Rev., s. 2609; C. S., s. 3487.)

§ 60-87. Police powers cease on company's filing notice.—Whenever any company shall no longer require the services of any policeman so appointed as aforesaid, it may file a notice to that effect in the office of the Governor and the office of the Utilities Commission and thereupon the power of such officer shall cease and determine. (1871-2, c. 138, s. 56; Code, s. 1993; Rev., s. 2610; C. S., s. 3488; 1943, c. 676, s. 3.)

Editor's Note.—The 1943 amendment substituted the words “office of the Governor and the office of the Utilities Commission” for the words “several offices in which notice of such appointment was originally filed.”
For comment on the 1943 amendment, see 21 N. C. Law Rev. 330.

ARTICLE 11.

Joint Rates.

§ 60-88. Carriers permitted to establish joint rates.—Any operating railroad company is authorized and directed to enter into arrangements for the establishment of joint rates and through routes with common carriers by water and with other such railroad companies for the transportation of persons and/or property transported wholly within the State of North Carolina by such carrier by water and such railroad company. (1931, c. 195.)

ARTICLE 12.

Carriage of Passengers.

§ 60-89. Railroad passenger rates established.—No railroad company doing business as a common carrier of passengers in the State of North Carolina shall, except as herein provided, charge, demand or receive for transporting any passenger and his or her baggage, not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its road in North Carolina, a rate in excess of three cents per mile: Provided, however, that independently owned and operated railroad companies in North Carolina whose mileage of road in this State is one hundred miles or less may charge a rate twenty per cent higher than the rate above specified; but this proviso shall not extend to branch lines of railroad companies controlling over one hundred miles of road, whether chartered in or out of the State: Provided, further, this section shall not apply to railroads hereafter built less than fifty miles in length. For transporting children under twelve years and over five years old, one-half of the rate above prescribed may be charged. For transporting children under five years old, accompanied by any person paying fare, no charge whatever shall be made. Where the amount of the ticket at the prescribed rate would amount to any figure between two multiples of five, the price of the ticket shall be the multiple of five which is nearest the price of the ticket at the rate above mentioned; or, in the event that the amount is equidistant between the multiples of

five, the price charged for the ticket shall be on the basis of the higher of those two multiples of five. No charge less than ten cents shall be required. A charge of fifteen cents may be added to the fare of any passenger when the same is paid on the train, if the ticket might have been procured within a reasonable time before the departure of the train. (Ex. Sess. 1908, c. 144, s. 1; C. S., s. 3489; Ex. Sess. 1920, c. 51, s. 1.)

Cross References.—As to free carriage, see § 62-134. As to rate regulation in general, see § 62-122 et seq. As to passenger's baggage, see § 60-119. As to duty of the railroad to file rates with Utilities Commission, see § 62-68.

Editor's Note.—Formerly the maximum charge allowed by this section was two and one-half cents per mile. The 1920 amendment raised the maximum rate to three cents per mile. At the same time the proviso allowing a twenty percent higher rate for railroads less than one hundred miles in length was added.

Right to Put Off Child on Train with Parent.—Where a conductor has taken up the ticket of a person traveling with his child, for whom a half ticket is required, but has not been purchased, and the parent is unable to pay the fare of the child with the extra fare allowed when a ticket has not been regularly purchased, the conductor's right to put the child off the train is dependent upon the return of the ticket he has collected from the parent, or its equivalent. *Landford v. Southern R. Co.*, 165 N. C. 653, 81 S. E. 998 (1914).

§ 60-90. Rates on leased or controlled lines.—In the case that any railroad company operating as a common carrier of passengers in the State of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in the State, the rate for carrying passengers thereon shall be determined for such railroad company by the rate prescribed by § 60-89 for the railroad company which owns, controls or operates the same. (Ex. Sess. 1908, c. 144, s. 2; C. S., s. 3490.)

§ 60-91. Violations of passenger rates misdemeanor.—Any railroad company violating any of the provisions of §§ 60-89 and 60-90, or counseling, ordering or directing any employee, agent or servant to violate any of such provisions, by charging, demanding or receiving any rate greater than that fixed by such sections, shall be guilty of a misdemeanor, and on conviction shall be fined not less than five hundred dollars nor more than five thousand dollars; and any agent, servant or employee of any railroad company who shall violate either § 60-89 or § 60-90 shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court. (Ex. Sess. 1908, c. 144, s. 3; C. S., s. 3491.)

Cross Reference.—As to charging unreasonable freight rates, see § 60-115.

§ 60-92. Accepting or giving free transportation illegally misdemeanor.—Any persons, except those permitted by law, who accept free transportation shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court; and any railroad, or its employees or agents, giving free transportation of any kind whatsoever, except that permitted by law, shall be guilty of a misdemeanor, and on conviction shall be fined not less than five hundred dollars nor more than two thousand dollars for each offense. (Ex. Sess. 1908, c. 144, s. 4; C. S., s. 3492.)

Cross Reference.—As to persons entitled to free carriage, see §§ 62-133, 62-134.

Editor's Note.—For cases arising prior to the enactment of this section, see State

v. Southern R. Co., 122 N. C. 1052, 30 S. E. 133 (1898); *McNeill v. Railroad Co.*, 135 N. C. 682, 47 S. E. 765 (1904).

§ 60-93. Powers of Utilities Commission over rates limited.—The Utilities Commission shall have no power to change, alter, modify or in any way affect the enforcement or operation of any of the provisions of the preceding sections of this article, except as the same shall be therein specifically authorized, or

the enforcement of any penalties for violating the provisions thereof. (Ex. Sess. 1908, c. 144, s. 7; C. S., s. 3493; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Cross Reference.—As to regulation of rates by Utilities Commission, see § 62-122 et seq.

§ 60-94. Separate accommodations for different races.—All railroad and steamboat companies engaged as common carriers in the transportation of passengers for hire, other than street railways, shall provide separate but equal accommodations for the white and colored races at passenger stations or waiting rooms, and also on all trains and steamboats carrying passengers. Such accommodations may be furnished by railroad companies either by separate passenger cars or by compartments in passenger cars, which shall be provided by the railroads under the supervision and direction of the Utilities Commission: Provided, that this shall not apply to relief trains in cases of accident, to Pullman or sleeping cars, or through express trains that do not stop at all stations and are not used ordinarily for traveling from station to station, to negro servants in attendance on their employers, to officers or guards transporting prisoners, nor to prisoners so transported. (1899, c. 384; 1901, c. 213; Rev., s. 2619; C. S., s. 3494; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Cross References.—As to duty of Utilities Commission to require separate waiting rooms, see § 62-44. As to separation of races by motor carriers, see § 62-121.71; by street and interurban railways, see § 60-135.

Conductor Directing White Passengers to Colored Coach.—When a railroad company has furnished equal and separate accommodations on its train for the white and colored races, no penalties may be recovered by reason of the conductor merely directing a few white passengers to take the coach set apart for the colored people. *Merritt v. Atlantic Coast Line R.*, 152 N. C. 281, 67 S. E. 579 (1910).

Sheriff with Colored Prisoner.—Where the conductor of a train required a white sheriff to go into the coach provided for colored people with a colored prisoner in his custody, traveling with him on the train, and there is no evidence that the conductor did so in a harsh or abusive manner, or that the accommodations furnished were unequal to those of the other coach, damages sought by the sheriff will be denied as a matter of law. *Huff v. Norfolk Southern R. Co.*, 171 N. C. 203, 88 S. E. 344 (1916).

Cited in *Corporation Commission v. Transportation Committee*, 198 N. C. 317, 151 S. E. 648 (1930).

§ 60-95. Certain carriers may be exempted from requirement.—The Utilities Commission is hereby authorized to exempt from the provisions of § 60-94 steamboats, branch lines and narrow-gauge railroads and mixed trains carrying both freight and passengers, if in its judgment the enforcement of the same be unnecessary to secure the comfort of passengers by reason of the light volume of passenger traffic, or the small number of colored passenger travelers on such steamboats, narrow-gauge railroads, branch lines or mixed trains. (1899, c. 384, s. 2; 1901, c. 213; Rev., s. 2620; C. S., s. 3495; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

§ 60-96. Use of same coach in emergencies.—When any coach or compartment car for either race shall be completely filled at a station where no extra coach or car can be had, and the increased number of passengers could not be foreseen, the conductor in charge of such train may assign and set apart a portion of a car or compartment assigned for passengers of one race to passengers of the other race. (1899, c. 384, s. 3; Rev., s. 2621; C. S., s. 3496.)

§ 60-97. Penalty for failing to provide separate coaches.—Any railroad or steamboat company failing to comply in good faith with the provisions of §§ 60-94 to 60-96 shall be liable to a penalty of one hundred dollars per day, to be recovered in an action brought against such company by any passenger on any train or boat of any railroad or steamboat company which is required by this

chapter to furnish separate accommodations to the races, who has been furnished accommodations on such railroad train or steamboat only in a car or compartment with a person of a different race in violation of law. (1899, c. 384, s. 5; Rev., s. 2622; C. S., s. 3497.)

§ 60-98. Exceptions to requirement of separate coaches and toilets.—As to trains consisting of not more than one passenger car unit, operated principally for the accommodation of local travel, although operated both intrastate and interstate and irrespective of the motive power used, the Utilities Commission is authorized to make such rules and regulations for the separation of the races and with regard to toilet facilities as in its best judgment may be feasible and reasonable in the circumstances, and the rules and regulations established pursuant to this authority shall be exceptions to the provisions of §§ 60-94 and 60-107. (1935, c. 270; 1941, c. 97, s. 5.)

§ 60-99. Unused tickets to be redeemed.—When any round-trip ticket is sold by a railroad or other transportation company, it shall be the duty of such company to redeem the unused portion of said ticket by allowing to the holder thereof the difference between the cost thereof and the price of a one-way ticket between the stations for which such round-trip ticket was sold. Whenever any one-way or regular ticket is sold by a railroad or other transportation company, and not used by the purchaser, it shall be the duty of the company selling the ticket to redeem it at the price paid for it. All railroad and other transportation companies shall redeem in money all mileage tickets known as five-hundred, thousand and two-thousand mile tickets, sold by them, if presented within a year from the date of the sale, when as much as fifty per centum of such ticket has been used by the purchaser, by paying the same price per mile paid for it, or shall allow the original holder to ride it out. (1891, c. 290; 1893, c. 249; 1895, c. 83, ss. 2, 3; 1897, c. 418; Rev., s. 2627; C. S., s. 3503.)

Cited in *State v. Ray*, 109 N. C. 736, 14 S. E. 83 (1891); *Line R. Co.*, 151 N. C. 207, 65 S. E. 897 (1909); *Kindley v. Seaboard Air* (1909).

§ 60-100. Ticket may be refused intoxicated person; prohibited entry misdemeanor.—The ticket agent of any railroad, steamboat or other transportation company shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated. The conductor, captain or other person in charge of any railroad car, steamboat or other conveyance for the use of the traveling public shall at all times have power to prevent any intoxicated person from entering such car, boat or other conveyance. If any intoxicated person, after being forbidden by the conductor, captain or other person having charge of any such railroad train, steamboat or other conveyance for the use of the traveling public, shall enter such train, boat or other conveyance, he shall be guilty of a misdemeanor. (1885, c. 358, ss. 1, 2, 3; Rev., ss. 2625, 2626, 3757; C. S., s. 3504.)

Cross References.—As to public drinking on railway passenger cars, see § 14-333. As to sale of whiskey on railroad cars, see § 18-70.

When Exemplary Damages Allowed.—In an action for damages for refusal to allow a person with a ticket to board a

train because he was intoxicated, exemplary damages will be allowed if such refusal was made with malice, undue force, or insult. *Story v. Norfolk, etc., R. Co.*, 133 N. C. 59, 45 S. E. 349 (1903).

Cited in *Stanley v. Southern R. Co.*, 160 N. C. 323, 76 S. E. 221 (1912).

§ 60-101. Entering cars after being forbidden misdemeanor.—No person shall enter any railroad passenger car, baggage car, mail car or caboose car, or go upon the platform of such cars, after being forbidden so to do by the conductor, his assistants, the baggagemaster or other person in charge of such cars, unless the person enter such cars or go upon such platforms as a passenger or in some official capacity authorized by law, or on business with a passenger or some official or employee of the railroad, or for some other like purpose. Any

person violating this section shall be guilty of a misdemeanor and shall be fined not exceeding ten dollars. (1883, c. 351; Code, s. 1979; Rev., s. 3752; C. S., s. 3505.)

Cross References.—As to breaking in- intent, see § 14-56. As to train robbery, see to or entering railroad cars with felonious §§ 14-88 and 14-89.

§ 60-102. Riding in first-class cabin with second-class ticket misdemeanor.—If any passenger purchasing or holding a second-class ticket, after being requested or directed by any captain or other officer in charge of any steamboat in this State, riding in any first-class cabin, refuses to pay the difference between a first-class and a second-class fare or rate, or refuses to go into the second-class cabin, when there shall be a comfortable second-class cabin on such steamboat, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any justice of the peace in the county where such offense is committed shall have jurisdiction of the offense, upon sworn complaint of any officer of such steamboat company. (1903, c. 795; Rev., s. 3761; C. S., s. 3506.)

§ 60-103. Passenger refusing to pay fare and violating rules may be ejected.—If any passenger shall refuse to pay his fare, or violate the rules of a railroad corporation, it shall be lawful for the conductor of the train and servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train. (1871-2, c. 138, s. 34; Code, s. 1962; Rev., s. 2629; C. S., s. 3507.)

Cross Reference.—As to action for damages for wrongful ejection, see also note to § 60-75.

Permission to Ride in Express Car.—Where a party shipped horses by express with an agreement that he should ride in the same car he cannot ride in the passenger coach without paying his fare. *Teeter v. Southern Exp. Co.*, 172 N. C. 616, 90 S. E. 761 (1916).

Ejecting Person from Baggage Car.—A person who gets on a blind baggage car, though he has a ticket, he does not tell the conductor that he has it, and the conductor does not see it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. *McGraw v. Southern R. Co.*, 135 N. C. 264, 47 S. E. 758 (1904).

Mileage Book Holder Must Comply with Terms.—The holder of a mileage book must comply with its terms if reasonable opportunity is given, or he may be ejected. *Mason v. Seaboard Air Line R. Co.*, 159 N. C. 183, 75 S. E. 25 (1912); *McNairy v. Norfolk, etc., R. Co.*, 172 N. C. 505, 90 S. E. 497 (1916).

Ejection of Party Refusing to Show Mileage Book.—When a purchaser of a mileage book from a railroad company is riding on an exchange ticket, and refuses, without excuse, to show his mileage book, in connection with the ticket, to the conductor on the train, he is not regarded as a passenger, and the conductor has the

right to eject him from the train. *Mason v. Seaboard Air Line R. Co.*, 159 N. C. 183, 75 S. E. 25 (1912).

Evidence of Drunkenness Inadmissible.—In an action for wrongful ejection from a train, evidence of drunkenness of plaintiff is not admissible, where the answer simply denies the wrongful ejection alleged in the complaint. *Raynor v. Wilmington Seacoast R. Co.*, 129 N. C. 195, 39 S. E. 821 (1901).

Ejection Caused by Failure of Conductor to Return Ticket.—Where the conductor failed to return a ticket to a passenger to be used on another train, and the passenger was ejected therefrom for lack of the ticket, the railroad is liable for all damages attending the ejection. *Sawyer v. Norfolk, etc., R. Co.*, 171 N. C. 13, 86 S. E. 166 (1915).

Reliance on Agent's Statements.—The purchaser of a ticket may rely upon the statements of the railroad agent as to trains, connection, validity of ticket, etc., and if the passenger is ejected as a result of the agent's mistake the railroad is liable. *Hallman v. Southern R. Co.*, 169 N. C. 127, 85 S. E. 298 (1915); *Creech v. Atlantic, etc., R. Co.*, 174 N. C. 61, 93 S. E. 453 (1917).

How Conductor May Eject Passenger.—The conductor of a railroad train is authorized to expel without using unnecessary force one who refuses to pay regular fare, at any point where he may safely get

off provided it be "at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train;" and provided further that the ejected person is not willfully and wantonly exposed to danger of life or limb. *Roseman v. Carolina Cent. R. Co.*, 112 N. C. 709, 16 S. E. 766 (1893).

Passenger Must Be Ejected Near Station or House.—The railroad company owed a duty to plaintiff ejected from its train to put her off the train at a suitable and proper place, either at a station or near a house, even though she had not been rightfully a passenger. *Bullock v. Atlantic Coast Line R. Co.*, 152 N. C. 66, 67 S. E. 60 (1910).

Flag Station Not a Usual Stopping Place.—A place along a railroad company's track is not a usual stopping place within the meaning of this section when it is merely a flag station without shelter, and the nearest dwelling is three-quarters of a mile away; and where one traveling

on the train was put off at such place at 9 o'clock in the night for failure to exchange his mileage for a ticket, and was informed by the conductor that it was "a rather poor place to spend the night," it does not preclude his recovery for the company's violation of the statute, that he again boarded the train and complied with the conductor's demand in paying the additional charge required of those who have no tickets. *McNairy v. Norfolk, etc., R. Co.*, 172 N. C. 505, 90 S. E. 497 (1916).

Carrier Not Liable for Unusual Results.—A conductor requiring an intoxicated man to leave the train for nonpayment of fare did not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house or to the railroad station, or even to his own father's house, which was not far away. *Roseman v. Carolina Cent. R. Co.*, 112 N. C. 709, 16 S. E. 766 (1893).

§ 60-104. **Beating way on trains misdemeanor; venue.**—If any person, other than a railroad employee in the discharge of his duty, without authority from the conductor of the train or by permission of the engineer, and with the intention of being transported free and without paying the usual fare for such transportation, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this State, or on the drawheads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car or mail car on any train, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not more than thirty days. Any person charged with a violation of this section may be tried in any county in this State through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered. (1899, c. 625; 1905, c. 32; Rev., s. 3748; C. S., s. 3508.)

Effect on Liability of Insurance Company.—A policy of accident insurance that excepts from the company's full liability "sickness due to immorality or the violation of law," does not of itself exclude such liability for an injury caused by the plaintiff's stealing a ride on a railway train,

made a misdemeanor by this section, unless the plaintiff's act was so reckless as to withdraw it from the class of accidents covered by the policy. *Poole v. Imperial Mut. Life, etc., Co.*, 188 N. C. 468, 125 S. E. 8 (1924).

§ 60-105. **Injury while on platform or in other prohibited places.**—In case any passenger on any railroad shall be injured while on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passenger cars then in the train, such company shall not be liable for the injury: Provided, such company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers. (1871-2, c. 138, s. 42; Code, s. 1978; Rev., s. 2628; C. S., s. 3509.)

Cross Reference.—As to injury while riding on platform of streetcar, see § 60-140.

Effect of Posting Notice.—When this section has been complied with, a rule of a railroad company prohibiting passengers

from going on the platform while the train is in motion is given the force and effect of a State law, barring a recovery for injuries sustained under such circumstances. *Shaw v. Seaboard Air Line R. Co.*, 143 N. C. 312, 55 S. E. 713 (1906).

Notice Need Be Only in English.—This section requires only that the notice to be placed by a railroad company in its coach, relieving the company from liability to a passenger injured while riding on the platform, etc., shall be in English, and the fact that such passenger cannot read that language is immaterial. *Bane v. Norfolk Southern R. Co.*, 176 N. C. 247, 97 S. E. 11 (1918).

Riding on Platform Prima Facie Negligence.—It is prima facie negligence for a passenger to voluntarily ride on the platform of a rapidly moving train. *Wagner v. Atlantic Coast Line R. Co.*, 147 N. C. 315, 61 S. E. 171 (1908).

Section Not Applicable When Passenger Alighting.—This section is for the protection of passengers and should be reasonably construed, and has no application

when the injury complained of was received as the passenger was alighting at a regular station after the train had stopped for that purpose, though he may have ridden in violation of the statute before the train had stopped. *Kearney v. Seaboard Air Line R. Co.*, 158 N. C. 521, 74 S. E. 593 (1912).

Person on Passenger Platform at Station.—One who is on the passenger platform of railroad company at its station with the purpose of becoming a passenger on its expected train is entitled to the protection due a passenger from dangerous conditions and usages there. *Thomas v. Southern R. Co.*, 173 N. C. 494, 92 S. E. 321 (1917).

Cited in *Roberson v. Carolina Taxi Service*, 214 N. C. 624, 200 S. E. 363 (1939).

§ 60-106. Checking baggage; liability for loss.—A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of any railroad corporation, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf. If such check be refused on demand, the corporation shall pay to such passenger the sum of ten dollars, to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the conductor in charge of the train.

If a passenger, whose bag has been checked, shall produce the check and his baggage shall not be delivered to him, he may by an action recover the value of such baggage. (1871-2, c. 138, s. 36; Code, s. 1970; Rev., s. 2623; C. S., s. 3510; 1947, c. 781.)

Editor's Note.—The section consisted of one sentence prior to the 1947 amendment, which rewrote the part now constituting the third sentence.

§ 60-107. Cars and toilets to be kept clean.—Every person or railroad company, whether incorporated or not, engaged in the regular business of carrying passengers on his or its railroad cars in this State, shall have such cars cleaned, brushed, dusted and the windows washed, if needed, at least once each day, and shall in each car, in which male and female passengers are carried, have therein a toilet room for each sex, and have the same kept clean and decent. Any person or corporation engaged in the business aforesaid who shall willfully or negligently fail or refuse to give orders to his or its agent in charge of such cars to comply with the requirements of this section, shall forfeit twenty dollars for each day of such failure or refusal, to be recovered by any person suing therefor. (1907, c. 474, ss. 1, 2; C. S., s. 3511.)

Cross Reference.—As to exception to this section, see § 60-98.

§ 60-108. Evidence of failure to order cleaning of cars; violation of orders misdemeanor.—The willful or negligent refusal or the failure on the part of the conductor or manager of any passenger car named in § 60-107 to comply with such section shall be received as evidence of failure or refusal of such person or railroad company to give the orders therein provided for. Moreover, such conductor or manager shall be guilty of a misdemeanor if he fail or refuse to carry out such orders of the persons or company mentioned in the said section. (1907, c. 474, s. 3; C. S., s. 3512.)

§ 60-109. Surcharge on Pullman car transportation.—It shall be unlawful for any railroad or Pullman car company doing business in North Carolina to collect from any person within the boundaries of North Carolina any surtax or surcharge for Pullman car transportation from one point to any other point within the bounds of the State of North Carolina; but nothing in this section shall be construed to affect in any way the charge which any railroad or Pullman car company may require for transportation on interstate travel. (1923, c. 147; C. S., s. 3512(a).)

Editor's Note.—It was said in 1 N. C. Law Rev. 305, that the power exercised in this section is clearly within the power of

the State, and has been observed by carriers since its passage.

ARTICLE 13.

Carriage of Freight.

§ 60-110. No charge in excess of printed tariffs; refunding overcharge; penalty.—No railroad, steamboat, express or other transportation company engaged in the carriage of freight and no telegraph company or telephone company shall demand, collect or receive for any service rendered or to be rendered in the transportation of property or transmission of messages more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law. In case of any overcharge, contrary to the provisions of this section, the person aggrieved may file with any agent of the company collecting or receiving greater compensation than the amount allowed a written demand, supported by a paid freight bill and an original bill of lading or duplicate thereof for refund of overcharge, and a maximum period of sixty days shall be allowed such company to pay claims filed under this section. Any company failing to refund such overcharge within the time allowed shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars per day for each day's delay thereafter until said overcharge is paid, together with all costs incurred by the party aggrieved: Provided, the total forfeiture shall not exceed one hundred dollars. (1903, c. 590, ss. 1, 2; Rev., ss. 2642, 2643, 2644; C. S., s. 3514.)

Cross References.—As to power of Utilities Commission to fix rates generally, see § 62-122. As to railroad freight rates, see § 62-135 et seq. As to action for double the overcharge in railroad freight rates, see § 62-138. As to venue of action against railroad, see § 1-81. As to schedule of rates as evidence, see § 62-132. As to long and short hauls, see § 62-128. As to contract relating to rates, see § 62-129. As to duty to file schedule of rates with Utilities Commission, see § 62-68.

Constitutionality of Section.—This section is not unconstitutional as in violation of the Fourteenth Amendment to the federal Constitution, or the commerce clause of said Constitution, and the acts passed in pursuance thereof. *Efland v. Southern R. Co.*, 146 N. C. 135, 59 S. E. 355 (1907); *Iron Works v. Southern R. Co.*, 148 N. C. 469, 62 S. E. 595 (1908). But see *Hardware Co. v. Seaboard Air Line R. Co.*, 170 N. C. 395, 86 S. E. 1025 (1915).

Section Not Applicable to Interstate

Shipment.—Under the Interstate Commerce Act, as amended, Congress, in the exercise of the constitutional powers conferred on it, has taken entire control of rates upon interstate shipments of goods, and this section is inoperative as to such shipments. *Hdw. Co. v. Seaboard Air Line R. Co.*, 170 N. C. 395, 86 S. E. 1025 (1915).

For earlier cases holding contra, see *Thurston v. Southern R. Co.*, 165 N. C. 598, 81 S. E. 785 (1914); *Macon County Supply Co. v. Tallulah Falls R. Co.*, 166 N. C. 82, 82 S. E. 13 (1914).

Penalty Enforceable though Charges Small.—The penalty fixed by this section to enforce the duty of the carrier in regard to proper charges for transporting freight and refund of overcharges, which cannot in any event exceed \$100, is enforceable for a default established against defendant, though the particular transportation charges may appear disproportionately small. It is on failure to return small amounts wrongfully overcharged that penalties are especially required. In large

matters the claimant can better afford the cost of litigation. *Efland v. Southern R. Co.*, 146 N. C. 129, 59 S. E. 359 (1907).

Burden of Proving Overcharge.—The burden is upon the plaintiff to show that a freight rate charged and collected by a carrier was in excess of its tariff required of the carrier to be published, when he seeks to recover this excess and the statutory penalty; and where the shipment has been routed over one line of connecting carriers and the tariff filed by the carrier over another route is shown, it affords no evidence as to the rate of the actual route of the shipment, and, in the absence of further evidence, a judgment as of nonsuit should be granted. *Hdw. Co. v. Seaboard Air Line R. Co.*, 170 N. C. 395, 86 S. E. 1025 (1915).

Rates Need Not Be Same for Both Directions.—In shipments to a great distance, special circumstances, such as flow of traffic, may justify a higher rate between two points in one direction than in the opposite; and in an action for the recovery of the penalty under this section, it is error for the judgment below in effect to charge the jury that such tariff rate published between the two points for freight moving in an opposite direction to that of the shipment in question was conclusive, and that they should be governed in their verdict as to the overcharge accordingly. *Scully & Co. v. Atlantic Coast Line R. Co.*, 144 N. C. 180, 56 S. E. 876 (1907).

Freight Charge on Undelivered Shipment.—Where the defendant collected freight charges for an entire shipment, as invoiced and originally billed, and the sum of 96 cents was paid as freight on that part of the shipment which was "short" and not delivered, this was an overcharge, and failure to refund such overcharge after the sixty days allowed for investigation rendered the defendant liable for the penalty denounced by this section. *Cottrell*

v. Carolina, etc., R. Co., 141 N. C. 383, 54 S. E. 288 (1906).

Agent as Party Aggrieved.—Where under agreement with his principal the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid its unlawful charges on a shipment, he is the party aggrieved, and may maintain his action to recover the excess, and also the penalty when settlement has not been made within sixty days, when he has filed written demand supported by the original freight bill and the original or duplicate bill of lading, etc. *Tilley v. Southern R. Co.*, 172 N. C. 363, 90 S. E. 309 (1916).

What Demand Must Specify.—Where the carrier has demanded and received an unlawful freight charge for a shipment, and the party aggrieved has made written demand of the carrier for payment of the overcharge, as required by the statute, it is not necessary, in order to maintain an action for the penalty imposed upon the carrier failing to settle in sixty days, that the written demand specify the penalty, or that demand therefor be made in the justice's court or alleged in the complaint filed on appeal therefrom. *Tilley v. Southern R. Co.*, 172 N. C. 363, 90 S. E. 309 (1916).

Same—Separate Demands in Same Envelope.—The mere fact that the plaintiff inclosed separate written demands in the same envelope, and gave an aggregate amount thereof, in a letter accompanying them, does not affect the demands being specific, when the overcharges were separate and distinct, the demand made specifically as to each, accompanied separately with the paid freight bill and duplicate bill of lading, and each demand was complete in itself; and such is a compliance with the provisions of this section. *Efland v. Southern R. Co.*, 146 N. C. 129, 59 S. E. 359 (1907).

§ 60-111. Penalty for failure to receive and forward freight tendered.—Agents or other officers of railroad and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day such company refuses to receive such shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at

which there is an agent that such car is loaded and ready for shipment. (Code, s. 1964; 1903, cc. 444, 693; Rev., s. 2631; C. S., s. 3515.)

Cross References.—As to power of Utilities Commission to prevent discrimination, see § 62-56. As to venue of action against railroad, see § 1-81. As to regulation of shipment of inflammable substances and explosives, see § 62-58.

This section is constitutional as applied to intrastate shipments. *Corbett v. Atlantic Coast Line R. Co.*, 205 N. C. 85, 170 S. E. 129 (1933).

Intrastate Shipments.—The penalty imposed by this section is not a burden upon interstate commerce when shipments are intrastate. *Wampum Cotton Mills v. Carolina, etc., R. Co.*, 150 N. C. 612, 64 S. E. 588 (1909).

Interstate Shipments.—In *Reid v. Southern R. Co.*, 150 N. C. 753, 64 S. E. 874 (1909), it was held that the penalty provided for by the provisions of this section would apply to interstate shipments, the same not being a burden on interstate commerce. In reviewing the same case the United States Supreme Court reversed this decision and held that the section could not apply to interstate shipments. *Southern Ry. Co. v. Reid*, 222 U. S. 424, 32 S. Ct. 140, 56 L. Ed. 257 (1912).

Section Strictly Construed.—This is a penal statute and must be strictly construed. *Cox v. Atlantic Coast Line R. Co.*, 148 N. C. 459, 62 S. E. 556 (1908).

Requisites of Valid Tender.—This section provides that the tender be made at a regular station and that the articles tendered be of the nature and kind received by the carrier for transportation, and it is necessary in an action for the penalty to show that the character of the shipment and place of tender are such as fall within its provisions. *Olive v. Atlantic Coast Line R. Co.*, 152 N. C. 279, 67 S. E. 583 (1910).

Same — Sufficiency of Allegation.—A complaint alleging that plaintiff tendered to a carrier at a certain station a certain quantity of loose lumber for shipment, etc., which the defendant wrongfully and unlawfully refused to receive, states a good cause of action, since it would be inferred, to be thereafter shown by proof, that this station referred to was a regular station, and that loose lumber was an article usually received by the carrier. *Olive v. Atlantic Coast Line R. Co.*, 152 N. C. 279, 67 S. E. 583 (1910).

Meaning of "Whenever Tendered."—The words "whenever tendered" can only be qualified by supplying the ellipsis "within the usual hours adopted by the

public for the transaction of such business at the place where the tender is made." *Alsop v. Southern Express Co.*, 104 N. C. 278, 10 S. E. 297 (1889).

Effect of Carrier's Regulation as to Time of Tender.—Where money was tendered to the agent of an express company at a regular station for shipment at 2 o'clock P. M., and the trains carrying express freight in the direction of the place to which it was to be consigned passed only at 12:55 o'clock each day, a regulation of the company that money would be received for shipment only on the morning before the train on which it was to be transported passed, would not protect the company in an action brought to recover a penalty incurred by violation of this section. *Alsop v. Southern Express Co.*, 104 N. C. 278, 10 S. E. 297 (1889).

Tender of Freight Eight Minutes before Train.—Where the plaintiff tendered to the defendant thirty crates of strawberries at a small station requiring only one agent to attend to the various duties of express, telegraph, and railroad agent, and the tender was made at the time the train for which the shipment was intended was seen approaching the depot, about eight minutes before its arrival, a charge of the court that it was for the jury to determine whether, under the circumstances, the tender of the shipment for that train was in time was not open to plaintiff's objection. *Shaw v. Southern Express Co.*, 171 N. C. 216, 88 S. E. 222 (1916).

Requisites for Daily Penalty.—In order for the daily penalty to attach to the carrier for continually refusing to accept freight for shipment under the provisions of this section, it is necessary for actual or constructive tender of the freight to be made to the carrier each day; and where cattle are the subject of shipment, evidence that the shipment had been refused and that the shipper kept the cattle near the depot and told the defendant's agent thereof, and that he would deliver them when notified that the company would receive them, is insufficient except as to the first penalty. *Bane v. Atlantic Coast Line R. Co.*, 171 N. C. 328, 88 S. E. 477 (1916).

When the common carrier permits a shipper to load a car with his goods and refuses to receive it for shipment or to issue a bill of lading, it is a refusal to receive the goods for shipment, under this section; and when the shipper leaves the goods in the car, with request for shipment, and by his conduct, understood by the railroad,

makes his tender continuous, each day's delay is a separate refusal, within the meaning of the statute, to which the penalty will apply. *Garrison v. Southern R. Co.*, 150 N. C. 575, 64 S. E. 578 (1909).

Same—Placing Goods in Depot.—Placing a shipment of goods in the depot of the carrier, prepared for and with request for shipment, and thus leaving them there, makes each day's delay by the carrier "a refusal to ship," under this section, and the carrier, thus refusing, is responsible for the penalty. *Burlington Lumber Co. v. Southern R. Co.*, 152 N. C. 70, 67 S. E. 167 (1910).

Meaning of "Under Existing Laws."—The words "Under existing laws," in this section, qualify the word "forward," and are used in reference to the rules governing the legal relations of consignor, consignee and the connecting lines. *Alsop v. Southern Express Co.*, 104 N. C. 278, 10 S. E. 297 (1889).

Who Is the "Party Aggrieved."—The shipper of the goods is the "party aggrieved," and is the one entitled to sue for the penalty prescribed in this section which arises from the wrongful refusal of the carrier's agent to accept the goods for transportation. *Reid v. Southern R. Co.*, 149 N. C. 423, 63 S. E. 112 (1908).

Same—Consignee of Goods Shipped on Approval.—A consignee to whom goods are shipped on approval owes a duty to the consignor to return them if they are unsatisfactory, and he must do so to relieve himself of liability to the consignor; and he is the party aggrieved, under this section, and may maintain his action thereunder for the penalty prescribed upon the refusal of the carrier to accept the goods for shipment. *Burlington Lumber Co. v. Southern R. Co.*, 152 N. C. 70, 67 S. E. 167 (1910).

Same—Agent of Attaching Creditor.—The penalty prescribed by this section is for the person who is interested in having the goods shipped, and whose legal right in respect thereto is denied; and a person may not maintain an action for the penalty, as the party aggrieved, who has no right or interest in the goods tendered by him for shipment, except as agent or attorney for an attaching creditor and surety on his attachment bond, after the debt has been paid and the goods released. *McRackan v. Atlantic Coast Line R. Co.*, 150 N. C. 331, 63 S. E. 1042 (1909).

Goods Not Delivered to Carrier.—When the plaintiff did not deliver the goods to the carrier, because they could not be transported by a train then getting ready to leave the station, but carried them

back and shipped them the next day, a nonsuit should be allowed. *Cox v. Atlantic Coast Line R. Co.*, 148 N. C. 459, 62 S. E. 556 (1908).

Tender of Perishable Goods for Train Not Carrying Accommodations Therefor.

—An express company is not liable for damages and the statutory penalties of this section for refusing to receive a shipment of thirty crates of strawberries for a certain train not carrying accommodations for shipments of this character, though it had taken, on occasion, a few berries thereon for the shipper, where the lack of accommodations was known to the public, and to the shipper, and accommodations on other daily trains were specially provided. *Shaw v. Southern Express Co.*, 171 N. C. 216, 88 S. E. 222 (1916).

Refusal to Accept Loose Hay.—Where the Corporation Commission had authorized and fixed and approved the charges for the transportation of baled hay, without expressly requiring its acceptance by the carrier when unbaled or loose, and by express provision it did not require the carrier to receive "cotton or other merchandise and warehouse the same unless the articles offered are in good shipping condition, etc.," the carrier was not liable, for the penalty prescribed by this section, for refusing to receive for shipment a carload of loose hay, such shipments evidently being of such a character as to endanger not only the property of the carrier, but that of others received by the carrier for shipment. *Tilley v. Norfolk & Western R. Co.*, 162 N. C. 37, 77 S. E. 994 (1913).

Embargo on Consignee's Freight.—A railroad company may show, in defense to an action for refusal to receive goods for shipment when tendered, such matters as would excuse its failure to do so at common law, unavoidable conditions then existing, over which it had no control; when a carrier has refused a shipment of the nature and kind it was its business to receive, and which it could have received at the point tendered without working a hardship or oppression, it is no defense for it to show that, for the reason of the consignee's blocking the freight yards at destination, an embargo had been placed by the railroad on shipments tendered to be forwarded to him there. *Garrison v. Southern R. Co.*, 150 N. C. 575, 64 S. E. 578 (1909).

Embargo by Connecting Carrier.—The penalty imposed by this section is enforceable against a railroad company refusing to receive freight when tendered, though to reach the destination it was necessary for another road to receive and

transport the freight beyond the junctional point; and it is no valid excuse that the connecting line had laid an embargo on the consignee, for it was the duty of the initial carrier to transport the goods and make a tender to the connecting line to be relieved of the penalty. *Wampum Cotton Mills v. Carolina & Northwestern R. Co.*, 150 N. C. 612, 64 S. E. 588 (1909).

When Rate Unknown to Carrier.—Where the defendant carrier refused to receive for shipment goods tendered to it, basing its right to refuse upon the ground that it was necessary for the shipment to go over lines of connecting carriers in order to reach its destination and that no joint rate had been made, and the plaintiff offered to prepay the freight, and asked for a bill of lading, it was the duty of the defendant to accept the shipment, forward it to its connecting line; and to use reasonable means of ascertaining the rate of freight, by wire if necessary, for the issuance of a through bill of lading. *Reid v. Southern R. Co.*, 153 N. C. 490, 69 S. E. 618 (1910).

In an action to recover the penalties alleged to have been incurred under this section, for refusing to receive freight for transportation, where the plaintiff delivered freight for shipment at the defendant's station and tendered the charges, and an agent received the freight for storage, but refused to give a bill of lading because he did not know the freight rates, and kept the freight twelve days, there was a refusal "to receive for transportation," and the action is brought under the proper statute. *Twitty v. Southern R. Co.*, 141 N. C. 355, 53 S. E. 957 (1906).

Mismarking of Part of Shipment.—In an action to recover a penalty against a carrier for failing to ship one of four packages consigned for shipment under a single bill of lading, the defendant is estopped to claim as a defense that the mismarking of three of the packages was a sufficient excuse for failing to ship the fourth. *Grocery Co. v. Sou. R. Co.*, 136 N. C. 396, 48 S. E. 801 (1904).

Freight Not Consigned to Regular Sta-

tion.—A refusal of the carrier's agent to receive, at its depot, freight, and transportation charges therefor, destined for a point on the carrier's road which was only a siding, and was not a regular station, is wrongful, and subjects the carrier to the penalty prescribed by this section, when the refusal is on the ground that the agent did not know where the given destination was, but it appears that he could have ascertained that freight was ordinarily shipped there on way bills made out to a regular station on the carrier's road some two miles distant therefrom. *Reid v. Southern R. Co.*, 149 N. C. 423, 63 S. E. 112 (1908).

Conclusiveness of Referee's Findings.—Where in an action to recover the prescribed penalties under this section the referee finds upon ample evidence, in a hearing in which no error of law is committed, that the shipment came within a certain classification, and that the shipper tendered the correct amount for such classification, and the finding is approved by the trial court, such finding is conclusive on appeal, and the carrier may not successfully contend that the shipment came within another classification for which higher freight charges were prescribed, and where a higher tariff has been charged on one shipment the shipper is entitled to recover the excess paid. *Corbett v. Atlantic Coast Line R. Co.*, 205 N. C. 85, 170 S. E. 129 (1933).

Sufficiency of Evidence.—Evidence that the shipper's contract to deliver certain merchandise was canceled because of the carrier's wrongful refusal to accept the merchandise for shipment is sufficient to support the referee's finding or actual damages, profits which would have been certainly realized but for the carrier's wrongful refusal of the shipment being recoverable under this section. *Corbett v. Atlantic Coast Line R. Co.*, 205 N. C. 85, 170 S. E. 129 (1933).

Cited in *Burlington Lbr. Co. v. Southern R. Co.*, 152 N. C. 70, 67 S. E. 167 (1910); *Kemp v. Norfolk, etc., R. Co.*, 169 N. C. 731, 86 S. E. 621 (1915).

§ 60-112. Penalty for failure to transport within reasonable time.

—It shall be unlawful for any railroad company, steamboat company, express company or other transportation company doing business in this State to omit or neglect to transport within a reasonable time any goods, merchandise or other articles of value received by it for shipment and billed to or from any place in the State of North Carolina, unless otherwise agreed upon between the company and the shipper, or unless the same be burned, stolen or otherwise destroyed, or unless otherwise provided by the North Carolina Utilities Commission.

Any company violating any of the provisions of this section shall forfeit to the party aggrieved the sum of fifteen dollars for the first day and two dollars

for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities there shall be a forfeiture in like manner of ten dollars for the first day and one dollar for each succeeding day, but the forfeiture shall not be collected for a period exceeding thirty days.

In reckoning what is a reasonable time for such transportation, it shall be considered that such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations. A delay of two days at the initial point and forty-eight hours at one intermediate point for each hundred miles of distance or fraction thereof over which such freight is to be transported shall not be charged against the transportation company as unreasonable and shall be held to be *prima facie* reasonable, and a failure to transport within such time shall be held *prima facie* unreasonable. This section shall be construed to refer not only to delay in starting the freight from the station where it is received, but to require the delivery at its destination within the time specified: Provided, that if such delay shall be due to causes which could not in the exercise of ordinary care have been foreseen, and which were unavoidable, then upon the establishment of these facts to the satisfaction of the justice of the peace or jury trying the cause, the defendant transportation company shall be relieved from any penalty for delay in the transportation of freight, but it shall not be relieved from the costs of such action. In all actions to recover penalties against a transportation company under this section, the burden of proof shall be upon the transportation company to show where the delay, if any, occurred. (1903, c. 590, s. 3; 1905, c. 545; Rev., s. 2632; 1907, cc. 217, 461; C. S., s. 3516; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Cross Reference.—As to venue of action against railroad, see § 1-81.

Editor's Note.—Under this section as it formerly stood, a penalty was imposed for unreasonable delay in the transportation of goods. Construing the statute in *Alexander v. Atlantic Coast Line R. Co.*, 144 N. C. 93, 56 S. E. 697 (1907), the court held that the term "transportation" did not include a delivery to consignee at the point of destination, and if goods shipped by a carrier had been properly placed at the point of destination, no penalty was incurred under this section for a negligent delay in delivery from the car or warehouse of the carrier. Subsequently the legislature amended the statute so as to include delays in delivery after transportation had ceased.

For a review of the history of legislative penalties for the refusal of railroads to transport freight, see *Grocery Co. v. Southern R. Co.*, 136 N. C. 396, 48 S. E. 801 (1904).

Constitutionality of Section.—This section is in the nature of a police regulation and is constitutional and valid. *Davis v. Southern R. Co.*, 147 N. C. 68, 60 S. E. 722 (1908); *Owens v. Hines*, 178 N. C. 325, 100 S. E. 617 (1919).

It does not deny to the carrier the equal protection of the laws. *Grocery Co. v. Southern R. Co.*, 136 N. C. 396, 48 S. E. 801 (1904); *Rollins v. Seaboard Air Line Railway*, 146 N. C. 153, 59 S. E. 671 (1907).

Does Not Apply to Interstate Shipments.

—A penalty may not be recovered of the carrier of an interstate shipment for negligent delay in transportation under this section. *Bivens Bros. v. Atlantic Coast Line R. Co.*, 176 N. C. 414, 97 S. E. 215 (1918). See also *Hickory Marble Co. v. Southern R. Co.*, 147 N. C. 53, 60 S. E. 719 (1908).

Same.—Although Both Terminal Points in State.—A penalty under this section cannot be recovered for the failure of a railroad company to transport freight within a reasonable time, when the initial and terminal points are within the State, but the shipment necessarily passes into another state in transitu. Such is interstate commerce and cannot be interfered with by the State. *Shelby Ice, etc., Co. v. Southern R. Co.*, 147 N. C. 66, 60 S. E. 721 (1908).

Carrier's Common-Law Duty Unaltered.

—This section does not supersede or alter the duty of carrier at common law, but merely enforces an admitted duty and superadds a penalty. *Meredith v. Seaboard Air Line Ry. Co.*, 137 N. C. 478, 50 S. E. 1 (1905).

Section Strictly Construed.—This is a penal statute, and must be strictly construed. *Alexander v. Atlantic Coast Line R. Co.*, 144 N. C. 93, 56 S. E. 697 (1907).

"Ordinary Time" a Question for Jury.—The question of "ordinary time" for the transportation of freight by the carrier, in a suit for a penalty for failure to transport,

under this section, is a question of fact for the jury. *Shelby Ice, etc., Co. v. Southern R. Co.*, 147 N. C. 66, 60 S. E. 721 (1908); *Wall-Huske Co. v. Southern R. Co.*, 147 N. C. 407, 61 S. E. 277 (1908).

In an action for the recovery of a penalty under this section, it was for the jury to find what was "ordinary" time, under the surrounding circumstances, and whether the defendant transported freight within such time; also, the amount of recovery after allowing for the "lay days," etc., provided by this section. It is error for the trial court to instruct the jury, if they believe the evidence, to answer the issue in a certain way or in a sum certain. *Davis v. Southern R. Co.*, 147 N. C. 68, 60 S. E. 722 (1908).

Same—No Fixed Rule.—This section does not fix a "hard and fast" rule in defining reasonable time. The two days at the initial point and forty-eight hours at each intermediate point are not the standards by which "reasonable time" is measured, but are not to be charged as "unreasonable," or to this extent the standard of the common-law duty is lowered. *Jenkins v. Southern R. Co.*, 146 N. C. 178, 59 S. E. 663 (1907).

Same—Burden of Proof.—When the evidence discloses that the time taken by the railroad company for transporting goods, etc., was prima facie reasonable as fixed by the statute, the question of reasonable time is one for the jury to measure by the statutory standard, the burden of proof being upon the plaintiff. *Alexander v. Atlantic Coast Line R. Co.*, 144 N. C. 93, 56 S. E. 697 (1907).

Same—Evidence.—In an action to recover the penalty given by this section, the burden of proof is on the plaintiff to show that the carrier failed to transport and deliver the goods within a reasonable time, which is defined to be the "ordinary time" required to transport and deliver. This may be shown by proving the distance over which the goods are to be transported and the time consumed therein. From this evidence the jury may, as a matter of common knowledge and observation, draw the conclusion whether, in view of the usual speed of freight trains, the time consumed, the distance, and other conditions, the carrier has failed to transport and deliver within a reasonable time. *Jenkins v. Southern R. Co.*, 146 N. C. 178, 59 S. E. 663 (1907).

Same—Illustrations.—When there was evidence that the time in transporting a certain shipment from one station to another only 25 miles away, on the same railroad, was twelve days, the jury would be

permitted, from their common observation and experience, to consider and determine the question of ordinary time between the two points, and, in the absence of explanation by defendant, fix the amount of wrongful delay. *Rollins v. Seaboard Air Line Railway*, 146 N. C. 153, 59 S. E. 671 (1907).

When it was admitted that certain articles were received by defendant, to be transported and delivered to plaintiff, the party aggrieved, the place of shipment and destination both being in the State, 58 miles apart, with but one intermediate point between them, and that the articles were not delivered to plaintiff within twenty-one days, the delay was unreasonable. *Watson v. Atlantic Coast Line R. Co.*, 145 N. C. 236, 59 S. E. 55 (1907).

Two Days Allowed at Initial Point.—Under this section, the carrier is allowed two days at the initial point for the transportation of freight instead of the one day allowed by § 1-593. *Wall-Huske Co. v. Southern R. Co.*, 147 N. C. 407, 61 S. E. 277 (1908).

Day of Receipt and Day of Delivery Not Deducted.—Under this section the two days at the initial point are allowed for the purpose of giving a reasonable time to begin the transportation; the forty-eight hours at each intermediate point are allowed for the necessary change of cars or unloading and loading; and it is not a reasonable construction of the statute to deduct the day of the receipt and the day of delivery from the time thus fixed. *Watson v. Atlantic Coast Line R. Co.*, 145 N. C. 236, 59 S. E. 55 (1907).

Deductible Time Allowed Applies to Actions for Penalty.—The deductible time allowed by this section in computing "reasonable time," to wit, "two days at the initial point and forty-eight hours at one intermediate point for each hundred miles distance or fraction thereof," applies to actions brought to recover the penalty given by said section and fixing the amount thereof, and not to actions for damages only. *Talley v. Atlantic Coast Line R. Co.*, 198 N. C. 492, 152 S. E. 390 (1930).

"Intermediate Point" Defined.—An "intermediate point," for which time is allowed under this section, in transporting freight is only where the freight is transferred to another road. *Davis v. Atlantic Coast Line R. Co.*, 145 N. C. 207, 59 S. E. 53 (1907).

In shipment of less than carload lots, a point where they are ordinarily transferred from one car to another in transit, at a junctional point on the same road, is an intermediate point, within the meaning of

this section. *Blue Ridge Collection Agency v. Southern R. Co.*, 147 N. C. 593, 61 S. E. 462 (1908).

Same—Transfer at Carrier's Distributing Point.—When a carload intrastate shipment necessarily is transferred without breaking bulk from one road of the carrier's system to another thereof at a general distributing point in the carrier's system in order to reach destination, the carrier is allowed thereat the statutory time for transportation at such point as an intermediate point. *Wall-Huske Co. v. Southern R. Co.*, 147 N. C. 407, 61 S. E. 277 (1908).

No Absolute Right to Hold Freight Full Time Limit.—This section, providing that a carrier shall not allow any freight to remain at any "intermediate point" for more than forty-eight hours, does not authorize the carrier to hold it at each of such points the extreme limit, without any necessity for detaining it at all. *Meredith v. Seaboard Air Line Ry. Co.*, 137 N. C. 478, 50 S. E. 1 (1905).

Computation of Time.—From the time consumed in transportation must be deducted the "ordinary time" within which the goods should have been transported and delivered, and two days at the "initial point" and forty-eight hours at each "intermediate point;" the remainder is the number of days for which the carrier is liable for the penalty. *Jenkins v. Southern R. Co.*, 146 N. C. 178, 59 S. E. 663 (1907).

Same—Sundays.—The time in which railroads shall transport freight shall be computed by excluding the first day and including the last, except when the last day falls on Sunday. *Davis v. Atlantic Coast Line R. Co.*, 145 N. C. 207, 59 S. E. 53 (1907).

When the carrier was allowed two days' time for a shipment at an intermediate point, and therefore could not deliver it before Sunday, delivery on the next succeeding day was a compliance with the law. *Blue Ridge Collection Agency v. Southern R. Co.*, 147 N. C. 593, 61 S. E. 462 (1908).

In a suit for the statutory penalty against a carrier for failure to transport freight, under this section, the defense that the last day, being Sunday, should not be counted is unavailable when it is made to appear that the delay chargeable began to run and to be counted from the Saturday preceding; for the charge for delay having once begun to run, it continues to run without deduction for Sundays or holidays. *Watson v. Atlantic Coast Line R. Co.*, 145 N. C. 236, 59 S. E. 55 (1907); *Wall-Huske Co.*

v. Southern R. Co., 147 N. C. 407, 61 S. E. 277 (1908).

When Transportation Ceases.—Transportation ceases when the duty of the carrier as a warehouseman commences, and in respect to freight transported in carload lots, when the car reaches destination and is placed for unloading. What particular parts of the carrier's tracks and freight yards may be used for such purposes must of necessity be left to its discretion, but the car must be reasonably accessible and placed for delivery before transportation is fully ended. *Brooks Mfg. Co. v. Southern R. Co.*, 152 N. C. 665, 68 S. E. 243 (1910).

Transportation does not cease when a carload is placed by the carrier within the yard limits of the point of destination. *Wall-Huske Co. v. Southern R. Co.*, 147 N. C. 407, 61 S. E. 277 (1908).

Negligent Default in Delivery.—This section extends the penalty to cases of negligent default in the carrier's making delivery of the freight to the consignee. *Mitchell v. Atlantic Coast Line R. Co.*, 183 N. C. 162, 110 S. E. 859 (1922).

Delivery Does Not Have to Be on Private Tracks.—This section does not apply to a delivery on the private tracks of a consignee; but to avoid the penalty it is required of the carrier to place for delivery a carload shipment on its track at destination at a place reasonably accessible. *Brooks Mfg. Co. v. Southern R. Co.*, 152 N. C. 665, 68 S. E. 243 (1910).

Duty to Notify Consignee.—Where a shipment of goods is delivered to a railroad company for transportation, the title vests in the consignee, with the duty resting upon the carrier on the arrival of the goods at destination to notify the consignee and make delivery. This principle applies to a side-station when notification of arrival should have been given from a nearby station, and the inquiring consignee was there misinformed as to the arrival, and the car in the meanwhile was broken into and the shipment stolen. *Acme Mfg. Co. v. Tucker*, 183 N. C. 303, 111 S. E. 525 (1922).

When Goods Travel Over Several Lines.—When the initial carrier delivers goods to its connecting carrier, necessary for them to be by it further transported to their destination, and an unreasonable delay occurs, without evidence as to which carrier was responsible for the delay, the defendant, the initial carrier, is liable for the entire delay, the burden of proof being upon it as the party having the evidence peculiarly within its own knowledge or possession. *Watson v. Atlantic Coast Line R. Co.*, 145 N. C. 236, 59 S. E. 55 (1907).

Same—Parties to Action.—Where an intrastate shipment of goods is transported over connecting lines to its destination, it is proper for the trial court to make both roads parties to an action to recover the penalty for the failure to transport safely and within a reasonable time, the burden being upon each defendant to show that it had not failed in its duty. *Sellers Hosiery Mills v. Southern R. Co.*, 174 N. C. 449, 93 S. E. 952 (1917).

Who Is "Party Aggrieved."—The plaintiff is entitled to recover the penalty as the "party aggrieved," under this section, for the defendant's wrongfully failing to transport freight within a reasonable time, where the facts show that, from the attendant circumstances or terms of the agreement, he is the one whose legal right is denied and who is alone interested in having the transportation properly made. *Cardwell v. Southern R. Co.*, 146 N. C. 218, 59 S. E. 673 (1907).

Same—Where Goods to Be Sold for Consignor's Benefit.—The plaintiff may maintain his action against the defendant railroad company, under this section, for wrongful failure to transport certain goods received by the latter, and bill of lading issued by it to plaintiff, when it appears that plaintiff shipped the goods to be for his benefit sold by the consignee, and that he (the plaintiff) was the one who alone acquired the right to demand the service to be rendered by the defendant, and was the party aggrieved. *Rollins v. Seaboard Air Line Railway*, 146 N. C. 153, 59 S. E. 671 (1907).

When the consignor ships goods to be sold for his own benefit, he is the "party aggrieved," under this section, and the proper party plaintiff. *Robertson v. Atlantic Coast Line R. Co.*, 148 N. C. 323, 62 S. E. 413 (1908).

Same—Goods Not to Be Paid for until Delivery.—When the consignor had agreed with the consignee that the latter was only required to pay for the intrastate shipment when it reached its destination, the consignor may maintain his action for delay in transitu, as the party aggrieved. *Davis v. Southern R. Co.*, 147 N. C. 68, 60 S. E. 722 (1908).

When, by the contract or agreement between a vendor and vendee of goods, the goods are to be "received, inspected and weighed" by the vendee before any part of the purchase price is payable, the title does not vest in the vendee, and the vendor is the "party aggrieved" within the meaning of this section. *Elliott v. Southern R. Co.*, 155 N. C. 235, 71 S. E. 339 (1911).

Same—Notice Immaterial.—When it is

shown that the plaintiff is the "party aggrieved," under this section, it is of no importance and bears in no way on the justice of plaintiff's demand or of defendant's obligation, whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time. *Rollins v. Seaboard Air Line Railway*, 146 N. C. 153, 59 S. E. 671 (1907).

The real "party aggrieved" is entitled to recover the penalty, under this section, irrespective of the question of knowledge or of notice to the defendant. *Cardwell v. Southern R. Co.*, 146 N. C. 218, 59 S. E. 673 (1907).

Action Not Brought "on Relation of State."—Under this section, the action for penalty is given directly to the party aggrieved, and is not required to be brought "on relation of the State." If it were, failure to bring the action in such form would be a mere informality, which could be remedied by amendment. *Robertson v. Atlantic Coast Line R. Co.*, 148 N. C. 323, 62 S. E. 413 (1908).

Joinder of Actions.—An action for damages against a carrier for a lost shipment, and one for the penalty for unreasonable delay given by this section, do not merge into each other. They arise on contract and may be joined in the same action. *Robertson v. Atlantic Coast Line R. Co.*, 148 N. C. 323, 62 S. E. 413 (1908).

Burden of Proof as to Destruction of Goods.—The burden of proof is on the carrier to show that it is relieved of the penalty prescribed by this section, under the provision thereof, because the goods were "burned, stolen or destroyed." That the goods were placed in defendant's car by the initial carrier, that search had been made therefor, without stating how thorough, and the absence of evidence that the goods had since been seen, is no evidence that they were "burnt, stolen or destroyed." *Robertson v. Atlantic Coast Line R. Co.*, 148 N. C. 323, 62 S. E. 413 (1908).

When Bill of Lading Not Presumptive Evidence.—When it was the consignor's duty to load a car for shipment, which had been placed at its mill by the carrier, and the carrier's agent gave a bill of lading upon the statement of the consignor that the car had been loaded, without being required to verify the statement, the bill of lading is not presumptive evidence of the receipt of the contents of the car, and the question is an open one for the jury in a suit by the consignee for the penalty for failure to deliver under this section. *Peele v. Atlantic, etc., R. Co.*, 149 N. C. 390, 63 S. E. 66 (1908).

Sufficiency of Evidence on Motion for Nonsuit.—Where a shipment of various articles was transported by the carrier to destination, and all were received by the consignee, except one of them, which was missing, and remained in the carrier's warehouse beyond the statutory reasonable time, a motion for nonsuit was properly denied. *Mitchell v. Atlantic Coast Line R. Co.*, 183 N. C. 162, 110 S. E. 859 (1922).

Issues.—An issue which presupposes a failure on defendant's part in its duty to transport freight, in an action for penalty under this section, is objectionable. *Davis v. Southern R. Co.*, 147 N. C. 68, 60 S. E. 722 (1908).

Verdict Incomplete.—Where it is estab-

lished by the jury that a consignment of goods was carried to the delivering point by the carrier, which failed to deliver to the consignee, or to notify him, and the goods were lost while in its possession, the verdict is incomplete where there was no issue submitted as to whether the carrier, who is a party to the action, was in default in not delivering the goods to the consignee. *Acme Mfg. Co. v. Tucker*, 183 N. C. 303, 111 S. E. 525 (1922).

Applied in *Alexander v. Atlantic Coast Line R. Co.*, 144 N. C. 93, 56 S. E. 697 (1907).

Cited in *Corbett v. Atlantic Coast Line R. Co.*, 205 N. C. 85, 170 S. E. 129 (1933).

§ 60-113. Flume companies exercising right of eminent domain become common carriers.—All flume companies availing themselves of the right of eminent domain under the provisions of the chapter Eminent Domain shall become public carriers of freight, for the purposes for which they are adapted, and shall be under the direction, control and supervision of the Utilities Commission in the same manner and for the same purposes as is by law provided for other public carriers of freight. (1907, c. 39, s. 4; C. S., s. 3517; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Local Modification.—Duplin: 1911, c. 214.

§ 60-114. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.—All common carriers doing business in this State shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classifications and rates made and filed with the Interstate Commerce Commission in case of shipments from without the State and with those of the Utilities Commission of this State in case of shipments wholly within this State, by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carriers to inform any consignee of the correct amount due for freight according to such classification and rates. Upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates, such common carrier shall deliver the freight in question to the consignee. Any failure or refusal to comply with the provisions hereof shall subject such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee aggrieved by any suit in any court of competent jurisdiction. (1905, c. 330, s. 1; Rev., s. 2633; C. S., s. 3518; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Cross References.—As to obligations and rights of carriers upon bills of lading, see § 21-9 et seq. As to the power of the Utilities Commission to regulate delivery, see § 62-55. As to railroad freight rates, see § 62-135 et seq. As to venue of action against railroad, see § 1-81.

Constitutionality of Section.—The penalty for failure of a common carrier to deliver freight, as prescribed by this section, shipped from beyond the State, after it has been unloaded from its cars and while in the depot, is constitutional and

not a burden upon interstate commerce. *Hockfield v. Southern R. Co.*, 150 N. C. 419, 64 S. E. 181 (1909); *Jeans v. Seaboard Air Line R. Co.*, 164 N. C. 224, 80 S. E. 242 (1913).

A railroad company owes it as a common-law duty to deliver freight upon tender of lawful charges by the consignee, and, in the absence of a conflicting regulation by Congress, this section, imposing a penalty upon default of the railroad company therein, is constitutional and valid, and is an aid to, rather than a burden upon,

interstate commerce. *Harrill Bros. v. Southern R. Co.*, 144 N. C. 532, 57 S. E. 383 (1907).

Foreign Corporation Bound to Obey State Laws.—Where a railroad corporation chartered by another state, leases a railroad chartered by this State, it is bound to observe and obey all laws of this State regulating the business of transportation. *Hines v. Wilmington, etc., R.*, 95 N. C. 434 (1886).

Intrastate Rebilling of Interstate Shipment.—An interstate shipment of goods which was missent, bill of lading lost, and rebilled from one point in the State to another therein, is an intrastate shipment, and upon the carrier's violating the provisions of this section, the penalty therein accrues. *Hockfield v. Southern R. Co.*, 150 N. C. 419, 64 S. E. 181 (1909).

Section Not Cumulative.—This section imposes only one penalty for the refusal of the railroad company to deliver freight upon demand and tender of charges, and it is not cumulative upon more than one demand for the same offense. *Harrill Bros. v. Southern R. Co.*, 144 N. C. 532, 57 S. E. 383 (1907).

Consignee Must Produce Bill of Lading.—A consignee must produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession. *Jeans v. Seaboard Air Line R. Co.*, 164 N. C. 224, 80 S. E. 242 (1913).

Insufficient Notice to Consignee.—Notice given by a carrier of the arrival of goods to a transfer company in the habit of hauling consignor's goods from the depot is not of itself sufficient notice to the consignee. *Hockfield v. Southern R. Co.*, 150 N. C. 419, 64 S. E. 181 (1909).

Burden of Proving Reason for Refusal to Deliver.—Where the consignee brings his action to recover the value of a ship-

ment of goods from the carrier, shows that the shipment was addressed to him, was prepaid, in the carrier's possession at destination, and a demand for delivery, the burden is on the carrier to show a valid reason for its refusal to deliver the shipment. *Jeans v. Seaboard Air Line R. Co.*, 164 N. C. 224, 80 S. E. 242 (1913).

No Liability for Unlawful Shipment.—A druggist who has not received a valid license to sell intoxicating liquors for the purposes and in the manner indicated, may not recover of the carrier the penalty provided by this section, for the failure to deliver such liquors to him for the purposes of sale, for such are unlawful and prohibited. *Smith v. Southern Express Co.*, 166 N. C. 155, 82 S. E. 15 (1914).

Carrier Cannot Collect Storage for Illegal Detention.—A carrier cannot enforce collection of storage charges arising from its wrongful refusal to deliver goods to consignee. *Hockfield v. Southern R. Co.*, 150 N. C. 419, 64 S. E. 181 (1909).

Agent Ignorant of Amount of Charges.—It is no defense to an action to recover a penalty for refusing to deliver shipment upon tender of freight charges by the consignee, for the defendant company to show its agents did not know the correct amount of the charges because of the defendant's failure to file its schedule of rates. *Harrill Bros. v. Southern R. Co.*, 144 N. C. 532, 57 S. E. 383 (1907).

Rate When Smaller Cars Furnished.—Where a consignor requested two cars of a certain standard size and the carrier furnished four cars of a smaller size the rate for the shipment must be the same. *Yorke Furniture Co. v. Railroad*, 162 N. C. 138, 78 S. E. 67 (1913).

Applied in Atlantic Coast Line R. Co. v. West Paving Co., 228 N. C. 94, 44 S. E. (2d) 523 (1947).

§ 60-115. Charging unreasonable freight rates misdemeanor.—If any railroad company doing business in this State shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of freight of any description, or for the use and transportation of any railroad car upon its track or any of the branches thereof or upon any railroad in this State which has the right, license or permission to use, operate or control the same, it shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred nor more than five thousand dollars. (1899, c. 164, s. 12; Rev., s. 3768; C. S., s. 3519.)

Cross References.—See § 62-135. As to action for double amount of overcharge, see § 62-138. As to penalty for willful

overcharge, see § 62-139. As to violation of statutes regulating passenger rates, see § 60-91.

§ 60-116. Allowing or accepting rebates or pooling freights misdemeanor.—If any person shall be concerned in pooling freights or shall directly or indirectly allow or accept rebates on freights he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one thousand dollars or

imprisoned not less than twelve months. (1879, c. 237, s. 2; Code, s. 1968; Rev., s. 3762; C. S., s. 3520.)

Cross Reference.—As to discrimination by rebate as misdemeanor, see § 60-6.

Cited in *McGwigan v. Wilmington & W. R. R.*, 95 N. C. 428 (1886).

§ 60-117. Partial charges for partial deliveries.—Whenever any freight of any kind shall be received by any common carrier in this State to be delivered to any consignee in this State, and a portion of the same shall not have been received at the place of destination, it shall not be lawful for the carrier to demand any part of the charges for freight or transportation due for such portion of the shipment as shall not have reached the place of destination. The carrier shall be required to deliver to the consignee such portion of the consignment as shall have been received upon the payment or tender of the freight charges due upon such portion. But nothing in this section shall be construed as interfering with, or depriving a consignor, or other person having authority, of his rights of stoppage in transitu. (1893, c. 495; Rev., s. 2641; C. S., s. 3521.)

§ 60-118: Repealed by Session Laws 1947, c. 781.

Editor's Note.—The repealed section related to placing railroad cars for loading. As to power of Utilities Commission to make rules for loading cars, see § 62-59.

For cases decided under the repealed section, see *McDuffie v. Seaboard Air Line Ry.*, 145 N. C. 397, 59 S. E. 122 (1907); *Forrester & Co. v. Southern R. Co.*, 147

N. C. 553, 61 S. E. 524 (1908); *Bell v. Norfolk Southern R. Co.*, 163 N. C. 180, 79 S. E. 421 (1913); *Smart v. Tallulah Falls R. Co.*, 173 N. C. 650, 92 S. E. 929 (1917); *Futch v. Atlantic Coast Line R. Co.*, 178 N. C. 282, 100 S. E. 436 (1919); *Pinehurst Peach Co. v. Norfolk Southern R. Co.*, 201 N. C. 176, 159 S. E. 359 (1931).

§ 60-119. Baggage and freight to be carefully handled.—All railroad and steamboat companies shall handle with care all baggage and freights placed with them for transportation, and they shall be liable in damages for any and all injuries to the baggage or freight of persons from whom they have collected fare or charged freight, while the same is under their control. Upon proof of injury to baggage or freight in the possession or under the control of any such company it shall be presumed that the injury was caused by the negligence of the company. (1897, c. 46; Rev., s. 2624; C. S., s. 3523.)

Cross References.—As to power of Utilities Commission to regulate the delivery of baggage, see § 62-55. As to conveying livestock in a cruel manner, see § 14-363. As to sanitation of cars, see § 130-279. As to carrier's liability for misdelivery, see § 21-11.

Delivery to Carrier Necessary to Fix Responsibility.—To fix the responsibility for lost baggage upon a railroad company, either as a common carrier or warehouseman, a delivery, actual or constructive, including an acceptance by the company, is necessary; and in order to a valid delivery the general rule is that when baggage is taken by others to the station, and to places where baggage is usually received, some kind of notice must be given to the agent authorized to receive it. *Williams v. Southern R. Co.*, 155 N. C. 260, 71 S. E. 346 (1911).

Same—Estoppel.—The requisites of the general rule to affect delivery of baggage of a passenger to a railroad company in order to hold the company liable may become modified by a custom of the latter to

consider and treat baggage as received when left at a given place, without further notice. *Williams v. Southern R. Co.*, 155 N. C. 260, 71 S. E. 346 (1911).

Stipulations Limiting Liability.—Stipulations upon a railroad ticket, limiting the liability of the carrier in a specified sum "unless a greater value has been declared by the owner and excess charges paid thereon at the time of taking passage," and similar provisions in a bill of lading for the transportation of freight, are void as an attempt on the part of the carrier to contract against its own negligence. *Cooper v. Norfolk Southern R. Co.*, 161 N. C. 400, 77 S. E. 339 (1913).

A common carrier cannot contract with a passenger against the loss of baggage by its negligence. *Thomas v. Southern R. Co.*, 131 N. C. 590, 42 S. E. 964 (1902).

Liability for Articles Not Properly Baggage.—While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which

are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault. *Trouser Co. v. Seaboard Air Line R. Co.*, 139 N. C. 382, 51 S. E. 973 (1905).

When Liability as Carrier Ceases.—When the baggage has arrived at its destination and has been deposited at the usual or customary place of delivery and kept there a sufficient time for the passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. *Trouser Co. v. Seaboard Air Line R. Co.*, 139 N. C. 382, 51 S. E. 973 (1905).

Liability When Passenger Not Carried.—When there is no partnership arrangements between connecting lines of railroads, and a passenger buys a through ticket from a carrier to his destination on a connecting line, checks his trunk through to his destination and voluntarily returns to the starting point without going upon

the road of the connecting lines, the latter carrier is not liable as insurer of the contents of the trunk from larceny by reason of taking the trunk to its destination, storing it there in its baggage room until its return was requested and then forwarding it to the junctional point, without compensation. *Kindley v. Seaboard Air Line Ry. Co.*, 151 N. C. 207, 65 S. E. 897 (1909).

Baggage Not on Same Train.—The passenger's right to a limited amount of baggage as a part of the consideration for the price of his ticket is upon the condition that the baggage accompany the passenger on the same train; and where without any default on the part of the carrier, its agent, without further charge, has the baggage forwarded on a later train, the carrier's liability is not that of an insurer, but of a gratuitous bailee, under the rule of the prudent man, and attaches only in instances of gross negligence. *Perry v. Seaboard Air Line R. Co.*, 171 N. C. 158, 88 S. E. 156 (1916).

§ 60-120. Claims for loss of or damage to goods; filing and adjustment.—Every claim for loss of or damage to property while in possession of a common carrier, including every express company, firm or corporation doing an express business within the State, shall be adjusted and paid within ninety days in case of shipments wholly within the State and within four months in case of shipments from without the State, after the filing of such claim with the agent of such carrier at the point of destination of such shipment, or point of delivery to another common carrier, by the consignee, or at the point of origin by the consignor, when it shall appear that the consignor was the owner of the shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof.

In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee aggrieved (or consignor, when it shall appear that the consignor was the owner of the property at the time of shipment and at the time of suit, and is, therefore, the party aggrieved), in any court of competent jurisdiction: Provided, that unless such consignee or consignor recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid; and that no penalty shall be recoverable under the provisions of this section where claims have been filed by both the consignor and consignee, unless the time herein provided has elapsed after the withdrawal of one of the claims.

Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and for the penalties herein provided for, may be united in the same complaint. (1905, c. 330, ss. 2, 4, 5; Rev., s. 2634; 1907, c. 983; 1911, c. 139; C. S., s. 3524.)

- I. General Consideration.
- II. Connecting Carriers.
- III. Claim against Carriers.
- IV. Actions.

I. GENERAL CONSIDERATION.
Section Must Be Strictly Construed and Followed.—This is a penal statute, and in order to recover, the plaintiff must bring

his case strictly within its terms. *Watkins v. American Ry. Express Co.*, 190 N. C. 605, 130 S. E. 305 (1925).

The penalty imposed by this section is to enforce obedience to the mandate of the law by punishment of the carrier, and the statute must be strictly construed, requiring the consignee to bring his case clearly within its language and meaning. *Eagles Co. v. East Carolina Ry.*, 184 N. C. 66, 113 S. E. 512 (1922).

Parol Agreement to Ship Sufficient.—When a carrier has received goods for transportation over its own and a connecting line which were not delivered, and upon consignor's parol request it has them reshipped to the initial or starting point, the latter agreement for reshipment, though resting in parol, is sufficient in an action for damages to the goods occurring while in the carrier's possession. *Lyon v. Atlantic Coast Line R. Co.*, 165 N. C. 143, 81 S. E. 1 (1914).

Carrier Cannot Contract against Own Negligence.—A common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration, but it cannot so limit its responsibility for loss or damage resulting from its negligence. *Mitchell v. Carolina Cent. R. Co.*, 124 N. C. 236, 32 S. E. 671 (1899); *Everett v. Norfolk, etc., R. Co.*, 138 N. C. 68, 50 S. E. 557 (1905).

Owner Cannot Refuse Damaged Goods.—Damages to a shipment of goods by a railroad company, caused by the carrier's negligence, does not justify the owner in refusing to accept them on that account, unless the damages are sufficient to render the goods practically worthless. He must accept the goods and sue for the damages upon the refusal of the carrier to pay them. *Whittington v. Southern R. Co.*, 172 N. C. 501, 90 S. E. 505 (1916).

II. CONNECTING CARRIERS.

Duty Assumed by Carrier.—Where a carrier accepts goods for transportation, in the absence of a special contract, it assumes the duty of safely carrying, within a reasonable time, the goods to the end of its line, and delivering them in like condition to the connecting carrier. *Meredith v. Seaboard Air Line Ry. Co.*, 137 N. C. 478, 50 S. E. 1 (1905).

Duration of Duty of Safe Carriage.—The duty of safe carriage attaches as the goods pass into the custody of each company, and ceases only when they are safely delivered to its successor. *Lindley v. Richmond, etc., R. Co.*, 88 N. C. 547 (1883).

Burden of Proof as to Safe Delivery.—

On proof that a carrier received goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, such proof being peculiarly within its power. *Meredith v. Seaboard Air Line Ry. Co.*, 137 N. C. 478, 50 S. E. 1 (1905).

Admissibility of Evidence.—To show that the freight was in good condition when it was delivered by the defendant to a connecting line, evidence that it is the custom of agents of such lines to examine freights before receiving them, and if found in good condition to forward them, and that such examination was made and forwarding was done, is admissible. *Knott v. Raleigh, etc., R. Co.*, 98 N. C. 73, 3 S. E. 735 (1887).

Prima Facie Case.—Where a shipment of goods is received by the consignee from the final carrier in bad condition, and there is evidence that this carrier received the goods from its connecting carrier in good condition, a prima facie case of negligence is made out against the delivering carrier, and presents sufficient evidence thereof to be submitted to the jury, with the burden of proof on it. *Lyon v. Atlantic Coast Line R. Co.*, 165 N. C. 143, 81 S. E. 1 (1914).

Presumption of Damage.—Among connecting lines of railway, that one in whose hands goods are found damaged is presumed to have caused the damage and the burden is upon it to rebut the presumption. *Morganton Mfg. Co. v. Ohio, etc., R. Co.*, 121 N. C. 514, 28 S. E. 474 (1897); *Mitchell v. Carolina Central R. Co.*, 124 N. C. 236, 32 S. E. 671 (1899); *Gwyn Harper Mfg. Co. v. Carolina Central R.*, 128 N. C. 280, 38 S. E. 894 (1901).

Same—Goods Found Damaged at Destination.—When goods are shipped over several connecting lines of carriers and are found in a damaged condition at destination, there is a rebuttable presumption that the injury was negligently inflicted by the last carrier. *Boss v. Atlantic Coast Line R. Co.*, 156 N. C. 70, 72 S. E. 93 (1911). This is on the principle that as the carrier is peculiarly in a position to know the facts, the burden of proof should rest on it. *Beville v. Atlantic Coast Line R. Co.*, 159 N. C. 227, 74 S. E. 349 (1912).

Liability for Negligence of Connecting Carrier.—A railroad company whose line is one of several connecting roads between places from and to which freight is shipped, in the absence of a special contract, or proof of copartnership by which each of the connecting lines will become liable for the contracts of the others, is not responsible for damages for negligence occurring

beyond its terminus. *Knott v. Raleigh, etc., R. Co.*, 98 N. C. 73, 3 S. E. 735 (1887).

But where two or more common carriers unite in forming an association creating a through line for the transportation of freight, payment of tariff charges to be made at the beginning or end of the transportation, with through bills of lading, the freight charges to be divided according to the respective mileage of the companies, they become a copartnership and each line is liable for any damage resulting from delay or otherwise on any part of the through line, notwithstanding a provision in the bill of lading that each company shall be liable only for loss or damage occurring on its own line. *Rocky Mount Mills v. Wilmington, etc., R. Co.*, 119 N. C. 693, 25 S. E. 854 (1896).

Interstate Shipments.—The entire regulation of interstate commerce is under federal control, and the penalty provided for by this section for failure of a carrier to pay a claim in the time prescribed does not apply to interstate shipments. See *Morphis v. Express Co.*, 167 N. C. 139, 83 S. E. 1 (1914). The federal laws make the initial carrier liable for damages to a shipment over connecting lines. However this does not relieve the intermediate or delivering carrier of responsibility for its own negligence, or prevent the State court from requiring the carriers to show which is responsible for the damage. See *Aydlett v. Norfolk Sou. R. Co.*, 172 N. C. 47, 89 S. E. 100 (1916). And notice to damages to the initial carrier of an interstate shipment of goods is sufficient notice to the connecting carrier. *Gilikin v. Norfolk Southern R. Co.*, 174 N. C. 137, 93 S. E. 469 (1917).

Effect of Court Order Relieving Initial Carrier.—While the initial carrier may also be held liable for damages to a shipment made over connecting lines, a direction of the court relieving it from liability does not necessarily relieve the carrier whose negligence caused the damages. *Gilikin v. Railroad*, 174 N. C. 137, 93 S. E. 469 (1917).

III. CLAIM AGAINST CARRIERS.

Filing of Claim Prerequisite to Penalty.—A consignor of a shipment of goods is required by this section to file his claim with the agent of the common carrier at the point of its origin, and this he must have done to maintain his action against the carrier for the penalty prescribed for its failure to settle for its loss, or damage thereto, within ninety days, etc. *Hamlet Grocery Co. v. Southern R. Co.*, 170 N. C. 241, 87 S. E. 57 (1915).

In order to recover the penalty, the

consignee must file his claim with the agent as the statute directs, and the filing thereof with another of the carrier's agents is insufficient. *Eagles Co. v. East Carolina Ry.*, 184 N. C. 66, 113 S. E. 512 (1922).

Carrier May Regulate Time of Filing.—A stipulation in a bill of lading denying the carrier's liability for damages unless written notice of such claim be filed within a specified period is in derogation of the common law, and while it will be upheld if reasonable, the burden of proof is on the carrier to show that it is. *Phillips v. Seaboard Air Line R. Co.*, 172 N. C. 86, 89 S. E. 1057 (1916).

A stipulation that claims must be filed in four months is reasonable. *Culbreth v. Atlantic Coast Line R. Co.*, 169 N. C. 723, 86 S. E. 624 (1915). An allowance of sixty days is reasonable, but an allowance of thirty days is unreasonable. *Gwyn-Harper Mfg. Co. v. Carolina Central R.*, 128 N. C. 280, 38 S. E. 894 (1901).

Filing Claim by Mail.—The essential things for the proper filing of the claim against the common carrier for damages, and for the penalty under the provisions of this section, being its delivery to and acceptance by the carrier's designated agent, such filing is not restricted to its manual delivery, but the same may be done through the agency of the United States mail. The delivery of the mail will be presumed. *Eagles Co. v. East Carolina Railway*, 184 N. C. 66, 113 S. E. 512 (1922).

Omission of Amount of Loss.—It is not required that a claimant state the amount of his loss in his claim for damages against a carrier. *McRary v. Southern Ry. Co.*, 174 N. C. 563, 94 S. E. 107 (1917).

Necessity of Written Demand.—A penal statute is to be strictly construed, and the provisions of this section are not complied with when oral demand is made, as such cannot be filed under the ordinary acceptance of the word and does not afford the carrier the protection that a written demand would give. *Thompson v. Southern Express Co.*, 147 N. C. 343, 61 S. E. 182 (1908). But failure to file a formal written demand is no bar to a recovery from the carrier of actual damages sustained. *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 36 S. E. 348 (1900); *Kime v. Sou. R. Co.*, 153 N. C. 398, 69 S. E. 264 (1910).

Stipulations May Be Waived.—The stipulation in a livestock bill of lading requiring that notice in writing be given the carrier's agent at destination, of claim for damages to the animals shipped, before they are removed or mingled with other animals, may be waived by the carrier's agent at the delivering point. *Newborn v.*

Louisville, etc., R. Co., 170 N. C. 205, 87 S. E. 37 (1915).

Connecting Carriers.—Where the second carrier in the connected line of shipment causes damages to the shipment by improperly loading it, it may not defeat an action to recover such damages, when the required notice within four months has been filed with and accepted without comment by it, on the ground that such notice had not been filed with the initial or final carrier under the terms of the contract of carriage. The doctrine of notice to the agent is applicable here. *Aydlett v. Norfolk Southern R. Co.*, 172 N. C. 47, 89 S. E. 1000 (1916).

Interstate Shipments.—The federal statutes, while recognizing the right of the carrier to stipulate for the filing of claims within a reasonable period, provide that if the loss or damage is due to a delay in transit by negligence no notice shall be required as a condition precedent to recovery. *Mann v. Transportation Co.*, 176 N. C. 104, 96 S. E. 731 (1918).

IV. ACTIONS.

Who May Bring Action.—Ordinarily the title to a shipment of goods by common carrier passes to the consignee upon their acceptance by the carrier, and he may sue for damages thereto in transit; but when it is shown that the consignee refused to accept the damaged goods, and that the sale has been cancelled by consent, the consignor may maintain his action against the carrier for damages. *Aydlett v. Norfolk Southern R. Co.*, 172 N. C. 47, 89 S. E. 1000 (1916).

Joinder of Causes of Action.—A recovery of the value of a shipment of goods and the penalties for the refusal of the carrier to deliver and for the failure to settle the claim within the statutory period, may be united in the same action. *Jeans v. Seaboard Air Line R. Co.*, 164 N. C. 224, 80 S. E. 242 (1913).

Same—Issues Separate and Distinct.—In an action against a railroad company to recover damages to a shipment of goods and the penalty for the failure of defendant to pay the same within ninety days, as allowed by this section, the issues raised are entirely separate and distinct from each other, and the trial judge may set aside the verdict on the second issue, and retain that on the first one, for a retrial. *Hussey v. Atlantic Coast Line R. Co.*, 183 N. C. 7, 110 S. E. 599 (1922).

As to venue of action against railroad, see § 1-81.

Prima Facie Case.—In an action against

the carrier for damages for the destruction of a shipment of freight by fire, a prima facie case is made out when the plaintiff shows the receipt of the freight for transportation and its nondelivery. *Everett v. Norfolk, etc., R. Co.*, 138 N. C. 68, 50 S. E. 557 (1905); *Osborne v. Southern Ry. Co.*, 175 N. C. 594, 96 S. E. 34 (1918).

Same—Limited Liability.—In cases of limited liability, proof of shipment and loss or injury makes a prima facie case for the shipper, and then the burden is upon the carrier to show that the circumstances of the loss bring it within the excepted causes, and when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence. *Mitchell v. Carolina Cent. R. Co.*, 124 N. C. 236, 32 S. E. 671 (1899).

Plaintiff Must Prove Failure to Settle.—The burden is on plaintiff to show that the common carrier has failed to settle his claim in ninety days, etc., after written demand under the provisions of this section, applying to intrastate shipments, and the prima facie case made out by showing the unreasonable delay in the delivery of the shipment is not sufficient. *Watkins v. American Ry. Express Co.*, 190 N. C. 605, 130 S. E. 305 (1925).

Recovery Must Equal Claim.—In order to recover the penalty for failure to settle a claim for damages within ninety days, etc., the burden is on plaintiff to show that the amount of his recovery be at least equal to the amount of his written demand. *Watkins v. American Railway Express Co.*, 190 N. C. 605, 130 S. E. 305 (1925).

Settlement after Penalty Accrues.—The proviso that consignee must first recover the full amount claimed is only to protect the carrier against excessive demands and not to discourage settlements for losses, and the plaintiff's right to recover the penalty in such suits is not lost by accepting settlement for damages for full amount claimed after the penalty had accrued. *Rabon v. Atlantic Coast Line R.*, 149 N. C. 59, 62 S. E. 743 (1908).

Measure of Damages for Delay.—In the trial of an action against a railroad company for loss occasioned by its delay in transporting machinery shipped over its line by plaintiff which was engaged in equipping a cotton factory, where it appeared that workmen employed by the plaintiff were forced to remain idle, though under pay of plaintiff, the measure of plaintiff's damages was the interest on the unemployed capital, the wages paid to workmen and such other costs and expenses

incurred by plaintiff in consequence of the delay. *Rocky Mount Mills v. Wilmington, etc., R. Co.*, 119 N. C. 693, 25 S. E. 854 (1896).

§ 60-121. Existing remedies to continue.—Section 60-120 shall not deprive any consignee of any rights or remedies now existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon such common carriers. (1905, c. 330, s. 5; Rev., s. 2635; C. S., s. 3525.)

Common-Law Remedies.—The common-law remedies of shippers and passengers are not taken away by the provisions of this chapter. *Bell v. Norfolk Sou. R. Co.*, 163 N. C. 180, 79 S. E. 42 (1913), and cases there cited.

Action May Be Brought in Contract or Tort.—A person who has sustained injuries by reason of the failure of a railroad com-

pany to provide proper means of transportation or operate its trains may bring an action on contract, or in tort, independent of the statute. *Purcell v. Richmond & Danville R. Co.*, 108 N. C. 414, 12 S. E. 954 (1891); *Va.-Carolina Peanut Co. v. Atlantic Coast Line R. Co.*, 155 N. C. 148, 71 S. E. 71 (1911)

§ 60-122. Carrier's right against prior carrier.—Any common carrier, upon complying with the provisions of §§ 60-114 and 60-120, shall have all the rights and remedies herein provided for against a common carrier from which it receives the freight in question. (1905, c. 330, s. 3; Rev., s. 2636; C. S., s. 3526.)

Cross Reference.—As to power of Utilities Commission to act as arbitrator in disputes between carriers, see § 62-61.

§ 60-123. Regulation of demurrage.—No railroad or other transportation company doing business in the State shall make any charge on account of demurrage while a car, whether the same be a refrigerator car or not, is being loaded for shipment, until it has remained at the place of loading for forty-eight hours from the time it has been so placed; but the Utilities Commission may change this provision, if it considers it unreasonable, under the power vested in it under the chapter Utilities Commission, to make regulations as to demurrage and the loading of cars. (Ex. Sess. 1913, c. 55; C. S., s. 3527; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Cross Reference.—As to power of Utilities Commission to regulate demurrage, see § 62-59.

§ 60-124. Shipment of livestock on Scuppernong River regulated; violation of regulations misdemeanor.—If any transportation company or common carrier shall receive livestock for shipment at any of the landings or shipping points on Scuppernong River, Columbia excepted, between the hours of sunset and sunrise, or shall during the time any livestock may be held for shipment at any landing or shipping point on such river, Columbia excepted, fail to keep the same in a covered pound or inclosure, supplied with necessary food and drinking water, and at all times in full view of the public, such transportation company, common carrier, or the agent of either, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. (1903, c. 283; Rev., s. 3675; C. S., s. 3528.)

§ 60-125. Carload shipments of watermelons regulated; violation of regulations misdemeanor.—It shall be the duty of all common carriers to furnish the weights of all carload shipments of watermelons originating within the State to the shippers thereof within forty-eight hours after receipt of the same. Any common carrier violating the provisions of this section shall upon conviction be fined ten dollars for each offense. (Ex. Sess. 1913, c. 68; C. S., s. 3529.)

§ 60-126. Express companies to settle promptly for cash-on-delivery shipments; penalty.—Every express company which shall fail to make settlement with the consignor of a cash-on-delivery shipment, either by payment of the moneys stipulated to be collected upon the delivery of the articles so shipped or by the return to such consignor of the article so shipped, within twenty days after demand made by the consignor and payment or tender of payment by him of the lawful charges for transportation, shall forfeit and pay to such consignor a penalty of twenty-five dollars, where the value of the shipment is twenty-five dollars or less; and, where the value of the shipment is over twenty-five dollars, a penalty equal to the value of the shipment; the penalty not to exceed fifty dollars in any case: Provided, no penalty shall be collectible where the shipments, through no act of negligence of the company, is burned, stolen or otherwise destroyed: Provided further, that the penalties here named shall not be in derogation of any right the consignor may now have to recover of the company damages for the loss of any cash-on-delivery shipment or for negligent delay in handling the same. (1909, c. 866; C. S., s. 3530.)

§ 60-127. Failure to place name on produce shipped misdemeanor.—Any person, firm or corporation selling or offering for sale or consignment any barrel, crate, box, case, package or other receptacle containing any berries, fruit, melons, potatoes, vegetables, truck or other produce of any kind whatsoever, to be shipped to any point within or without the State of North Carolina, without the true name of the grower or packer either written, printed, stamped or otherwise placed thereon in distinct and legible characters, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that this section shall not apply to railroads, express companies and other transportation companies selling or offering for sale, for transportation or storage charges or any other charges accruing to such railroads, express companies or other transportation companies, any barrel, crate, box, case, package, or other receptacle containing berries, fruit, melons, potatoes, vegetables, truck or other produce. (1915, c. 193; C. S., s. 3531.)

§§ 60-128, 60-129: Repealed by Session Laws 1947, c. 781.

Editor's Note.—The repealed sections resemble similar provisions, see §§ 60-131 and 60-132, to the sale of unclaimed freight. For

§ 60-130. Funds from unclaimed freight to be paid to State University.—Such railroad, steamboat, express or other transportation company shall make an entry of the balance of the proceeds of the sale, if any, of each parcel of freight owned by or consigned to the same person, as near as can be ascertained, and at any time within five years thereafter shall refund any surplus so retained to the owner of such freight, his heirs or assigns, on satisfactory proof of such ownership; if no person shall claim the surplus within five years, such surplus shall be paid to the State University. (1871-2, c. 138, s. 50; Code, s. 1987; Rev., s. 2639; C. S., s. 3534.)

Cross Reference.—As to unclaimed personalty escheating to the University of North Carolina, see § 116-23.

§ 60-131. Sale of unclaimed baggage or freight; notice; sale of neglected property.—Any common carrier which has had in its possession on hand at any destination in this State any article whether baggage or freight, for a period of sixty days from its arrival at destination, which said carrier cannot deliver because unclaimed, may at the expiration of said sixty days sell the same at public auction at any point where in the opinion of the carrier the best price can be obtained: Provided, however, that notice of such sale shall be mailed to the consignor and consignee, by registered mail, if known to such carrier, not less than fifteen days before such sale shall be made; or notice of the sale shall be published once a week for two consecutive weeks in some newspaper of general

circulation published at the point of sale: Provided, that if there is no such paper published at such point, the publication may be made in any paper having a general circulation in the State: Provided further, however, that if the nondelivery of said article is due to the consignee's and consignor's rejection of it, then such article may be sold by the carrier at public or private sale, and at such time and place as will in the carrier's judgment net the best price, and this without further notice to either consignee or consignor, and without the necessity of publication. (1921, c. 124, s. 1; C. S., s. 3534(a).)

Editor's Note. — For decisions under former statute relating to sale of unclaimed freight, see *Norfolk Southern R. Co. v. New Bern Iron Works*, 172 N. C. 188, 90 S. E. 149 (1916); *Holloman v. Southern R. Co.*, 172 N. C. 372, 90 S. E. 292 (1916).

§ 60-132. Sale of live or perishable or cheap freight. — Where the article referred to in § 60-131 is live freight, or perishable freight, or freight of such low value as would not bring the accrued transportation and other charges if held for sixty days as provided in said section, the common carrier may, with or without advertisement, sell the same in such manner and at such time and in such place as will best in its judgment protect the interests of the carrier, the consignor and the consignee, and whenever practicable the consignor and consignee shall be notified of the proposed sale of such live or perishable freight, or freight of such low value. (1921, c. 124, s. 2; C. S., s. 3534(b).)

Editor's Note. — For decisions under former statute relating to sale of unclaimed perishable freight, see *Norfolk Southern R. Co. v. New Bern Iron Works*, 172 N. C. 188, 90 S. E. 149 (1916); *Holloman v. Southern R. Co.*, 172 N. C. 372, 90 S. E. 292 (1916).

§ 60-133. Record of articles and prices; deduction of expenses; payment of balance. — The carrier shall keep a record of the articles sold, and of the prices obtained therefor, and shall, after deducting all charges and expenses of the sale, including advertisement, if advertised, pay the balance to the owner of such articles on demand therefor made at any time within two years from the date of the sale. (1921, c. 124, s. 3; C. S., s. 3534(c).)

ARTICLE 14.

Street and Interurban Railways.

§ 60-134. May build and maintain water-power plants. — Where any street or interurban railway company owns lands on one or both sides of a stream which can be used in developing a water power, and desires to erect and maintain a water-power plant for the purpose of generating electricity to be used in operating such railway, then such railway company shall have the power to erect, maintain and operate such water-power plant for such purpose, and may build, maintain and operate any and all dams, ponds, canals, bridges, ferries, aqueducts, flumes, waterways, wasteways, reservoirs, and all works, machinery, houses, shops and buildings necessary for the use and operation of a water-power plant for generating electricity. Whenever such company shall not own the entire water front, or all of the lands, water rights, or other easements necessary to be used in fully developing such water power, it shall have the power to acquire any other lands, water rights or easements which may be needed to fully develop such water power; and if the company cannot agree with the owners for the purchase of such lands, water rights or other easements, the same may be condemned by the railway company for that purpose, and the procedure shall be the same as that provided for the condemnation of lands for railroads: Provided, that no dwelling house, yard, garden, orchard or burial ground shall be condemned for such purpose: Provided further, that such company shall not have the power to condemn any water power, right or property of any person, firm or corporation engaged in the actual service of the general public, where such power, right or prop-

erty is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public. Any surplus electric power generated by any plant erected under the provisions of this section may be sold by such company upon reasonable terms. (1907, c. 302; 1913, c. 94; C. S., s. 3535.)

Burden of Proof.—Where a quasi-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or water power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water power within the provision of the statutes excepting them. *Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co.*, 171 N. C. 314, 88 S. E. 245 (1916).

Land Used in Developing Power.—A public service corporation, owning lands

on one bank of stream, cannot condemn across the stream and take the water rights held in the stream by another public service corporation, when it appears that the defendant holds its lands across the stream to supply power to operate its electric light and power plant, with which it is supplying such light and power to its patrons. *Blue Ridge Interurban R. Co. v. Oates*, 164 N. C. 167, 80 S. E. 398 (1913); *Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co.*, 169 N. C. 471, 86 S. E. 296 (1915).

§ 60-135. Separate accommodations for different races; failure to provide misdemeanor.—All street, interurban and suburban railway companies, engaged as common carriers in the transportation of passengers for hire in the State of North Carolina, shall provide and set apart so much of the front portion of each car operated by them as shall be necessary, for occupation by the white passengers therein, and shall likewise provide and set apart so much of the rear part of such car as shall be necessary for occupation by the colored passengers therein, and shall require as far as practicable the white and colored passengers to occupy the respective parts of such car so set apart for each of them. The provisions of this section shall not apply to nurses or attendants of children or of the sick or infirm of a different race, while in attendance upon such children or such sick or infirm persons. Any officer, agent or other employee of any street railway company who shall willfully violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1907, c. 850, ss. 1, 5, 7; 1909, c. 851; C. S., s. 3536.)

Cross References.—See note to § 60-136. As to railroads providing separate accommodations, see § 60-94.

"Willful," as used in a criminal statute, means something more than an intention to do a thing; it implies the doing of an act

purposely and deliberately, without authority or careless whether one has the right to do the act or not, in violation of law. *State v. Harris*, 213 N. C. 758, 197 S. E. 594 (1938).

§ 60-136. Passengers to take certain seats; violation of requirement misdemeanor.—Any white person entering a streetcar or other passenger vehicle or motor bus for the purpose of becoming a passenger therein shall, in order to carry out the purposes of § 60-135, occupy the first vacant seat or unoccupied space nearest the front thereof, and any colored person entering a street car or other passenger vehicle or motor bus for a like purpose shall occupy the the first vacant seat or unoccupied space nearest the rear end thereof, provided, however, that no contiguous seat on the same bench shall be occupied by white and colored passengers at the same time, unless and until all the other seats in the car have been occupied. Upon request of the person in charge of the streetcar or other passenger vehicle or motor bus, and when necessary in order to carry out the purpose of providing separate seats for white and colored passengers, it shall be the duty of any white person to move to any unoccupied seat toward or in the front of the car, vehicle or bus, and the duty of any colored person to move to any unoccupied seat toward or in the rear thereof, and the failure of any such person to so move shall constitute prima facie evidence of an intent to violate this section. Any person violating the provisions of this section shall be

guilty of a misdemeanor and, upon conviction, shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. Any such person may also be ejected from the car, vehicle or bus by the person charged with the operation thereof. Each person now or hereafter charged with the operation of any such streetcar, passenger vehicle or motor bus is hereby invested with police powers and authority to carry out the provisions of this section. (1907, c. 850, ss. 2, 6; C. S., s. 3537; 1939, c. 147.)

Editor's Note.—The 1939 amendment inserted the words "or other passenger vehicle or motor bus" in the first sentence. It also inserted the second sentence and made other changes in the section.

Effect of § 60-139.—The contention that this section and § 60-135 do not apply to motor vehicles transporting passengers for hire except on busses used in transporting passengers within a city or town was held without merit as the provisions of such sections were extended by § 60-139, to include "motor busses operated in the urban, interurban or suburban transportation of passengers for hire, and to the operator or operators thereof, and the agents, servants, and employees of such operators." *State v. Johnson*, 229 N. C. 701, 51 S. E. (2d) 186 (1949).

Segregation of Interstate Passengers.—While it is held in *Morgan v. Virginia*, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A. L. R. 574 (1946), that a State statute which requires segregation of interstate passengers is beyond the State's power to make, the decision does not purport to invalidate reasonable rules and regulations of interstate carriers, which require segregation of the white and negro races. *Pridgen v. Carolina Coach Co.*, 229 N. C. 46, 47 S. E. (2d) 609 (1948).

Burden of Proving Intentional Viola-

tion.—While this section does not require the State to prove willfulness, the burden rests upon the State to show beyond a reasonable doubt that defendant intentionally violated the statute. *State v. Brown*, 225 N. C. 22, 33 S. E. (2d) 121 (1945).

State Need Not Show That Defendant Was Intrastate Passenger.—In a prosecution under § 60-135 and this section, evidence that a white and a colored defendant occupied the same seat on a bus and refused to move to unoccupied seats in the front and rear of the bus as required by statute, makes out a prima facie case of intent to violate the statute and is sufficient to withstand defendants' motion for judgment as of nonsuit even in the absence of evidence by the State that defendants were intrastate passengers, since the burden of going forward with the evidence to show that defendants were interstate passengers rests upon defendants. *State v. Johnson*, 229 N. C. 701, 51 S. E. (2d) 186 (1949).

Evidence Sufficient for Jury.—Where State's evidence tended to show that defendant, when called upon by bus driver, refused to move her seat, compelling the driver to call upon officers of the law to remove her, there was sufficient evidence for the jury, and motion for nonsuit was properly denied. *State v. Brown*, 225 N. C. 22, 33 S. E. (2d) 121 (1945).

§ 60-137. No liability for mistake in assigning passengers to wrong seat.—No street, suburban or interurban railway company, its agents, servants or employees, shall be liable to any person on account of any mistake in the designation of any passenger to a seat or part of a car set apart for passengers of the other race. (1907, c. 850, s. 8; C. S., s. 3538.)

§ 60-138. Misconduct on car; riding on front platform misdemeanor.—It shall be unlawful for any passenger to expectorate upon the floor or any other part of any streetcar, or to use, while thereon, any loud, profane or indecent language, or to make any insulting or disparaging remark to or about any other passenger or person thereon within his or her hearing. It shall likewise be unlawful for any passenger to stand willfully upon the front platform, fender, bumper, running board or steps of such car while the same is in motion, whether such passenger has or has not paid the usual fare for riding on such car. Any person willfully violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. He may also be ejected from the car by the conductor and other agent or agents charged with the operation of such car, who are hereby invested with police powers to carry out the provisions of this section. (1907, c. 850, ss. 3, 6; C. S., s. 3539.)

§ 60-139. Sections 60-135 to 60-138 extended to motor busses used as common carriers.—The provisions of §§ 60-135 to 60-138 are hereby extended to motor busses operated in the urban, interurban or suburban transportation of passengers for hire, and to the operator or operators thereof, and the agents, servants, and employees of such operators. (1933, c. 489.)

Cross Reference.—See note to § 60-136. 197 S. E. 594 (1938); *State v. Johnson*, 229 Applied in *State v. Harris*, 213 N. C. 758, N. C. 701, 51 S. E. (2d) 186 (1949).

§ 60-140. Passenger riding on rear platform assumes risk; copies of section to be posted.—Any passenger who shall ride upon the rear platform of any streetcar in motion, when there is room for such passenger either to sit or stand inside the car, shall be deemed to have assumed all the risks of being injured while so riding, as the result of any act of the streetcar company: Provided, that such company shall make it appear that such passenger would not have been injured had he been on the inside of said car: Provided further, that before any street, interurban or suburban railway shall be allowed to invoke the provisions of this section it shall have copies thereof printed and framed and one copy hung in each end of all cars operated on its lines, and shall further have a placard hung in a conspicuous place on the rear of such cars, which shall read as follows: "Passengers are warned not to ride on this platform," and a placard hung on each side of open cars in a conspicuous place, which shall read as follows: "Passengers are warned not to ride on the running board." (1907, c. 850, s. 4; C. S., s. 3540.)

Cross Reference.—As to injury while on train platform, see § 60-105.

§ 60-141. Streetcars to have vestibule fronts; failure to provide them misdemeanor.—All street passenger railway companies shall use vestibule fronts, of frontage not less than four feet, on all passenger cars run by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year: Provided, that such companies shall not be required to close the sides of the vestibules: Provided further, that such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather, not to exceed four days in any one month within the period herein prescribed for the use of vestibule fronts. The Utilities Commission is hereby authorized to make exemptions from the provisions of this section in cases where in their judgment the enforcement of this section is unnecessary. Any such company that shall refuse or fail to comply with the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each day of such refusal or failure. (1901, c. 743; Rev., ss. 2615, 3800; C. S., s. 3541; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Duty of Streetcar Company.—A streetcar company owes the duty to its passengers to use a high degree of care to see that they safely alight from its cars. *Woods v. North Carolina Public-Service Corporation*, 174 N. C. 697, 94 S. E. 459 (1917).

Causal Connection between Violation and Injury.—The plaintiff must show a causal connection between the violation by defendant of this section and the injury sustained. *Rich v. Asheville Electric Co.*, 152 N. C. 689, 68 S. E. 232 (1910).

§ 60-142. Streetcars to have fenders; failure to provide them misdemeanor.—All street passenger railway companies shall use practical fenders in front of all passenger cars run by them. The Utilities Commission is hereby authorized to make exemptions from the provisions of this section in cases where in their judgment the enforcement of this section is unnecessary. Any such company that shall refuse or fail to comply with the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each day of such refusal or failure.

(1901, c. 743, s. 2; Rev., ss. 2616, 3801; C. S., s. 3542; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

"Practical Fenders" Defined.—The "practical fenders" required for streetcars by this section are those which are efficient for the purpose of protecting human life, etc., or the most approved appliance in general use, and a violation of this statute is negligence per se. *Smith v. Charlotte Elec. Ry. Co.*, 173 N. C. 489, 92 S. E. 382 (1917).

Violation Negligence Per Se.—The violation of this section by a streetcar company, in failing to provide a "practical fender" for its car, causing an injury, is evidence of actionable negligence per se. *Ingle v. Asheville Power, etc., Co.*, 172 N. C. 751, 90 S. E. 953 (1916); *Hanes v. Southern Pub. Utilities Co.*, 191 N. C. 13, 131 S. E. 402 (1926).

Travelers by Vehicles Protected.—The requirement of "practical fenders" on streetcars applies to the protection of those traveling by vehicles, automobiles, etc. *Hanes v. Southern Pub. Utilities Co.*, 191 N. C. 13, 131 S. E. 402 (1926).

Burden of Proof as to Exemption.—The

burden of proof is on a street railway company to show that the Commission, in its judgment, had found it unnecessary to enforce the provisions of this section, requiring the use of "practical fenders" on their streetcars, in an action to recover damages caused by its negligence in not using them. *Smith v. Charlotte Elec. Ry. Co.*, 173 N. C. 489, 92 S. E. 382 (1917).

Exemption of All Companies Unauthorized.—This section does not authorize an exemption of all the street railway companies by the Commission, as this would amount to a suspension of the statute. *Henderson v. Durham Traction Co.*, 132 N. C. 779, 44 S. E. 598 (1903).

Evidence.—In an action for the killing of a dog by a streetcar, it is not competent to show the condition of the fenders on particular cars other than the one by which the dog was killed, it being shown that the fenders were different on different cars. *Moore v. Electric Ry., etc., Co.*, 136 N. C. 554, 48 S. E. 822 (1904).

ARTICLE 15.

Electric Interurban Railways.

§ 60-143. **Organization.**—Any electric interurban railway company, whether organized under the laws of this or any other State, may construct, maintain and operate electric interurban railways and engage in business in this State. (1927, c. 33, s. 1.)

§ 60-144. **Right of eminent domain.**—Any such company may exercise the right of eminent domain under the provisions of chapter forty and acts amendatory thereof, and for the purpose of constructing its roads and other works shall have the powers given railroad corporations by this chapter, and acts amendatory thereof, provided, that no such company shall operate over the streets of any municipality by means of steam motive power, except with the consent of the municipal authorities. (1927, c. 33, s. 2; 1949, c. 496.)

Editor's Note.—The 1949 amendment rewrote the last few lines of this section relating to steam motive power.

§ 60-145. **Status defined.**—All such companies shall be deemed public service corporations and shall be subject to the laws of this State regulating such corporations. (1927, c. 33, s. 3.)

ARTICLE 16.

Pipe Line Companies.

§ 60-146. **Right of eminent domain conferred upon pipe line companies; other rights.**—Any pipe line company transporting or conveying natural gas, gasoline, crude oil, or other fluid substances by pipe line for the public for compensation, and incorporated under the laws of the State of North Carolina, may exercise the right of eminent domain under the provisions of chapter

forty and acts amendatory thereof, and for the purpose of constructing and maintaining its pipe lines and other works shall have all the rights and powers given railroads and other corporations by chapters fifty-six and sixty and acts amendatory thereof, provided the pipe lines of such companies transporting or conveying natural gas, gasoline, crude oil, or other fluid substances shall originate within this State. Nothing herein shall prohibit any such pipe line company granted the right of eminent domain under the laws of this State from extending its pipe lines from within this State into another state for the purpose of transporting natural gas into this State, nor to prohibit any such pipe line company from conveying or transporting natural gas, gasoline, crude oil, or other fluid substances from within this State into another state. All such pipe line companies shall be deemed public service companies and shall be subject to the laws of this State regulating such corporations. (1937, c. 280.)

Cross Reference.—As to supervision by Utilities Commission, § 62-30. 40-2 apply only to pipe lines originating in North Carolina. See 15 N. C. Law Rev.

Editor's Note.—Both this section and § 364.

Chapter 61.

Religious Societies.

Sec.

- 61-1. Trustees may be appointed and removed.
 61-2. Trustees may hold property.
 61-3. Title to lands vested in trustees, or in societies.

Sec.

- 61-4. Trustees may convey property.
 61-5. Authority of bishops, ministers, etc., to acquire, hold and transfer property; prior transfers validated.
 61-6. House on vacant land vests title.

§ 61-1. **Trustees may be appointed and removed.**—The conference, synod, convention or other ecclesiastical body representing any church or religious denomination within the State, as also the religious societies and congregations within the State, may from time to time and at any time appoint in such manner as such body, society or congregation may deem proper, a suitable number of persons as trustees for such church, denomination, religious society, or congregation. The body appointing may remove such trustees or any of them, and fill all vacancies caused by death or otherwise. (1796, c. 457, ss. 1, 2; 1844, c. 47; 1848, c. 76; R. C., c. 97; Code, ss. 3667, 3668; Rev., ss. 2670, 2671; C. S., s. 3568.)

Editor's Note.—Session Laws 1945, c. 90, provides for the appointment of trustees for certain Primitive Baptist churches to dispose of abandoned church property and distribute the proceeds thereof.

This section applies only to religious societies and not to educational institutions. *Allen v. Baskerville*, 123 N. C. 126, 31 S. E. 383 (1898); *Thornton v. Harris*, 140 N. C. 498, 53 S. E. 341 (1906).

Hence, upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," it was held that their successors should be appointed under § 45-9 by the clerk of the superior court. *Thornton v. Harris*, 140 N. C. 498, 53 S. E. 341 (1906).

Society May Remove Trustees at Will.—Under the provisions of this section, a religious society may remove a trustee of church property who proves faithless to his trust, and may fill any vacancy thus created. *Nash v. Sutton*, 117 N. C. 231, 23 S. E. 178 (1895). Faithlessness is not required, however, and it may remove trustees at will. *Conference v. Allen*, 156 N. C. 524, 72 S. E. 617 (1911).

Section Not Affected by Church Regulations.—A church has authority to appoint a "suitable number" of its own trustees for the purpose of acquiring and holding

church property, and remove them at will; and where the discipline of the denomination with which a church is affiliated has provided a note to be given for the trial of "offenses," this regulation refers to infractions of church discipline and does not apply to the election or removal of trustees. *Conference v. Allen*, 156 N. C. 524, 72 S. E. 617 (1911).

Trustee May Maintain Action for Removal of Trustees, etc.—A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. *Nash v. Sutton*, 109 N. C. 550, 14 S. E. 77 (1891).

And Member May Maintain Action.—In the absence of competent trustee and a governing body authorized to appoint trustees, any member of a religious society has such a beneficial interest as will enable him, in behalf of fellow members, to maintain such action as may be necessary to protect their common interest. *Nash v. Sutton*, 109 N. C. 550, 14 S. E. 77 (1891).

Cited in *Bridges v. Pleasants*, 39 N. C. 26 (1845); *King v. Richardson*, 136 F. (2d) 849 (1943).

§ 61-2. **Trustees may hold property.**—The trustees and their successors have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for or on account of the donations and property so held or claimed by them, and for and on account of any matters relating thereto. They shall be accountable to the churches,

denominations, societies and congregations for the use and management of such property, and shall surrender it to any person authorized to demand it. (1796, c. 457, ss. 1, 3; 1844, c. 47; 1848, c. 76; R. C., c. 97; Code, ss. 3667, 3668; Rev., ss. 2670, 2671; C. S., s. 3569.)

Cross References.—See note to § 61-3. As to trusts and trustees generally, see § 36-19 et seq. As to certain religious associations presumed to be incorporated, see § 55-13.

This section applies only to property held for religious purposes and not to property held in trust for a "Baptist church and for the education of the youths of the colored race." *Thornton v. Harris*, 140 N. C. 498, 53 S. E. 341 (1906).

No General Capacity of Acquisition.—Religious societies or their trustees have no general capacity of acquisition; they can only take for the use of the society. And by a conveyance to trustees, for purposes forbidden by the policy of the law, nothing passes. *Trustees v. Dickenson*, 12 N. C. 189 (1827).

Church Has Right to Use of Property.—A church of the congregational system having elected certain trustees to supersede several theretofore elected, holds the church property through those trustees later elected, and has the right to the use of the church for religious services without molestation from the trustees removed, or from its conference. *Conference v. Allen*, 156 N. C. 524, 72 S. E. 617 (1911).

Levy on Communion Service.—A communion service of a church is not liable to seizure and sale under an execution by a pastor for salary due him. *Lord v. Hardie*, 82 N. C. 241 (1880).

An individual member of a religious society has an equitable interest in the property held by the society. *Nash v. Sutton*, 117 N. C. 231, 23 S. E. 178 (1895).

Trusts for Special Purposes.—There is nothing in this section which precludes trustees of a certain North Carolina church from accepting trusts for special purposes; and, even if there were, a trust for a special purpose would not fail because they were named as trustees but equity would appoint other trustees to administer it in application of the maximum that a trust will not be allowed to fail for lack of a trustee. *King v. Richardson*, 136 F. (2d) 849 (1943).

Trustees Are Agents.—The trustees of a church are merely agents and have no property interest as against the governing body of the church. *Conference v. Allen*, 156 N. C. 524, 72 S. E. 617 (1911).

Same—May Mortgage Property.—A congregation taking possession of a church cannot contest the validity of a mortgage given by the trustees for the purchase

money on the ground that it was ultra vires. *Rountree v. Blount*, 129 N. C. 25, 39 S. E. 631 (1901).

Same—May Enforce Bequest.—Where a testator provides for building a fence around a certain chapel cemetery, the trustees of the chapel are the proper parties to require the executor to perform this provision. *Cabe v. Vanhook*, 127 N. C. 424, 37 S. E. 464 (1900).

Same—May Recover Property.—The title to church property is vested in the trustees individually and they may recover at law, though in the writ and declaration they style themselves "trustees." *Walker v. Fawcett*, 29 N. C. 44 (1846).

Title Not in Controversy in Contest between Trustees.—In a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust for the same beneficial owner, the title does not come in controversy. *Thornton v. Harris*, 140 N. C. 498, 53 S. E. 341 (1906).

Original Trustees May Sue though Not Legally Appointed.—Where a conveyance is made to three persons for a certain tract of land, as trustees for a church, a suit of trespass may be brought by them against the wrongdoers, though they may not have been appointed trustees according to law. *Walker v. Fawcett*, 29 N. C. 44 (1846).

It is only when a suit is brought by persons, who claim as "successors," that the question arises, whether the original bargainees were duly chosen the trustees of a religious congregation, and whether the persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to the former, and thereby vest in them the title to the property, which is necessary to support an action. *Walker v. Fawcett*, 29 N. C. 44 (1846).

Trustees Cannot Recover for Physical Suffering of Pastor, etc.—In suit by the trustees of a church against a railroad company for the improper use of its terminal or depot at or near the manse of the church, no recovery can be had for any physical suffering upon the part of their pastor, his family, or the individuals composing the congregation. *Taylor v. Seaboard Air Line Ry.*, 145 N. C. 400, 59 S. E. 129 (1907).

Rights of Trustees as against Majority of Members.—See note to § 61-3.

Liability of Trustees.—The trustees of a

church are liable for material ordered by one of their number and used in building the church although the order was not authorized. *Tull v. Trustees*, 75 N. C. 424 (1876). But the building committee of a

church is not liable for injuries received by a workman. *Wilson v. Clark*, 110 N. C. 364, 14 S. E. 962 (1892).

Cited in Bridges v. Pleasants, 39 N. C. 26 (1845).

§ 61-3. Title to lands vested in trustees, or in societies.—All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation within the State for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which such churches, chapels or other houses of public worship were built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in such churches, denominations, societies and congregations, respectively, according to such intent. (1776, c. 107; 1796, c. 457, s. 4; R. C., c. 97, s. 1; Code, s. 3665; Rev., s. 2672; C. S., s. 3570.)

Cross Reference.—See note to § 61-2.

This section applies only to religious societies and not to educational institutions. *Allen v. Baskerville*, 123 N. C. 126, 31 S. E. 383 (1898).

Congregational and Connectional Systems.—The rights of an individual member of a congregation under the congregational system is discussed in *Conference v. Allen*, 156 N. C. 524, 72 S. E. 617 (1911); and the connectional system is discussed in *Simmons v. Allison*, 118 N. C. 763, 24 S. E. 716 (1896); *Tilley v. Ellis*, 119 N. C. 233, 26 S. E. 29 (1896); *Kerr v. Hicks*, 154 N. C. 265, 70 S. E. 468 (1911); *Gold v. Cozart*, 173 N. C. 612, 92 S. E. 600 (1917).

Where a diocese receiving a devise of land was afterwards divided into two dioceses the land becomes the property of both and not that of the diocese in which the land happens to be and in which the testator resided. *Trustees v. Trustees*, 102 N. C. 442, 9 S. E. 310 (1889).

Title by Adverse Possession.—A church holding real property for a hundred years, and using it for religious purposes, acquires a fee simple title by adverse possession, independent of the validity of its deed. *Gold v. Cozart*, 173 N. C. 612, 92 S. E. 600 (1917).

A bequest for a religious charity must be to some definite purpose, and to some body or association of persons having a legal existence and with capacity to take. There is no provision for donations to be employed in any general system of diffusing the knowledge of Christianity throughout the earth. *Bridges v. Pleasants*, 39 N.

C. 26 (1845).

Bequest to Build Church Where Amount Insufficient.—A provision in a will that a church is to be built from certain funds will not fail because there is not a sufficient amount of the funds to build a church as large as directed by the testator. *Paine v. Forney*, 128 N. C. 237, 38 S. E. 885 (1901).

Specific Trust Must Be Imperative.—A specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing the courts to interfere and control the management and disposition of the property, unless this is the clear intent of the grantor expressed in language which should be construed as imperative. *Hayes v. Franklin*, 141 N. C. 599, 54 S. E. 432 (1906).

No Trust Created.—The recital in a deed conveying land to the vestry and wardens of a church that it was made "for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans, or in the promotion of any other charitable or religious objects to which the property may be appropriated" by the grantee, creates no trust, and the grantee can convey a perfect title. *St. James v. Bagley*, 138 N. C. 384, 50 S. E. 841 (1905).

Trustees May Hold Property as against Majority of Members.—Where land is conveyed to the officers and trustees of a non-denominational religious organization for the purposes of the organizations, its officers and trustees have title to the property in trust and are entitled to hold it for the use and occupancy of the organization

as against members of the organization, even though they are in the large majority, who seek possession of the property for use and occupancy by a denominational church. *Wheelless v. Barrett*, 229 N. C. 282, 49 S. E. (2d) 629 (1948).

Rights of Majority of Congregation Withdrawing from Denomination.—A conveyance of land to trustees for the erection of a church to belong to a denomination, gives the title in trust for the use of the

denomination, and therefore members of the congregation of the church so erected who withdraw affiliation from the denomination, even though they be a majority of the congregation, are not entitled to the control and use of the property as against the denomination, irrespective of whether the particular church is congregational or connectional. *Western North Carolina Conference v. Talley*, 229 N. C. 1, 47 S. E. (2d) 467 (1948).

§ 61-4. Trustees may convey property.—The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances, and all such conveyances so made or heretofore made, or hereafter to be made, shall be effective to pass the land in fee simple to the purchaser or to the mortgagee for the purposes in such conveyances or mortgage expressed; and they may sell or mortgage its personal property. (1855, c. 384; 1889, c. 484; Rev., s. 2673; C. S., s. 3571.)

Sale to Promote Testator's Purpose.—Where a testator devised lands to the trustees of a certain church, "to be held by them as a rectory or residence for the ministers of said church; that the same shall not be disposed of, sold, or used in any other way or for any other purpose than the one designated," the trustees might sell the property if the purpose declared would be promoted thereby; or the court might order a sale under its general equity power.

Church v. Ange, 161 N. C. 314, 77 S. E. 239 (1912).

Lease of Part of Property.—Where land was conveyed to a church for the purpose of maintaining a church for worship, the court will not restrain the officers of the church from leasing a small portion of the lot for erecting a store. *Hayes v. Franklin*, 141 N. C. 599, 54 S. E. 432 (1906).

Cited in *Bond v. Tarboro*, 217 N. C. 289, 7 S. E. (2d) 617, 127 A. L. R. 695 (1940).

§ 61-5. Authority of bishops, ministers, etc., to acquire, hold and transfer property; prior transfers validated.—Whenever the laws, rules, or ecclesiastic polity of any church or religious sect, society or denomination, commits to its duly elected or appointed bishop, minister or other ecclesiastical officer, authority to administer its affairs, such duly elected or appointed bishop, minister or other ecclesiastical officer shall have power to acquire by gift, purchase or otherwise, and to hold, improve, mortgage, sell and convey the property, real or personal, of any such church or religious sect, society or denomination, for the purposes, in the manner and otherwise as authorized and permitted by its laws, rules or ecclesiastic polity; and in the event of the transfer, removal, resignation or death of any such bishop, minister or other ecclesiastical officer, the title and all rights with respect to any such property shall pass to and become vested in his duly elected or appointed successor immediately upon appointment or election, and pending appointment or election of such successor, such title and rights shall be vested in such person or persons as shall be designated by the laws, rules or ecclesiastic polity of such church or religious sect, society or denomination.

All deeds, deeds of trust, mortgages, wills or other instruments made prior to March 24, 1939, to or by a duly elected or appointed bishop, minister or other ecclesiastical officer, who, at the time of the making of any such deed, deed of trust, mortgage, will or other instrument, or thereafter, had authority to administer the affairs of any church, religious sect, society or denomination under its laws, rules or ecclesiastic polity, transferring property, real or personal, of any such church or religious sect, society or denomination, are hereby ratified and declared valid; and all transfers of title and rights with respect to property, prior to March 24, 1939, from a predecessor bishop, minister or other ecclesiastical officer who has resigned or died, or has been transferred or removed, to his duly

elected or appointed successor, by the laws, rules or ecclesiastic polity of any such church, or religious sect, society or denomination, either by written instruments or solely by virtue of the election or appointment of such successor, are also hereby ratified and declared valid.

This section shall not affect vested rights, or repeal any of the provisions of §§ 61-1 to 61-4, or of §§ 36-21 to 36-23. (1939, c. 177.)

§ 61-6. House on vacant land vests title.—All houses and edifices erected for public religious worship on vacant lands, or on lands of the State not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept sacred for divine worship, to and for the use of the society by which the same was originally established. (1778, c. 132, s. 6; R. C., c. 97, s. 2; Code, s. 3666; Rev., s. 2674; C. S., s. 3572.)

Chapter 62.

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ARTICLE 1.*Organization of the Commission.*

§ 62-1. **Number and appointment of commissioners; terms.**—The North Carolina Utilities Commission shall consist of five commissioners, who shall be appointed by the Governor, by and with the consent of the 1949 Senate, before adjournment sine die. Upon the expiration of the terms of the three commissioners now serving under appointments for terms of six years, their successors shall be appointed for terms of six years beginning the first day of February of the year in which their present terms expire, respectively. The two additional commissioners shall be appointed for terms expiring the first day of February, 1953, and upon the expiration of their terms their successors shall be appointed for terms of four years, respectively. The salary of the additional commissioners shall be fixed by the Director of the Budget, subject to approval of

the Advisory Budget Commission, not in excess of the salaries now paid to the other commissioners. (1941, c. 97, s. 2; 1949, c. 1009, s. 1.)

Editor's Note.—The Railroad Commission, established in 1891, became the Corporation Commission in 1899. See Consolidated Statutes, §§ 1023-1034; *Abbott v. Beddingfield*, 125 N. C. 256, 34 S. E. 412 (1899); *Corporation Comm. v. Railroad*, 137 N. C. 1, 49 S. E. 191 (1904); 2 N. C. Law Rev. 70. The above-mentioned sections were repealed by Public Laws 1933, c. 134, which created the office of Utilities Commissioner and vested in the Commissioner all of the existing powers, duties, etc., of the former Corporation Commission. The act also provided for two Associate Commissioners to act with the Commissioner in certain instances for the purpose of hearing and determining matters or issues of fact. The office of Utilities

Commissioner was abolished by Public Laws 1941, c. 97, which created the North Carolina Utilities Commission and vested said Commission with all the powers, duties, etc., of the Utilities Commissioner, or the Utilities Commissioner and the Associate Commissioners, prescribed in Public Laws 1933, c. 134, and other laws. The 1941 act further provided that the words "North Carolina Utilities Commission" should be substituted for "Utilities Commissioner," etc., throughout said chapter 134 or other act amendatory thereof.

The 1949 amendment, effective April 15, 1949, rewrote this section. For brief comment on amendment, see 27 N. C. Law Rev. 489.

§ 62-2. Organization of the Commission.—To facilitate the work of the Commission and for administrative purposes, the chairman of the Commission, with the consent and approval of the Commission, may organize the work of the Commission in several divisions and may designate a member of the Commission as the head of any division or divisions and assign to members of the Commission various duties in connection therewith. (1941, c. 97, s. 3; 1949, c. 1009, s. 2.)

Editor's Note.—The 1949 amendment rewrote this section, which formerly related to salaries of commissioners. For

brief comment on amendment, see 27 N. C. Law Rev. 489.

§ 62-3. Oath of office.—Each utilities commissioner before entering upon the duties of his office shall file with the Secretary of State his oath of office to support the Constitution and laws of the United States and the Constitution and laws of the State of North Carolina, and to well and truly perform the duties of his said office as utilities commissioner, and that he is not the agent or attorney of any utility company or public service corporation, or an employee thereof, and that he has no interest in any such company or corporation. (1933, c. 134, s. 5; 1935, c. 280; 1939, c. 404; 1941, c. 97.)

§ 62-4. Present utilities commissioner appointed to new Commission; chairman.—The present utilities commissioner is hereby named a commissioner of the North Carolina Utilities Commission for a term of six years, beginning with February first, one thousand nine hundred and forty-one, and is hereby designated chairman of said Commission, to hold such office during his term. Thereafter the Governor of the State of North Carolina is hereby vested with the right to designate the chairman of the North Carolina Utilities Commission. (1941, c. 97, s. 4.)

§ 62-5. Clerical assistance.—The Utilities Commission shall be allowed such stenographic and other clerical assistance as it may require for the performance of the duties and functions of the said office, to be established and fixed by such department, bureau, or other State agency as may be charged by law with the duty of determining the extent of such assistance in said departments; all such stenographers, clerks, and assistants and special investigators so provided for to be appointed by the Utilities Commission and subject to removal or discharge by it. The salaries and compensation of such clerical assistants, special investigators, or other office force as may be allowed in the office of the Utilities Commission shall be fixed in the manner as now provided by law for fixing

and regulating the salaries and compensation by other State departments. (1933, c. 134, s. 14; 1941, c. 97.)

Cross Reference.—As to determination of extent of assistance and regulation of salaries of stenographers, see §§ 143-36 and 143-37.

§ 62-6. To report annually to Governor.—It shall be the duty of the Commission to make to the Governor annual reports of its transactions, and recommend from time to time such legislation as it may deem advisable under the provisions of this chapter, and the Governor shall have one thousand copies of such report printed for distribution. (1899, c. 164, s. 27; Rev., s. 1117; 1911, c. 211, s. 9, 1913, c. 10, s. 1; C. S., s. 1065; 1933, c. 134, s. 8; 1941, c. 97.)

Matters of Public Record.—Reports of the Corporation Commission (now Utilities Commission) of North Carolina are matters of public record, of which the courts therein will take judicial notice. *Staton v. Atlantic Coast Line R. Co.*, 144 N. C. 135, 56 S. E. 794 (1907).

§ 62-7. To keep record of receipts and disbursements.—The Commission shall keep a record showing in detail all receipts and disbursements. (1899, c. 164, s. 34; Rev., s. 1115; C. S., s. 1063; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-8. To pay fees and money into treasury.—All license fees and seal tax and all other fees paid into the office of the Utilities Commission shall be turned into the State treasury; also all moneys received from fines and penalties. (1899, c. 164, ss. 26, 33; Rev., s. 1114; C. S., s. 1064; 1941, c. 97.)

§ 62-9. Adoption and use of seal; certificate.—The North Carolina Utilities Commission shall adopt a seal; and in all cases where a seal is required on any document, such seal so adopted by the Utilities Commission shall be sufficient; and whenever any record, paper, or document is required to be certified or evidenced by the certificate of the Utilities Commission or its chief clerk or wherever any act or thing is required or permitted to be evidenced by such certificate, the certificate shall be made by the Utilities Commission. (1933, c. 134, s. 15; 1941, c. 97, s. 7.)

§ 62-10. Public record of proceedings; chief clerk.—The Utilities Commission shall keep in its office at all times a record of its official acts, rulings, and transactions, which shall be public records of the State of North Carolina, and all rulings and determinations of said Commission upon matters and things authorized to be passed upon by this chapter, and shall have and appoint a chief clerk, who shall be experienced in railroad and other public utilities statistics, transportation and public service charges, and whose term of office shall be for a period of two years, and he shall file with the Secretary of State the oath of office similar to that prescribed for the Utilities Commission. The Utilities Commission shall have power to remove such clerk for cause at any time. (1933, c. 134, s. 13; 1941, c. 97.)

§ 62-10.1. Authority of Utilities Commission to employ technically qualified personnel.—The Utilities Commission is authorized and empowered to employ technically qualified personnel to serve as members of its staff and under its direction and supervision, including a communications engineer, an electrical engineer, a director of accounting, a transportation expert, and such other experts as the Commission may determine to be necessary in the proper discharge of the Commission's duties as prescribed by law. (1949, c. 1009, s. 3.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 489.

§ 62-10.2. Appointment of assistant attorney general assigned to Utilities Commission.—The Attorney General shall appoint an additional assistant attorney general who shall be assigned to the Utilities Commission and shall be under the direction of the Attorney General and perform such legal serv-

ices as may be necessary in connection with the duties of said Commission, but the Attorney General may require this assistant to perform such other legal duties as may be determined by him. The Director of the Budget is authorized to transfer to the Department of Justice, Attorney General's division, any appropriations made to the Utilities Commission for payment of legal services, to be used for the payment of the salary of such assistant attorney general, whose salary shall be fixed as provided by law. (1949, c. 1029, s. 3.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 489.

§ 62-10.3. Utilities Commission and State Board of Assessment to coordinate facilities and personnel for mutual assistance for rate making and taxation purposes.—The Utilities Commission, at the request of the State Board of Assessment, shall make available to the State Board of Assessment the services of such of the personnel of the Utilities Commission as may be desired and required for the purpose of furnishing to the State Board of Assessment advice and information as to the value of properties of public utilities, the valuations of which for ad valorem taxation are required by law to be determined by the State Board of Assessment. It shall be the duty of the Utilities Commission and the State Board of Assessment, with regard to the assessment and valuation of properties of public utilities doing business in North Carolina, to coordinate the activities of said departments so that each of said boards shall receive the benefit of the exchange of information gathered by them with respect to the valuations of public utilities property for rate making and taxation purposes, and the facilities of each of said State agencies shall be made fully available to both of them. (1949, c. 1029, s. 3.)

ARTICLE 2.

Procedure before the Commission.

§ 62-11. Short title.—This article shall be known and may be cited as the North Carolina Utilities Commission Procedure Act of 1949. (1949, c. 989, s. 1.)

Cross Reference.—For present provisions corresponding to § 62-11 as it read prior to the 1949 revision of this article, see § 62-12.

Editor's Note.—The 1949 act, effective April 15, 1949, repealed the former sixteen sections of this article and inserted in lieu thereof present §§ 62-11 to 62-26.15. Section 3 of the act provides: "This act shall not apply to any proceeding pending on appeal to the superior court or to the Supreme Court from an order or decision of the Utilities Commission made prior to the effective date of this act. Any party

to any proceeding, which is pending before the Commission at the time of the effective date of this act, who has theretofore filed exceptions within the time and in the manner provided theretofore by law, shall be allowed sixty days after the effective date hereof to file application for rehearing as provided in G. S. § 62-26.6 and shall have the right to appeal therefrom as provided in said section."

For a summary and discussion of the 1949 revision of this article, see 27 N. C. Law Rev. 490.

§ 62-12. Commission constituted a court of record.—For the purpose of making investigations, conducting hearings, making decisions and issuing orders, the Commission is hereby constituted a court of record and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law. The commissioners, their clerks, and members of the Commission's staff designated and assigned as examiners shall have full power to administer oaths and to hear and take evidence. The Commission shall render its decisions upon questions of law and of fact as other courts of similar jurisdiction. A majority of the commissioners shall constitute a quorum, and any act or decision of a majority of

the commissioners shall constitute the act or decision of the Commission. (1949, c. 989, s. 1.)

Editor's Note.—For cases decided under this section as it stood prior to the 1949 revision of this article, see note to § 62-26. The cases cited below were decided under former § 62-11, to which the present § 62-12 corresponds.

Commission Is an Administrative Agency.—The Utilities Commission, a creature of the General Assembly, is an administrative agency of the State, with such powers and duties as are given it by this chapter. These powers and duties are of a dual nature—supervisory or regulatory, and judicial. *State v. Atlantic Greyhound Corp.*, 224 N. C. 293, 29 S. E. (2d) 909 (1944); *Utilities Comm. v. Atlantic Greyhound Corp.*, 224 N. C. 672, 32 S. E. (2d) 23 (1944).

Commission Has Powers of Court of General Jurisdiction as to Certain Matters.

—For the purpose of making investigations and conducting hearings, the legislature has constituted the Utilities Commission a court of record, with all the powers of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure is prescribed, with the right in any party affected thereby to appeal to the courts. *State v. Atlantic Greyhound Corp.*, 224 N. C. 293, 29 S. E. (2d) 909 (1944); *Utilities Comm. v. Atlantic Greyhound Corp.*, 224 N. C. 672, 32 S. E. (2d) 23 (1944).

Deferring Use of Increased Rates Pending Investigation.—After rates for certain intrastate shipments had been duly established by the Utilities Commission, defend-

ant sought to increase such rates by filing tariff schedules to that effect. The Commission, in a proceeding to which defendant was a party, by order of postponement, which was not objected to, deferred use of the new increased rates pending investigation, and also directed that the rates previously fixed should not be changed by subsequent tariffs or schedules until this investigation and suspension proceeding had been disposed of, continuing the investigation from time to time at the request of defendant. It was held that such action of the Commission was binding on defendant. However, defendant should be given a reasonable time to comply with the order before penalties might be invoked. *State v. Atlantic Coast Line R. Co.*, 224 N. C. 283, 29 S. E. (2d) 912 (1944).

Commission Is without Inherent Powers of Appellate Court.—The North Carolina Utilities Commission is a court of general jurisdiction only as to subjects embraced within this chapter. It is a court of original jurisdiction and does not possess the inherent powers of an appellate court.

State v. Norfolk Southern Ry. Co., 224 N. C. 762, 32 S. E. (2d) 346 (1944).

Former Statute.—For cases construing § 1023 of the Consolidated Statutes, containing similar provisions, see *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897); *State v. Southern R. Co.*, 151 N. C. 447, 66 S. E. 427 (1909); *North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co.*, 170 N. C. 560, 87 S. E. 785 (1917); *State v. Southern R. Co.*, 185 N. C. 435, 117 S. E. 563 (1923).

§ 62-13. Witnesses; production of papers; contempt.—The Utilities Commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts. (1949, c. 989, s. 1.)

Cross References.—As to attendance of witnesses, see §§ 8-59 to 8-64. As to contempt, see § 5-1 et seq.

§ 62-14. Refusal of witnesses to testify.—If any person duly summoned to appear and testify before the Utilities Commission, or an examiner of said Commission, shall fail or refuse to testify without lawful excuse, or shall refuse to answer any proper question propounded him by a commissioner or examiner in the discharge of duty, or shall conduct himself in a rude, disrespectful or disorderly manner before a commissioner or examiner engaged in the conduct of any hearing or investigation, such persons shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000.00). (1949, c. 989, s. 1.)

§ 62-15. Subpoenas, issuance and service.—All subpoenas for witnesses to appear before the Commission or an examiner and notice to persons or corporations, shall be issued by the Commission or its clerk and be directed to any sheriff, constable or other officer authorized by law to serve process issued out of the superior courts, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. The Commission shall have the authority to require the applicant for a subpoena for persons and documents to make a reasonable showing that the evidence of such persons or documents will be material and relevant to the issue in the proceeding. (1949, c. 989, s. 1.)

Editor's Note.—Prior to the 1949 revision of this article, the subject matter of this section was covered by § 62-16, and this section related to rules of evidence, now covered by § 62-18. As to depositions, see § 62-19. As to burden of proof, see § 62-26.

§ 62-16. Service of process and notices.—The clerk of the Commission may serve any notice issued by it and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and all officers authorized by law to serve process issuing out of the superior courts, to serve any process, subpoenas and notices issued by the Commission, and such officers shall be entitled to the same fees as are prescribed by law for serving similar papers issuing from the superior court. Service of notice of all hearings, investigations and proceedings by the Commission may be made upon any person upon whom a summons may be served in accordance with the provisions governing civil actions in the superior courts of this State, and may be made personally by an authorized agent of the Commission or by mailing in a sealed envelope, registered, with postage prepaid. (1949, c. 989, s. 1.)

Cross References.—As to fees of officers, see § 162-6. As to penalty upon sheriff for failing to execute and return process, see § 162-14.

Editor's Note.—Prior to the 1949 revision

of this article, the subject matter of this section was covered by § 62-17, and this section related to the issuance and service of subpoenas, now covered by § 62-15.

§ 62-17. Bonds.—All bonds or undertakings required to be given by any of the provisions of this chapter shall be payable to the State of North Carolina, and may be sued on as are other undertakings which are payable to the State. (1949, c. 989, s. 1.)

Editor's Note.—Prior to the 1949 revision of this article, this section dealt with service of process and notices and corre-

sponded to present § 62-16, and bonds were covered by § 62-18.

§ 62-18. Rules of evidence.—In hearings and investigations conducted under the provisions of this chapter, the Commission shall apply the rules of evidence applicable in civil actions in the superior court, in so far as practicable, but no decision or order of the Commission shall be made or entered in any such proceeding unless the same is supported by competent, material and substantial evidence upon consideration of the whole record. Oral evidence shall be taken only on oath or affirmation. The rules of privilege shall be effective to the same extent that they are now or hereafter recognized in civil actions in the superior court. The Commission may exclude incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence. All evidence, including records and documents in the possession of the Commission of which it desires to avail itself, shall be made a part of the record in the case by definite reference thereto at the hearing. Every party to a proceeding shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues, to impeach any witnesses regardless of which party first called such witnesses to testify and to rebut the evidence against him. If a

respondent does not testify in his own behalf, he may be called and examined as if under cross-examination. (1949, c. 989, s. 1.)

Cross Reference.—As to rules of evidence generally, see § 8-1 et seq.

Editor's Note.—Prior to the 1949 revision of this article, this section dealt with bonds

or undertakings and corresponded to present § 62-17, and rules of evidence were covered by § 62-15.

§ 62-19. Depositions.—The Commission or any party to a proceeding may take and use depositions of witnesses in the same manner as provided by law for the taking and use of depositions in civil actions in the superior court. (1949, c. 989, s. 1.)

Cross Reference.—For cases decided under this section as it stood prior to the 1949 revision of this article, see notes to §§ 62-26.6, 62-26.8.

Editor's Note.—Prior to the 1949 revision

of this article, this section related to judgments of the Utilities Commission and appeals therefrom. For present provisions as to final orders of Commission and appeals, see § 62-26.3 et seq.

§ 62-20. Use of affidavits.—At any time, ten or more days prior to a hearing or a continued hearing, any party or the Commission may send by registered mail or deliver to the opposing parties a copy of any affidavit proposed to be used in evidence, together with the notice as herein provided. Unless an opposing party or the Commission at least five days prior to the hearing if the affidavit and notice are received at least twenty days prior to such hearing, otherwise at any time prior to or during such hearing sends by registered mail or delivers to the proponent a request to cross-examine the affiant at the hearing, the right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant at the hearing is not afforded after request therefor is made as herein provided, the affidavit shall not be received in evidence. The notice accompanying the affidavit shall set forth the name and address of the affiant and shall contain a statement that the affiant will not be called to testify orally and will not be subject to cross-examination unless the opposing parties or the Commission demand the right of cross-examination by notice mailed or delivered to the proponent at least five days prior to the hearing if the notice and affidavit are received at least twenty days prior to such hearing otherwise at any time prior to or during such hearing. (1949, c. 989, s. 1.)

Cross Reference.—For cases decided under this section as it stood prior to the 1949 revision of this article, see notes to §§ 62-26.6, 62-26.8, 62-26.10.

Editor's Note.—Prior to the 1949 revision

of this article, this section related to appeals from judgments of the Utilities Commission. For present provisions as to appeals, see § 62-26.6 et seq.

§ 62-21. Attorney General may intervene in certain cases.—The Attorney General shall, in cases in which in his opinion the public interest so requires, or upon the request of the Governor or of the Commission, attend or assign an assistant to attend any hearing before the Commission or an examiner and conduct the examination of witnesses and otherwise participate in said hearing on behalf of the State. (1949, c. 989, s. 1.)

Cross Reference.—For cases decided under this section as it stood prior to the 1949 revision of this article, see notes to §§ 62-26.8, 62-26.10.

Editor's Note.—Prior to the 1949 revision of this article, this section related to the

docketing of appeals and priority of trial, matters now covered by § 62-26.7, and the manner of trying appeals, which is now governed by §§ 62-26.6, 62-26.9 and 62-26.10.

§ 62-22. Stipulations and agreements.—In all contested proceedings the Commission, by prehearing conferences and in such other manner as it may deem expedient and in the public interest, shall encourage the parties and their counsel to make and enter stipulations of record for the purpose of eliminating

the necessity of proof of all facts which may be admitted, the authenticity of documentary evidence, the use of exhibits, and the clarification of the issues of fact and law. The Commission may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default. (1949, c. 989, s. 1.)

Editor's Note.—Prior to the 1949 revision of this article, this section provided for hearing an appeal from a decision of the

Utilities Commission at chambers. Procedure on appeal is now covered by § 62-26.6 et seq.

§ 62-23. Hearings to be public; record of proceedings.—All hearings before the Commission or its examiners shall be public, and shall be conducted in accordance with such general rules and regulations as the Commission may prescribe. A full and complete record shall be kept of all proceedings had before the Commission or its examiners, on any formal hearing, and all testimony shall be taken by a reporter appointed by the Commission. Any party to a proceeding shall be entitled to a copy of the record upon the payment of the reasonable cost thereof as determined by the Commission. (1949, c. 989, s. 1.)

Cross Reference.—For cases construing this section as it stood prior to the 1949 revision of this article, see note to § 62-26.12.

Editor's Note.—Prior to the 1949 revision of this article, this section related to appeals to the Supreme Court, a subject now covered by § 62-26.12.

§ 62-24. Complaints against public utilities.—Complaints may be made by the Commission on its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation or any agency of the State of North Carolina or any electric membership corporation organized under chapter 291 of the Public Laws of 1935, as amended, having an interest in the subject matter of such complaint by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or charge heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, charge, schedule, classification, rule, regulation or practice is unjust and unreasonable. Upon good cause shown and in compliance with the rules of the Commission, the Commission shall also allow any interested person or organization, having an interest in the subject matter of such complaint and authorized to file a complaint, to intervene in any pending proceeding. The Commission, by regulation, may prescribe the form of complaints filed under this section, and may in its discretion order two or more complaints dealing with the same subject matter to be joined in one hearing and thereafter no motion shall be allowed for the misjoinder of causes of action or misjoinder or nonjoinder of parties. Unless the Commission shall determine, upon consideration of the complaint or otherwise, and after notice to the complainant and after opportunity to be heard that no reasonable ground exists for an investigation of such complaint, the Commission shall fix a time and place for hearing, after reasonable notice to the complainant and the utility complained of, which notice shall be not less than ten days before the time set for such hearing. (1949, c. 989, s. 1.)

Editor's Note.—Chapter 291 of Public Laws 1935, referred to in this section, was codified as §§ 117-6 to 117-27.

Prior to the 1949 revision of this article, this section provided that a judgment of

the superior court approving or confirming freight or passenger rates fixed by the Commission should not be vacated upon appeal to the Supreme Court.

§ 62-25. Complaints by public utilities.—Any public utility shall have the right to complain on any of the grounds upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases, except that the complaint and notice of hearing shall be served

by the Commission upon such interested parties as it may designate. (1949, c. 989, s. 1.)

Cross Reference.—For cases construing this section as it stood prior to the 1949 revision of this article, see note to § 62-26.13.

Editor's Note.—Prior to the 1949 revision

of this article, this section related to enforcement of judgments on appeal by mandamus, a subject now covered by § 62-26.13.

§ 62-26. Burden of proof; Commission may make rules of practice.

—In all proceedings instituted by the Commission for the purpose of investigating any rate, charge, schedule, classification, rule, regulation or practice, the burden of proof shall be upon the carrier or public utility whose rate, charge, schedule, classification, rule, regulation or practice is under investigation to show that the same is just and reasonable. In all other proceedings the burden of proof shall be upon the complainant. Except as otherwise provided in this chapter, the Utilities Commission is authorized to formulate and promulgate rules of practice. (1949, c. 989, s. 1.)

Cross Reference.—For cases construing this section as it stood before the 1949 revision of this article, see note to § 62-26.14.

Editor's Note.—Prior to the 1949 revision of this article, this section related to peremptory mandamus to enforce orders of the Commission, a subject now covered by § 62-26.14. Rules of practice were formerly covered by § 62-12. See also § 62-26.3.

Rules Must Not Be Contrary to Statutes.—It was held under former § 62-12, to which this section corresponds, that while the power of the legislature to delegate authority to an administrative agency of the State to prescribe rules and regulations for the due and orderly per-

formance of its public functions is unquestioned, this did not authorize the formulation of rules contrary to the statute. *State v. Atlantic Coast Line R. Co.*, 224 N. C. 283, 29 S. E. (2d) 912 (1944).

Challenging Validity of Rules by Appeal.

—No procedure for appeals to the courts, from rules and regulations of the Utilities Commission, was prescribed by this article as it stood prior to the revision of 1949, hence it was held that the validity of such rules could not be challenged by appeal. *State v. Atlantic Greyhound Corp.*, 224 N. C. 293, 29 S. E. (2d) 909 (1944); *Utilities Comm. v. Atlantic Greyhound Corp.*, 224 N. C. 672, 32 S. E. (2d) 23 (1944). See § 62-26.10.

§ 62-26.1. Hearings by the Commission, a commissioner or examiner.—Except as otherwise provided in this chapter, any matter requiring a hearing shall be heard and decided by the Commission or shall, by written order of the Commission, be referred to one of the commissioners or a qualified member of the Commission staff as examiner for hearing, report and recommendation of an appropriate order or decision thereon. Subject to the limitations prescribed in this article, a commissioner or examiner, to whom a hearing has been referred by order of the Commission, shall have all the rights, duties, powers and jurisdiction conferred by this chapter upon the Commission. The Commission, in its discretion, may direct any hearing by the Commission or any commissioner or examiner to be held in such place or places within the State of North Carolina as it may determine to be in the public interest and as will best serve the convenience of interested parties. Before any member of the Commission staff enters upon the performance of duties as an examiner, he shall first take, subscribe to and file with the Commission an oath similar to the oath required of members of the Commission. (1949, c. 989, s. 1.)

§ 62-26.2. Recommended decision of a commissioner or examiner.—Any report made or order or decision recommended by a commissioner or examiner with respect to any matter referred to him for hearing shall be in writing and shall set forth separately his findings of fact and conclusions of law and shall be filed with the Commission. Copy of such recommended order, report and findings shall be served upon the parties in interest who have appeared in the proceeding. (1949, c. 989, s. 1.)

§ 62-26.3. Rules of practice.—Prior to each decision or order by the Commission in a proceeding initially heard by it and prior to any recommended decision or order of a commissioner or examiner, the parties shall be afforded an opportunity to submit, within the time prescribed by order entered in the cause, unless further extended by order of the Commission for the consideration of the Commission, commissioner, or examiner, as the case may be, proposed findings of fact and conclusions of law and brief. Within the time prescribed by the commissioner or examiner the parties shall be afforded an opportunity to file exceptions to his recommended decision or order and brief in support thereof, provided the time so fixed shall be not less than ten days from the receipt by such party of such recommended decision or order. The record shall show the ruling upon each requested finding and conclusion or exception. All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include (1) findings and conclusions and the reasons or basis therefor upon all the material issues of fact, law, or discretion presented in the record, and (2) the appropriate rule, order, sanction, relief, or statement of denial thereof. In all contested proceedings in which a commissioner or examiner has filed a report, recommended decision or order to which exceptions have been filed by one or more parties to the proceeding, the Commission, before making its final decision or order, shall afford the parties an opportunity for oral arguments. When no exceptions are filed within the time specified to a recommended decision or order, such recommended decision or order shall become the order of the Commission and shall immediately become effective unless the order is stayed or postponed by the Commission, provided, the Commission may, on its own motion, review any such matter and take action thereon as if exceptions thereto had been filed. When exceptions are filed, as herein provided, it shall be the duty of the Commission to consider the same and if sufficient reason appears therefor, to grant such review or make such order or hold or authorize such further hearing or proceeding in the premises as may be necessary or proper to carry out the purposes of this chapter. The Commission, after review, upon the whole record, or as supplemented by a further hearing, shall decide the matter in controversy and make appropriate order or decision thereon. (1949, c. 989, s. 1.)

§ 62-26.4. Final orders and decisions; service; compliance.—A copy of every final order or decision under the seal of the Commission, shall be served by registered mail upon the person, corporation, or municipal corporation against whom it runs or his attorney and notice thereof shall be given to the other parties to the proceeding or their attorney. Such order shall take effect and become operative as designated therein and shall continue in force either for a period which may be designated therein, or until changed or revoked by the Commission. If an order cannot, in the judgment of the Commission, be complied with within the time designated therein, the Commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. (1949, c. 989, s. 1.)

§ 62-26.5. Powers of Commission to rescind, alter or amend a prior order or decision.—The Commission may at any time upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions. (1949, c. 989, s. 1.)

§ 62-26.6. Rehearing; right of appeal.—No party to a proceeding before the Commission may appeal from any final order or decision of the Com-

mission unless he first petition for a rehearing as provided in this section. Within twenty days after the entry of any final order or decision, or within such time thereafter as may be fixed by the Commission, by order made within such twenty days, any party aggrieved by such decision or order may file a petition for rehearing with the Commission, which petition shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unlawful, unjust, unreasonable or unwarranted. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought shall be either granted or denied before such effective date, or the order shall then be suspended until such application is granted or denied. Any application for rehearing made within less than ten days before the effective date of the order as to which a rehearing is sought, and not granted within twenty days shall be deemed to be denied, unless the effective date of the order is extended for the period of the pendency of the application. If the application for rehearing is granted, the Commission shall proceed to hear and decide the matter with all dispatch. The Commission may decide the questions of law and fact raised by the petition to rehear upon the record previously made or order its record reopened and take additional evidence and make its decision upon the original record as amended. Within thirty days after the rendition of a decision on rehearing, if the decision fails to grant the full relief prayed for in the petition, or within thirty days after a decision becomes final by reason of the failure of the Commission to act, the petitioner may appeal to the superior court by filing written notice of such appeal with the Commission and serving a copy thereof upon the original complainant, if any, and mailing a copy to each party to the proceeding to the addresses as they appear in the files of the Commission in the proceeding. The failure of any party, other than the complainant and the Commission, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal. Within ten days after the filing of the notice of appeal, unless the time be extended by order of the court or by consent of the parties, the Commission shall transmit the entire record in the proceeding, or a copy thereof, certified under the seal of the Commission, to the superior court of a county agreed upon by the parties, or in the absence of such agreement to the superior court of a county in which the business involved in the proceeding is conducted, or is proposed to be conducted, or in which the remedy or relief sought is to be applied or enforced. The judge holding the courts of the county to which the record is sent or the resident judge of the judicial district embracing said county shall hear and determine all matters arising on such appeal, as in this article provided, and may, in the exercise of discretion, remove the case to any other county. After final determination of the case on appeal, the clerk of the superior court shall return to the Commission such records as were transmitted by it to such court, together with a certified copy of the decision of the court. (1949, c. 989, s. 1.)

Editor's Note.—All of the cases in the following note were decided before the 1949 revision of this article, and construe former §§ 62-19 and 62-20, to which this section corresponds.

Powers and Jurisdiction of Commission.—Under this article as it stood prior to the revision of 1949, it was held that, for the purpose of making investigations and conducting hearings, the legislature had constituted the North Carolina Utilities Commission a court of record, with all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure was prescribed and

authorized, with the right in "any party affected thereby" to appeal "from all decisions or determinations made by the Utilities Commission." *State v. Atlantic Greyhound Corp.*, 224 N. C. 293, 29 S. E. (2d) 909 (1944); *Utilities Comm. v. Atlantic Greyhound Corp.*, 224 N. C. 672, 32 S. E. (2d) 23 (1944). See § 62-12.

Orders of Commission Need No Confirmation.—The Utilities Commission is a State administrative agency of original and final jurisdiction, and its orders require no confirmation by any court to be effective. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824 (1940).

Rehearing upon Exceptions.—Under

this article as it stood prior to the 1949 revision, it was held that the Utilities Commission was not authorized to grant rehearings except in the manner prescribed by former § 62-20, to which this section corresponds. *State v. Norfolk Southern Ry. Co.*, 224 N. C. 762, 32 S. E. (2d) 346 (1944).

Appeal to Superior Court.—Under former § 62-20 appeal from the Commission must be to the superior court. *Pate v. Wilmington, etc., R. Co.*, 122 N. C. 877, 29 S. E. 334 (1898).

Jurisdiction of Superior Court—Dismissal.—The jurisdiction of the superior court with respect to the trial of law and fact on appeal under former § 62-20 was derivative and not original, and therefore if the Commission was without jurisdiction of the proceeding in which the order was made, from which the appeal was taken, because of the absence of a necessary party, or upon any other ground, the superior court was likewise without jurisdiction, and the proceeding pending therein, upon appeal, should be dismissed by said court. *State v. Southern Ry. Co.*, 196 N. C. 190, 145 S. E. 19 (1928).

Independent Action to Restrain Exercise of Rights Granted by Commission.—Plaintiffs instituted action against a competing carrier to restrain it from exercising rights given it by orders of the Utilities Commission amending its franchise. The orders were entered in proceedings to which plaintiffs were parties. It was held that plaintiffs had adequate remedy for the protection of their rights by appeal under former §§ 62-19 and 62-20, and judgment sustaining defendant's demurrer in the independent action was proper. *Atlantic Greyhound Corp. v. North Carolina Utilities Comm.*, 229 N. C. 31, 47 S. E. (2d) 473 (1948).

Right of Appeal Confined to Parties.—Former § 62-20 distinctly confined the right of appeal to a party to the proceeding. *North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co.*, 170 N. C. 560, 87 S. E. 785 (1916).

The right of appeal conferred by former § 62-20 was limited to a party to the proceeding. For purposes of appeal, those who had no property or proprietary rights which were or might be affected by orders of the Commission were not such parties. An appeal by persons who were not parties to the proceeding would be dismissed by the superior court, for the reason that said court acquired no jurisdiction by such appeal. *State v. Southern Ry. Co.*, 196 N. C. 190, 145 S. E. 19 (1928); *State v. Kinston*, 221 N. C. 359, 20 S. E. (2d) 322 (1942).

"Any Party Affected".—Under the provisions of former § 62-20, "any party affected" by the order of the Commission as to rates or charges for passengers by a street railway company, etc., was given the right of appeal to the court from such order. In *re Southern Pub. Utilities Co.*, 179 N. C. 151, 101 S. E. 619 (1919). This section refers to "any party aggrieved."

The former statute, providing that "from all decisions or determinations made by the Corporation [now Utilities] Commission any party affected thereby shall be entitled to an appeal," must necessarily mean from a decision which affects or purports to affect some right or interest of a party to the controversy and is in some way determinative of some material question involved. *State v. Southern R. Co.*, 147 N. C. 483, 61 S. E. 271 (1908).

It is the duty of a municipality granting a charter to a corporation to operate a streetcar system therein which, by contract, has limited the fares to be charged passengers within a certain amount, to represent the public in proceedings upon a petition filed by the railway company before the Commission requesting that it be permitted to raise the fares beyond those limited in the contract, and thus the municipality might appeal through the courts as former § 62-20 prescribed, when the order was adverse to it or the interest it represented, as a "party affected by the decision and determination of the Commission," expressly provided for by the statute. In *re Southern Pub. Utilities Co.*, 179 N. C. 151, 101 S. E. 619 (1919).

Who Were Not Parties under Former § 62-20.—Citizens seeking to have a railway station moved could not appeal from the Commission's decision, under former § 62-20, because they were not parties. *North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co.*, 170 N. C. 560, 87 S. E. 785 (1916).

Notice Mandatory.—Under former § 62-20, it was held that the statutory notice of an appeal by a railroad company from an order of the Commission was mandatory, and could not be extended by the consent of the parties of record. *State v. Southern R. Co.*, 185 N. C. 435, 117 S. E. 563 (1923); *State v. Norfolk Southern Ry. Co.*, 224 N. C. 762, 32 S. E. (2d) 346 (1944).

Notice to Complaining Party under Former § 62-20.—When notice of appeal to the superior court was given to the Commission by a railroad company, and other requirements of former § 62-20 relating thereto were met by the company, it was sufficient without giving notice of the appeal to the complaining party in the pro-

ceedings had before the Commission, as upon this appeal the statute made the Commission the party plaintiff. *North Carolina Corp. Comm. v. Southern R. Co.*, 151 N. C. 447, 66 S. E. 427 (1909).

Removal to Federal Courts.—Assuming that an order of the Commission made to compel a carrier to change the location and conditions of its depot to promote the convenience, security and accommodation of the public would be an invasion of interstate commerce, this does not transform the proceedings in which the order is made into “a suit at law or in equity,” as such removable from the superior court of the State to an inferior federal tribunal, upon the ground of diverse citizenship. *North Carolina Corp. Comm. v. Southern R. Co.*, 151 N. C. 447, 66 S. E. 427 (1909).

In proceedings for the removal of a cause from the State to the federal courts upon the question of diversity of citizenship under the federal statute applicable, the State court is not bound to surrender its jurisdiction until a case has been made which, on the face of the petition, shows the petitioner has a right to the transfer of the cause to the federal courts. *North Carolina Corp. Comm. v. Southern R. Co.*, 151 N. C. 447, 66 S. E. 427 (1909).

Final Process.—Under this article as it stood before the 1949 revision, it was held that the Commission had no power to enforce its orders and decrees by final proc-

ess issuing directly therefrom, and for such purpose resort must be had to ordinary courts, either by independent proceedings or in proper instances by process issued in cases carried before such courts on appeal. *State v. Southern R. Co.*, 147 N. C. 483, 61 S. E. 271 (1908). See §§ 62-26.13, 62-26.14.

Removal of Franchise Restriction as to Carriage of Passengers by Motor Carrier.—

Former § 62-20 authorized a petitioner to appeal to the superior court from an adverse ruling of the Utilities Commission on its petition for the removal from its franchise of a restriction in regard to the carriage of passengers, and the contention that no appeal would lie from such order because the right of appeal was governed by the motor carrier laws authorizing an appeal from an order affecting franchise only when entered for violation of law, was untenable. *Utilities Comm. v. Carolina Scenic Coach Co.*, 216 N. C. 325, 4 S. E. (2d) 897 (1939). See §§ 62-121.43 to 62-121.79.

Petitioner had the right to appeal to the superior court from the denial of its petition for the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between the said cities. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824 (1940).

§ 62-26.7. Appeal docketed; priority of trial.—The cause shall be entitled “State of North Carolina on relation of the Utilities Commission against (here insert name of appellant)”. It shall be placed on the civil issue docket of such court and shall have precedence over other civil actions. (1949, c. 989, s. 1.)

Editor's Note.—Prior to the 1949 revision of this article, the subject matter of this section was covered by § 62-21.

§ 62-26.8. Parties on appeal.—In any appeal to the superior court, the complainant in the original complaint before the Commission shall be a party to the record and each of the parties to the proceeding before the Commission shall have a right to appear and participate in said appeal. (1949, c. 989, s. 1.)

Former Law.—Under this article as it stood before the 1949 revision, in case of an appeal to the courts, the only authorized parties were the State of North Carolina on relation of the Commission as plaintiff and the railroad or other corporation as defendant. No one else could appeal, because there were, and under the statute could be, no other parties, and the right to appeal was confined to the parties

to the proceeding. *North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co.*, 170 N. C. 560, 87 S. E. 785 (1916).

The Utilities Commission is a party of record in a proceeding before it, and upon appeal the Commission becomes the party plaintiff. *State v. Norfolk Southern Ry. Co.*, 224 N. C. 762, 32 S. E. (2d) 346 (1944).

§ 62-26.9. No evidence admitted on appeal; remission for further evidence.—No evidence shall be received at the hearing on appeal but if any party shall satisfy the court that evidence has been discovered since the hearing before the Commission that could not have been obtained for use at that hearing

by the exercise of reasonable diligence, and will materially affect the merits of the case, the court may, in its discretion, remand the record and proceedings to the Commission with directions to take such subsequently discovered evidence, and after consideration thereof, to make such order as the Commission may deem proper, from which order an appeal shall lie as in the case of any other final order, from which order an appeal may be taken as provided in G. S. § 62-26.6, except that no additional petition for rehearing shall be required. (1949, c. 989, s. 1.)

Cross Reference.—See note to § 62-26.10.

§ 62-26.10. Record on appeal; extent of review.—On appeal the court shall review the proceeding without a jury in chambers or at term time and such review shall be confined to the record as certified by the Commission to the court, except that in cases of alleged irregularities in procedure before the Commission, not shown in the record, testimony thereon may be taken in the court. So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional provisions, or
- (b) in excess of statutory authority or jurisdiction of the Commission, or
- (c) made upon unlawful proceedings, or
- (d) affected by other errors of law, or
- (e) unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
- (f) arbitrary or capricious.

The court shall also compel action of the Commission unlawfully withheld or unlawfully or unreasonably delayed. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his petition for rehearing by the Commission. Upon any appeal to the superior court, the rates fixed, or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this chapter, shall be *prima facie* just and reasonable. If on any appeal the court may determine that an issue is presented which, for constitutional reasons, must be submitted to a jury, the court may order a jury trial as to such issue. (1949, c. 989, s. 1.)

Editor's Note.—All of the cases in the following note were decided before the 1949 revision of this article, and construe former §§ 62-20 and 62-21, corresponding to § 62-26.6 and this section. It should be noted that the 1949 revision made many changes in procedure, and especially in the extent of review.

Prior to the 1949 revision of this article, on appeal to the superior court the trial was under the same rules and regulations applicable in other civil causes, save and except the *prima facie* effect to be given the decision or determination of the Commission. *State v. Great Southern Trucking Co.*, 223 N. C. 687, 28 S. E. (2d) 201 (1943).

Appeal under Former Law Was Trial de Novo.—Upon appeal under the former statute by a party to a proceeding before the Corporation [now Utilities] Commission from an order made therein under §§ 62-42 and 62-43, the superior court had jurisdiction to try and determine both issues of law and issues of fact, duly presented by assignments of error based upon exceptions duly taken by the appellant during the hearing before the Commission. The trial of such issues by the superior court was *de novo*. *State v. Southern Ry. Co.*, 196 N. C. 190, 145 S. E. 19 (1928), citing *S. v. R.*, 161 N. C. 270, 76 S. E. 554 (1912).

Under this article as it stood before the

1949 revision, the trial was *de novo*, and from thence only would a further appeal lie to the Supreme Court, governed by the rule that such an appeal must not be fragmentary, but shall be from a final judgment or one final in its nature. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178 (1923).

A provision of former § 62-21, to which this section corresponds, that on appeal the trial should be "under the same rules and regulations as are prescribed for the trial of other civil causes," was interpreted to mean that the trial should be *de novo*. *State v. Great Southern Trucking Co.*, 223 N. C. 687, 28 S. E. (2d) 201 (1943), citing *North Carolina Corp. Comm. v. Winston-Salem Southbound R. Co.*, 170 N. C. 560, 87 S. E. 785 (1916).

Appeals from the Utilities Commissioner were analogous to appeals from a justice of the peace rather than appeals from a referee, and since the trial in the superior court was *de novo* upon issues of fact raised by the exceptions, the superior court properly refused to pass upon appellant's exceptions to the findings of fact *seriatim*. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824 (1940).

Decision of Commission Was "Prima Facie Just and Reasonable."—While on appeal from the Utility Commission to the superior court the provision of former § 62-21 was interpreted to mean that the trial should be *de novo*, the section also provided that the decision or determination of the Commission "shall be *prima facie* just and reasonable." *State v. Great Southern Trucking Co.*, 223 N. C. 687, 28 S. E. (2d) 201 (1943).

Findings of Fact Not Conclusive.—Former §§ 62-20 and 62-21 did not contain any provision that the findings of fact by the Utilities Commission should be conclusive on appeal. *State v. Willis Barber, etc., Shop*, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Presumptions.—The provision of the former statute that the decision of the Utilities Commissioner should be deemed *prima facie* just and reasonable, merely raised a presumption of law, and placed the burden of going forward with the proof upon the party appealing from the decision, but even if the section had been construed to raise a presumption of fact, an instruction that the findings and decision of the Commissioner were *prima facie* just and reasonable gave appellee the benefit of a presumption of fact when the evidence fully apprised the jury of the substance and purport of the order. *State v. Carolina Scenic*

Coach Co., 218 N. C. 233, 10 S. E. (2d) 824 (1940).

Issues of Fact.—While on appeal under the former law from the denial of a petition to remove certain restrictions from petitioner's franchise, the point at issue was the reasonableness of the Commissioner's order, which was a question of law, nevertheless the reasonableness of the order depended upon the attendant facts, and exceptions to the Commissioner's findings upon which his order was predicated, raised issues of fact for the determination of the jury. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824 (1940).

Petitioner filed a petition requesting the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between the said cities. The Utilities Commissioner denied the petition upon his findings, among others, that the service between the two cities furnished by another carrier was ample, that there was no necessity for permitting petitioner to furnish service between the two cities, and that the removal of the restriction was not demanded by the public interest. Upon appeal, under the former law, it was held that the exceptions raised issues of fact to be determined by a jury, a high degree of formality in separating findings and conclusions of fact from conclusions of law not being required, and the appeal was properly transferred to the civil issue docket and tried before a jury. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824 (1940).

Question for Decision on Appeal.—Petitioner filed a petition requesting the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between said cities. Upon appeal to the superior court under the former law from the denial of the petition, the carrier intervening and opposing the granting of the petition objected to the refusal of the court to submit an issue as to whether the public interest demanded additional transportation facilities between the two cities and objected to the submission of the issue as to whether the public convenience and necessity required the removal of the restriction from the petitioner's franchise, contending that the sole question within the superior court's jurisdiction was whether the public convenience and necessity required additional service, and that upon an affirmative finding to this issue in the superior court the matter should be remanded to the Com-

missioner in order that he might select the person or corporation to which he would award the franchise for such additional service. It was held that the question for the decision in the superior court upon appeal was whether petitioner should be given the relief prayed, and not whether the Commissioner should be sustained in his ruling, and the superior court had jurisdiction to determine the matter and grant the relief prayed for upon an affirmative finding by the jury upon the issue submitted. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824 (1940).

Evidence.—On appeal from an order of the Commission, under former § 62-21 the trial was *de novo* tried under the same rules and regulations as are prescribed for the trial of other civil causes; and any relevant evidence could be there introduced, whether it had theretofore been introduced before the Commission or not.

§ 62-26.11. **Relief pending review on appeal.**—Pending judicial review, the Commission is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, except as provided in G. S. § 62-136, the judge of the superior court is authorized to issue all necessary and appropriate process to postpone the effective date of any action by the Commission or take such action as may be necessary to preserve status or rights of any of the parties pending conclusion of the proceedings on appeal. The court may require the applicant for such stay to post adequate bond as required by the court. (1949, c. 989, s. 1.)

§ 62-26.12. **Appeal to Supreme Court.**—Any party may appeal to the Supreme Court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that the Utilities Commission, if it shall appeal, shall not be required to give any undertaking or make any deposit to assure the cost of such appeal, and such court may advance the cause on its docket so as to give the same a speedy hearing. (1949, c. 989, s. 1.)

Cross Reference.—As to appeal generally, see § 1-268 et seq.

Editor's Note.—Prior to the 1949 revision of this article, appeals to the Supreme Court were provided for in § 62-23.

An appeal does not lie directly from the Commission to the Supreme Court. *North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co.*, 170 N. C. 560, 568, 87 S. E. 785 (1916), citing *Pate v. Wilmington, etc., R.*

State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 76 S. E. 554 (1912). See § 62-26.9.

In a case wherein a union passenger depot had been ordered by the Commission it was reversible error in the superior court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values in a near-by town, where the present station of one of the roads is located. *State v. Seaboard Air Line, etc., R. Co.*, 161 N. C. 270, 76 S. E. 554 (1912).

Affirmance of Decision of Commission.—Under former § 62-21, in the absence of a showing that the decision of the Utilities Commission was clearly unreasonable and unjust, appellee, on appeal to the superior court, was entitled to an affirmance of the decision of the Commission. *State v. Carolina Coach Co.*, 224 N. C. 390, 30 S. E. (2d) 328 (1944).

Co., 122 N. C. 877, 29 S. E. 334 (1898).

Right Formerly Confined to State and Corporation.—Former § 62-23, which, before the 1949 revision of this article, corresponded to this section, confined the right of appeal to the State and the corporation whose legal rights were affected by the Commission's order. *North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co.*, 170 N. C. 560, 87 S. E. 785 (1916).

§ 62-26.13. **Judgment on appeal enforced by mandamus.**—In all cases in which, upon appeal, a judgment of the Utilities Commission is affirmed, in whole or in part, the appellate court shall embrace in its decree a mandamus to the appellant to put said order in force, or so much thereof as shall be affirmed, or the appellate court may make such other order as it deems appropriate. (1949, c. 989, s. 1.)

Editor's Note.—Prior to the 1949 revision of this article, § 62-25 provided for enforcement of judgments on appeal by man-

damus.

Performance Compelled by Mandamus.—Under former § 62-25, corresponding to

this section, it was said that the State court could compel performance only by resort to the high prerogative writ of mandamus, and that by authority of the statute. *North Carolina Corp. Comm. v. Southern R. Co.*, 151 N. C. 447, 66 S. E. 427 (1909).

Under former § 62-25, the right to a mandamus to enforce a valid order was given in causes which had been carried to the superior court by appeal. *State v. Southern R. Co.*, 147 N. C. 483, 61 S. E. 271 (1908).

§ 62-26.14. Peremptory mandamus to enforce order, when no appeal.—If no appeal is taken from an order, decision or judgment of the Utilities Commission within the time prescribed by law and the utility, corporation, firm or person to which the order, decision or judgment is directed, fails to put the same in operation, as therein required, the Utilities Commission may apply to the judge riding the superior court district which embraces Wake County or to the resident judge of said district at chambers, or to the judge holding the superior court in any judicial district in which the business is conducted upon ten days' notice, for a peremptory mandamus upon said utility, corporation, firm or person for the putting in force of said order, decision or judgment; and if said judge shall find that the order of said Commission was valid and within the scope of its powers, he shall issue such peremptory mandamus. An appeal shall lie to the Supreme Court in behalf of the Utilities Commission, or the defendant utility, corporation, firm or person, from the refusal or the granting of such peremptory mandamus. The remedy herein prescribed for enforcement of orders of the Commission is in addition to other remedies prescribed by law. (1949, c. 989, s. 1.)

Editor's Note.—All of the cases in the following note were decided before the 1949 revision of this article, and construe former § 62-26, to which this section corresponds.

Orders of Commission Are Not Judgments.—The Commission makes such orders as the circumstances of the case justify, but these orders are not judgments of a court. The Commission cannot issue execution to enforce them, they simply serve as the basis for judicial action in the superior court to enforce them or to punish their violation. 2 N. C. Law Rev. 74. See *Mayo v. Western Union Tel. Co.*, 112 N. C. 343, 16 S. E. 1006 (1893).

Mandamus to Enforce Final Order.—Where the Commission had ordered two railroad companies to erect a union depot at a junction after a hearing upon the petition of the citizens of the town, and the railroads had lost or waived their statutory right to appeal, such order was regarded, under this article as it stood before the 1949 revision, as a final judgment, and mandamus proceedings to compel the enforcement of the final order upon

failure of the railroads to except and appeal therefrom was the remedy authorized by former § 62-26, corresponding to this section. *State v. Southern R. Co.*, 185 N. C. 435, 117 S. E. 563 (1923).

Independent Proceedings for Mandamus.—Under former § 62-26 an appeal might be had by independent proceedings for mandamus to enforce a valid order from which no appeal had been taken. *State v. Southern R. Co.*, 147 N. C. 483, 61 S. E. 271 (1908).

Former § 62-26 referred to the corporation "affected" by the order instead of the corporation "to which the order *** is directed." It was held that the language of the former section indicated that the right of appeal from an order of the Commission was limited to the State and the corporation whose legal rights were affected by the order, under former § 62-20, which conferred the right of appeal on "any party affected." *North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co.*, 170 N. C. 560, 87 S. E. 785 (1916). See § 62-26.6 and note.

§ 62-26.15. Procedural provisions not repealed.—Nothing in this article shall be construed to repeal any of the procedural provisions of article 6B and article 7 of chapter 62 of G. S. (1949, c. 989, s. 4.)

ARTICLE 3.

Powers and Duties of the Commission.

§ 62-27. General powers of Commission.—The Utilities Commission

shall have general power and control over the public utilities and public service corporations of the State, and such supervision as may be necessary to carry into full force and effect the laws regulating the companies, corporations, partnerships, and individuals hereinafter referred to, and to fix and regulate the rates charged the public for service, and to require such efficient service to be given as may be reasonably necessary. (1933, c. 134, s. 2; 1941, c. 97.)

Editor's Note.—The Railroad Commission, established in 1891, became the Corporation Commission in 1899. See Consolidated Statutes, §§ 1023-1034; *Abbott v. Beddingfield*, 125 N. C. 256, 34 S. E. 412 (1899); *Corporation Comm. v. Railroad*, 137 N. C. 1, 49 S. E. 191 (1904); 2 N. C. Law Rev. 70. The above-mentioned sections were repealed by Public Laws 1933, c. 134, which created the office of Utilities Commissioner and vested in the Commissioner all of the existing powers, duties, etc., of the former Corporation Commission. The act also provided for two Associate Commissioners to act with the Commissioner in certain instances for the purpose of hearing and determining matters or issues of fact. The office of Utilities Commissioner was abolished by Public Laws 1941, c. 97, which created the North Carolina Utilities Commission and vested said Commission with all the powers, duties, etc., of the Utilities Commissioner, or the Utilities Commissioner and the Associate Commissioners, prescribed in Public Laws 1933, c. 134, and other laws.

For comment on this and subsequent sections, see 12 N. C. Law Rev. 292.

Legislative Power to Regulate.—The general power of the legislature to provide reasonable rules and regulations, directly or through a commission, has been upheld in *Atlantic Exp. Co. v. Wilmington, etc., Railroad*, 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805 (1892); *Corporation*

Comm. v. Seaboard Air Line System, 127 N. C. 283, 37 S. E. 266 (1900). See *Corporation Comm. v. Railroad*, 137 N. C. 1, 49 S. E. 191 (1904).

The power of the legislature, either directly or through appropriate governmental agencies, to establish reasonable regulations for public service corporations in matters affecting the public interests is now universally recognized, and the principle has been approved in well considered decisions dealing directly with the question. *Corporation Comm. v. Railroad*, 137 N. C. 1, 49 S. E. 191 (1904); *Corporation Comm. v. Seaboard Air Line Railroad*, 140 N. C. 239, 52 S. E. 941 (1905); *Atlantic Coast Line Railroad v. Goldsboro*, 155 N. C. 356, 71 S. E. 314 (1911), affirmed in 232 U. S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914); *In re Southern Public Utilities Co.*, 179 N. C. 151, 101 S. E. 619 (1919).

No Interference with Interstate Commerce.—The former Railroad Commission, being concerned solely in domestic affairs and trade, did not interfere with interstate commerce. *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897).

Applied in *City Coach Co. v. Gastonia Transit Co.*, 227 N. C. 391, 42 S. E. (2d) 398 (1947).

Cited in *Russ v. Western Union Tel. Co.*, 222 N. C. 504, 23 S. E. (2d) 681 (1943); *Atlantic Constr. Co. v. Raleigh*, 230 N. C. 365, 53 S. E. (2d) 165 (1949).

§ 62-28. To make and enforce rules for public service corporations.—The Utilities Commission has power to make any necessary and proper rules, orders and regulations for the safety, comfort and convenience of passengers, shippers or patrons of any public service corporation, and to require the observance of and to enforce the same by the company and its employees, such power being the same as that provided in this chapter in respect to railroads and other transportation companies. (1907, c. 469, s. 1a; 1913, c. 127, s. 2; C. S., s. 1037; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to duty of the Utilities Commission to enforce laws relative to the hours of service for employees of carriers, see § 60-58.

Legislative Intent.—There was no intention to give a schedule of the thousands of appliances used in handling the business of common carriers, nor to enumerate the countless dealings between them and their patrons, which the former Corporation Commission should supervise. The clearly

declared purpose was to put the control and supervision of the whole matter in the hands of an impartial commission, with power to make reasonable rules and orders, subject to the right of appeal by either party, the shipper or the carrier, to the courts, instead of leaving such dealing to the unrestricted will of the carrier. *Corporation Comm. v. Atlantic Coast Line R. Co.*, 139 N. C. 126, 51 S. E. 793 (1905).

Power to Make Orders and Regulations.

—The former Corporation Commission was given the power to make orders and regulations for the safety, etc., of shippers or patrons of any public service corporation. *Tilley v. Norfolk, etc., R. Co.*, 162 N. C. 37, 77 S. E. 994 (1913).

§ 62-29. Express and implied powers.—The Utilities Commission shall also have, exercise, and perform all the functions, powers, and duties and have all the responsibilities conferred by this article, and all such other powers and duties as may be necessary or incident to the proper discharge of the duties of its office. (1933, c. 134, s. 6; 1941, c. 97.)

§ 62-30. Supervisory powers.—Under the rules and regulations herein prescribed and subject to the limitations hereinafter set forth, the said Utilities Commission shall have general supervision over the rates charged and the service given, as follows, to wit:

(1) By railroads, street railways, steamboats, canals, express and sleeping-car companies, and all persons, firms or corporations engaged in the carrying of freight or passengers or otherwise engaged as common carriers;

(2) By telephone and telegraph companies and all other companies engaged in the transmission of messages, and by all firms and individuals owning or operating telephone or telegraph lines in the State;

(3) By electric light, power, water, and gas companies, pipe lines originating in North Carolina for the transportation of petroleum products, and corporations, other than such as are municipally owned or conducted, and all other companies, corporations, or individuals engaged in furnishing electricity, electric light current, power, or in transmitting or selling the same or producing the same from the watercourses of this State: Provided, that the exemption given to municipally owned or conducted electric light, power, water and gas companies from supervision by the Utilities Commission shall not apply to municipally owned electric light or power systems which are leased to and operated by private individuals, firms, or corporations.

(4) By all water power and hydroelectric companies or corporations now doing business in this State or which may hereafter engage in doing business in this State, whether organized under the laws of this State or under the laws of any other state or country, and such companies and corporations are deemed to be public service companies and subject to the laws of this State regulating the same;

(5) By flume companies, corporations, other than municipal corporations, or individuals owning or operating public sewerage systems in the State of North Carolina;

And the said Utilities Commission is hereby vested under this section with all power necessary to require and compel any public utility or public service corporation of the kinds herein designated or any other class of public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made to the citizens of the State who may be entitled to use the same under such rules and regulations as may be lawfully prescribed.

The power of control and supervision vested in the Commission under this section with respect to the various classes of public service corporations and individuals engaged in furnishing the public utilities mentioned shall be the same as that vested in it in respect to railroads and other transportation companies. (1913, c. 127, s. 7; C. S., s. 1112(b); 1933, c. 134, s. 3; 1937, c. 108, s. 2; 1941, cc. 59, 97.)

I. General Consideration.

II. Railroads and Other Common Carriers.

III. Telephone and Telegraph Companies.

I. GENERAL CONSIDERATION.

Cross References.—As to municipal control of public utilities, see §§ 160-282 to

160-285. As to report from municipality operating own utilities, see § 62-98.

Editor's Note.—The 1937 amendment inserted the reference to pipe lines in subsection (3).

The first 1941 amendment added the proviso at the end of subsection (3).

The second 1941 amendment, referred

to in the Editor's Note under § 62-1, directed that "Commission" should be substituted for "Commissioner." In bringing this section forward in the General Statutes in 1943, through error "Commissioner" was retained in the first line of the next to last paragraph. In view of the above mentioned directive, and the 1949 amendments to this chapter, which indicate that the present meaning is "Commission," the word "Commissioner," formerly retained, has been changed to read "Commission."

This section is similar to former § 1035 of the Consolidated Statutes. Most of the following cases were decided under that section and are given as an aid in construing the present law, but should be considered in the light of the former law.

Right of State to Regulate.—The right of the State to establish regulations for public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is firmly established. *Efland v. Southern R. Co.*, 146 N. C. 135, 59 S. E. 355 (1907). See *Whiting Mfg. Co. v. Carolina Aluminum Co.*, 207 N. C. 52, 175 S. E. 698 (1934).

Classification Must Not Be Arbitrary.—As to intrastate or domestic matters, the General Assembly has the right to establish regulations for public service corporations and for business enterprises in which the owners have devoted their property to public use, and to apply these regulations to certain classes of pursuits and occupations, imposing these requirements equally on all members of a given class, the limitation of this right of classification being that the same must be on some reasonable ground that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. *Efland v. Southern R. Co.*, 146 N. C. 135, 59 S. E. 355 (1907).

Not a Federal Question.—Whether a regulation of a state railroad commission otherwise legal is arbitrary and unreasonable because beyond the scope of the powers delegated to the commission is not a federal question. *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Fees and Charges Made by Municipality.—The North Carolina Utilities Commission has no jurisdiction to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. *Atlantic Constr. Co. v. Ra-*

leigh, 230 N. C. 365, 53 S. E. (2d) 165 (1949).

Applied in *City Coach Co. v. Gastonia Transit Co.*, 227 N. C. 391, 42 S. E. (2d) 398 (1947).

Cited in *Sinclair v. Moore Cent. R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

II. RAILROADS AND OTHER COMMON CARRIERS.

Legislature May Regulate Directly or Indirectly.—Railroad companies from the public nature of the business by them carried on, and the interest which the public has in their operation, are subject as to their State business to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end. *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Rate Fixing Power May Be Delegated.—The General Assembly has the power to establish a commission to supervise and regulate the rates of common carriers. *Atlantic Exp. Co. v. Wilmington, etc., Railroad*, 111 N. C. 463, 16 S. E. 393 (1892); *Corporation Comm. v. Seaboard Air Line System (Rate Case)*, 127 N. C. 283, 37 S. E. 266 (1900); *Corporation Comm. v. Railroad*, 137 N. C. 114, 49 S. E. 191 (1904); *Corporation Comm. v. Atlantic Coast Line R. Co. ("Track Scales Case")*, 139 N. C. 126, 51 S. E. 793 (1905); *Corporation Comm. v. Seaboard Air Line Railroad*, 140 N. C. 239, 52 S. E. 941 (1905).

When State May Regulate Interstate Commerce.—The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. *Morris, etc., Co. v. Southern Exp. Co.*, 146 N. C. 167, 59 S. E. 667 (1907).

Power of Commission over Railroads.—The former Corporation Commission had general control and supervision of all railroad corporations. *Tilley v. Norfolk, etc., R. Co.*, 162 N. C. 37, 77 S. E. 994 (1913).

Power to Appraise and Assess.—The former Corporation Commission was not clothed with the power of appraising and assessing railroad property. *Southern R. Co. v. North Carolina Corp. Comm.*, 97 F. 513 (1899).

When Power to Regulate Arbitrarily Exercised.—The public power to regulate

railroads and the private right of ownership of such property coexist, and the one does not destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership the exertion is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment. *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

When Duty of Railroad Entails Pecuniary Loss.—The State has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public even though it may entail some pecuniary loss. *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

III. TELEPHONE AND TELEGRAPH COMPANIES.

Telephone Company Subject to State Control.—A telephone company, acting under a quasi-public franchise, is properly classified among the public service corporations, and as such is subject to public

regulation and reasonable control. *Leavell v. Western Union Tel. Co.*, 116 N. C. 211, 21 S. E. 391 (1895); *Godwin v. Carolina Tel. Co.*, 136 N. C. 258, 48 S. E. 813 (1904); *Clinton-Dunn Tel. Co. v. Carolina Tel., etc., Co.*, 159 N. C. 9, 74 S. E. 636 (1912).

A local telephone company having an arrangement for the transmission of long distance messages over the lines of another company for pay, is a public service corporation and comes within the provisions of this section. *Horton v. Interstate Tel., etc., Co.*, 202 N. C. 610, 163 S. E. 694 (1932).

Jurisdiction of Court Not Ousted.—The section giving general control of telephone companies to the former Corporation Commission does not oust the court of its jurisdiction to compel the company to perform a public duty it owes to an individual. *Walls v. Strickland*, 174 N. C. 298, 93 S. E. 857 (1917).

When Telegram Not Interstate Commerce.—See *State v. Western Union Tel. Co.*, 113 N. C. 213, 18 S. E. 389 (1893); *Leavell v. Western Union Tel. Co.*, 116 N. C. 211, 21 S. E. 391 (1895).

§ 62-31. Commission to keep itself informed as to utilities; reduction of rates.—The said Utilities Commission shall at all times be required to keep itself informed as to the public service corporations hereinbefore specified and enumerated, their rates and charges for service, and the service supplied to the citizens of the State and purposes therefor; and it shall at all times be empowered and required to inquire into such service and rates charged therefor, and to fix and determine as herein provided the reasonableness thereof, and upon petition or otherwise to make full inquiry into such rates and charges in behalf of the citizens of the State, and compel and require compliance with the regulations and charges, and final determination fixed therefor under the provisions of this article, and no corporation, association, partnership, or individual, other than carriers of passengers and property by rail, express, highway and/or water, doing business in the State of North Carolina as a public service corporation, or any other corporation herein designated, shall be allowed to increase its rate and charge for service, or change its classification in any manner whatsoever except upon petition duly filed with the Utilities Commission and inquiry held thereon and final determination of the reasonableness and the necessity of any such increase or change in classification or service: Provided, however, that nothing herein shall be construed to prevent any public service corporation under the jurisdiction of the Commission from reducing its rates, either directly or by change in classification. (1933, c. 134, s. 16; 1937, c. 165; 1939, c. 365, ss. 1, 2; 1941, c. 97.)

Editor's Note.—The 1939 amendment changed the latter part of this section and repealed the 1937 amendment which had added a provision as to approval of rate increases in certain cases without a hearing. For a discussion of 1937 amendment, see 15 N. C. Law Rev. 365. For comment on the 1939 amendment, see 17 N. C. Law Rev. 374.

Reduction of Rates.—The proviso to this section deprived the Utilities Commission of jurisdiction over reductions in rates. This means that any railroad acting lawfully, that is, individually and with proper intent, may reduce its own rates free of the control of the Utilities Commission, but it does not mean that it can, acting unlawfully or as a result of a conspiracy with other

railroads, use this uncontrolled power to injure a competitor and it does not follow that conspiracies in violation of chapter 75 of the General Statutes are made legal by the proviso. *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240 (1937).

Where certain carriers by truck sought injunctive relief against railroad carriers for reduction in rates as to certain com-

modities and as between certain localities, it was held that they had no legal right to have their contract price protected against lawful competition from rail carriers, who could, under this section, reduce rates at will. *Carolina Motor Service v. Atlantic Coast Line R. Co.*, 210 N. C. 36, 185 S. E. 479, 104 A. L. R. 1165 (1936).

§ 62-32. To investigate companies and businesses under its control.—The Commission shall from time to time visit the places of business, and investigate the books and papers of all corporations, firms or individuals engaged in the transportation of freight or passengers, the transmission of messages either by telegraph or telephone, or in the furnishing of other public utilities the supervision and control of which is vested in the Utilities Commission to ascertain if all the orders, rules and regulations of the Utilities Commission have been complied with, and shall have full power and authority to examine all officers, agents and employees of such companies, individuals, firms or corporations, and all other persons, under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this chapter. (1899, c. 164, s. 1; Rev., s. 1064; 1913, c. 127, ss. 1, 2, 7; 1917, c. 194; C. S., s. 1060; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-33. System of accounts.—The Utilities Commission may establish a system of accounts to be kept by the public utilities, under its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner in which such accounts shall be kept. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to the power of Commission to require separate accounts for interstate and intrastate business of public service companies, see § 62-140.

§ 62-34. Reports.—The Utilities Commission shall at least once every twelve months require any public utility to file annual reports in such form and of such content as the Commission may require and special reports concerning any matter about which the Commission is authorized to inquire or to keep itself informed, or which it is authorized to enforce. All reports shall be under oath when required by the Commission. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-35. Investigations.—The Utilities Commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or any particular utility. In conducting such investigation the Commission may proceed either with or without a hearing as it may deem best, but shall make no order without affording the parties affected thereby a hearing.

If after such an investigation, or investigation and hearing, the Commission, in its discretion, is of the opinion that the public interest shall be more greatly conserved by an appraisal of any properties in question, the investigation of any particular construction, the audit of any accounts or books, the investigation of any contracts, or the practices, contracts or other relations between the utility in question and any holding or finance agency with which such public utility may be affiliated, it shall be the duty of the Commission to report its findings and recommendation to the Governor and Council of State with request for an allotment from the emergency and contingency fund to defray such expense which may be granted as provided by law for expenditures from such fund or may be denied. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-36. To fix rates for public utilities in cities.—The Utilities Com-

mission shall have full power and authority to fix and establish any and all rates which any public service or quasi public service corporation other than railroads using steam as a motive power shall charge or exact from any person, firm or corporation in any city for the services rendered or commodity furnished. (1917, c. 136, subch. 3, s. 1; C. S., s. 2783; 1933, c. 134, s. 8; 1941, c. 97.)

Municipal Charter Subject to State Powers.—The power conferred by a city charter “to provide water and lights and to contract for same” is subject to the police power of the State, with respect to rates to be charged by a public service corporation under such contracts as the city may make under its charter. *Corporation Comm. v. Henderson Water Co.*, 190 N. C. 70, 128 S. E. 465 (1925).

And Contract Rate May Be Changed.—Although the rate to be charged for water is stipulated by contract between a city and a water company, this may be changed by the Commission if it appears that the rate contracted for is too low, and the one fixed by the Commission is just. The burden of proof is on the one alleging that the rate fixed by the Commission is unreason-

able. *Corporation Comm. v. Henderson Water Co.*, 190 N. C. 70, 128 S. E. 465 (1925).

Right to Injunction against Commission.—A public service corporation, having a contract with a city, applying to the Commission for the increase of the rate contracted for with the city and obtaining partial relief, will not be granted an injunction by the federal court against the Commission on the grounds that the rate is confiscatory, for such increase as is allowed by the Commission is that much more than could have been received under the contract with the city had the Commission refused to act. *Henderson Water Co. v. Corporation Comm.*, 269 U. S. 278, 46 S. Ct. 112, 70 L. Ed. 273 (1925).

§ 62-37. Manner of enforcing above regulations.—The North Carolina Utilities Commission shall have the power to require such improvements and extensions to the service of public service corporations mentioned in § 62-36 as it may deem necessary after the investigation of any complaint of any person, corporation, or municipality as to the inadequacy of such service. Upon application being made, the Utilities Commission shall proceed to hear, pass on, and determine, in the manner prescribed by law, a just or reasonable rate or charge for the service or other commodity rendered or furnished; the hearing before the Utilities Commission shall be governed by the law as to the Commission relating to the fixing of rates and rules and orders of the Commission as to the enforcement thereof by the Commission. The Utilities Commission shall have the same power and authority in hearing and passing on any matter or case under § 62-36, enforcing or fixing of rates, supervising and regulating said corporation or otherwise as they now have under the general law. The failure or refusal to conform to or obey any decision, rule, regulation, or order made in such cases by the Utilities Commission shall subject said public utility corporation or quasi public utility corporation refusing or failing to comply herewith to the penalties provided in this chapter. (1917, c. 136, subch. 3, s. 2; C. S., s. 2784; 1933, c. 134, s. 8; 1941, c. 97.)

Cited in *Sinclair v. Moore Cent. R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

§ 62-38. Sections 62-36 and 62-37 not to affect existing power.—Nothing contained in §§ 62-36 and 62-37 shall be construed to deprive the Utilities Commission of the authority and power which it now has under the laws of North Carolina to supervise and regulate and fix the rates for public utility corporations or quasi public utility corporations operating or doing business in such city. (1917, c. 136, subch. 3, s. 3; C. S., s. 2785; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-39. To require transportation and transmission companies to maintain facilities.—The Utilities Commission has power to require all transportation and transmission companies to establish and maintain all such public service facilities and conveniences as may be reasonable and just. It may require steamboat companies to provide such wharf and warehouse facilities as may be

reasonable and just. (1907, c. 469, s. 2; Ex. Sess. 1913, c. 52, s. 1; C. S., s. 1038; 1933, c. 134, s. 8; 1941, c. 97.)

Cited in *Sinclair v. Moore Cent. R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

§ 62-40. To authorize lumber companies to transport commodities.

—The Utilities Commission has power to authorize lumber companies, having logging roads, to transport all kinds of commodities other than their own and passengers, and to charge therefor reasonable rates to be approved by the Commission. (1911, c. 160; 1915, c. 6; C. S., s. 1039; 1933, c. 134, s. 8; 1941, c. 97.)

Establishing Joint Rate of Transportation.—A lumber company, chartered and organized for the purpose of transporting its own products, may be created a limited

public carrier by the order of the Commission, under the provisions of this section. *Corporation Comm. v. Atlantic Coast Line R. Co.*, 187 N. C. 424, 121 S. E. 767 (1924).

§ 62-41. To establish and regulate stations for freight and passengers.

—The Commission is empowered and directed to require, where the public necessity demands, and it is demonstrated that the revenue received will be sufficient to justify it, the establishment of stations by any company or corporation engaged in the transportation of freight and passengers in this State, and to require the erection of depot accommodations commensurate with such business and revenue, and to require the erection of accommodations for loading and unloading livestock and for feeding, sheltering and protecting the same in transportation. The Commission shall not require any company or corporation to establish any station nearer to another station than five miles. (1899, c. 164, s. 2, subsec. 12; Rev., s. 1097; 1913, c. 155; C. S., s. 1040; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to power of Utilities Commission to regulate building of shelters at railroad division points, see § 60-54.

Power to Require and Regulate Depots.

—The Commission can order new depots established wherever they are needed, and has the lesser power to require proper facilities at those already established. *Corporation Comm. v. Railroad*, 139 N. C. 126, 51 S. E. 793 (1905).

May Require Track Scales.—The Commission is empowered, under this section, to require “depot accommodations commensurate with such business and revenue,” which justifies the Commission in requiring “track scales” at points along the line. *Corporation Comm. v. Atlantic Coast Line R. Co.*, 139 N. C. 126, 51 S. E. 793 (1905).

The court, or the jury upon proper instructions, as the case may be, should pass

upon the reasonableness and necessity of an order of the Commission requiring track scales to be put in. *Corporation Comm. v. Atlantic Coast R. Co.*, 139 N. C. 126, 51 S. E. 793 (1905).

Railroad Not Released from Private Contract.

—The limitation on the powers of the Commission to require common carriers to establish stations within five miles of each other does not release the carriers from a contract, with an individual, to maintain a flag stop within the bounds of his plantation. *Parrott v. Atlantic, etc., R. Co.*, 165 N. C. 295, 81 S. E. 348 (1914).

Orders Subject to Review by the Courts.

—The power of the Commission, under this section, cannot be unreasonably exercised, and its orders are subject to review by the superior court and the Supreme Court. *Corporation Comm. v. Atlantic Coast Line R. Co.*, 139 N. C. 126, 51 S. E. 793 (1905).

§ 62-42. To require change, repair, and additions to stations.—The Commission is empowered and directed to require a change of any station or the repairing, addition to, or change of any station house by any railroad or other transportation company in order to promote the security, convenience and accommodation of the public, and to require the raising or lowering of the track at any crossing when deemed necessary. (1899, c. 164, s. 2, subsec. 13; Rev., s. 1097; C. S., s. 1041; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—See note under § 62-43.

Liberal Construction.—This section and § 62-43 are of a remedial nature, and will be liberally construed by the courts in favor of the exercise of the authority conferred.

State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563 (1923). See *State v. Southern R. Co.*, 196 N. C. 190, 145 S. E. 19 (1928).

Section Supplementary to Police Powers.

—This section, authorizing the Commission to require railroads to raise or lower

their tracks at a crossing, is supplementary to and not in derogation of the exercise by the State, or an incorporated town authorized by it, of such police powers. *Atlantic Coast Line Railroad v. Goldsboro*, 155 N. C. 356, 71 S. E. 514 (1911).

Entire Expense on Railroad.—In *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 269 (1894), it was held that the imposition upon a railroad company of the entire expense of a change of grade at a railroad crossing is not a violation of any constitutional right. *Atlantic Coast Line Railroad v. Goldsboro*, 155 N. C. 356, 71 S. E. 514 (1911).

§ 62-43. To provide for union depots.—The Commission is empowered and directed to require, when practicable, and when the necessities of the case, in its judgment, require, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, accommodation and convenience of the traveling public, and to unite in the joint undertaking and expense of erecting, constructing and maintaining such union passenger depot, commensurate with the business and revenue of such railroad companies or corporations, on such terms, regulations, provisions and conditions as the Commission shall prescribe. The railroads so ordered to construct a union depot shall have power to condemn land for such purpose, as in case of locating and constructing a line of railroad: Provided, that nothing in this section shall be construed to authorize the Commission to require the construction of such union depot should the railroad companies at the time of application for said order have separate depots, which, in the opinion of the Commission, are adequate and convenient and offer suitable accommodations for the traveling public. (1903, c. 126; Rev., s. 1097; C. S., s. 1042; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to power of railroads to condemn land for union station, see § 40-4.

Liberal Construction.—The statute in its principal purpose may be considered as remedial in its nature, and as to that feature will receive a liberal construction. *Dewey v. Atlantic Coast Line R. Co.*, 142 N. C. 392, 55 S. E. 292 (1906). See note under § 62-42.

Section Valid Exercise of Legislative Power.—The power of the legislature to enact a statute of this character has been established by numerous and well-considered decisions, and is no longer open to question. *Corporation Comm. v. Atlantic Coast Line R. Co.*, 139 N. C. 126, 51 S. E. 793 (1905); *Corporation Comm. v. Railroad*, 140 N. C. 239, 52 S. E. 941 (1905); *Dewey v. Atlantic Coast Line R. Co.*, 142 N. C. 392, 55 S. E. 292 (1906).

Powers Given by Necessary Implication.—The statute authorizing the Commission to order union stations to be built and maintained carries with it the power to do what is reasonably necessary to execute such order, including the use of the streets of a town for legitimate railroad purposes, the laying of tracks, etc., necessary to that

In *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638 (1897), the court held that the railroad company was liable for the expense of raising its roadbed to conform to the city grade, and said that it must yield to the reasonable burden imposed by the growth and development of the country or the city, and where the public welfare demands a change of grade of the highway or street, the railroad company must, at its own expense, make such alterations in the grade of its crossings as will conform to the new grade. *Atlantic Coast Line Railroad v. Goldsboro*, 155 N. C. 356, 71 S. E. 514 (1911).

end. *Griffin v. Southern R. Co.*, 150 N. C. 312, 64 S. E. 16 (1909).

When Union Stations May Be Required.

—Under this section the Commission is empowered to direct the establishment of union stations under certain conditions. When these conditions are found to exist, then the two railroads may be compelled to unite in the erecting, constructing, and maintaining such union passenger depot commensurate with the business and revenues of such railroad companies on such terms, regulations, provisions and conditions as the Commission shall prescribe. *State v. Seaboard Air Line, etc., R. Co.*, 161 N. C. 270, 76 S. E. 554 (1912).

The remedy was intended to apply to all the towns and cities in the State where, in the legal discretion of the Commission, the move is practicable, the convenience of the traveling public requires it, and the existing facilities, in the judgment of the Commission, are inadequate. *Dewey v. Atlantic Coast Line R. Co.*, 142 N. C. 392, 55 S. E. 292 (1906).

Same—Must Be Practicable.—Whenever the Commission requires and orders a union station to be built, the only restriction in the statute is when "practicable."

The other matters as to the security, accommodation, and convenience of the public are simply reasons addressed to the judgment of the Commission. When there is an appeal from its order, the sole query for a jury, under the statute, is whether the execution of the order is "practicable." The finding of the Commission that it is practicable is *prima facie* correct; and the burden is upon the defendant to show evidence to the contrary. *State v. Seaboard Air Line, etc., R. Co.*, 161 N. C. 270, 76 S. E. 554 (1912).

New Union Station.—Under the provisions of this section and § 62-42, the Commission has the power to require railroad companies subject to its jurisdiction, which have constructed or maintained a union passenger station in a city or town of the State, to construct or equip a new union passenger station in such city or town upon its finding that the present station is inadequate. *State v. Southern Ry. Co.*, 196 N. C. 190, 145 S. E. 19 (1928).

Jurisdiction Original—Exercised upon Own Motion or Petition of Interested Parties.—The jurisdiction of the Commission with respect to the construction of passenger stations is original, and may be exercised either upon its own motion or upon petition of interested parties. *State v. Southern Ry. Co.*, 196 N. C. 190, 145 S. E. 19 (1928).

Parties.—Under this section, the Commission is not without jurisdiction of a proceeding with respect to the erection, construction, and maintenance of a new union passenger station in city or town, because one or more railroad companies entering such city or town are not made parties in the proceeding. The presence of two or more railroad companies as parties is sufficient. *Corporation Commission v. Southern Ry. Co.*, 196 N. C. 190, 145 S. E. 19 (1928).

Same—Lessor—Appeal.—Where three

railroad companies use a union station in a city in connection with the operation of their railroads, two as owners, and the other as lessee of a fourth road, it is not jurisdictional before the Commission or the superior court on appeal under § 62-20 that in the proceedings before the Commission under this section and § 62-42 to compel them to build and maintain an adequate station, that the lessor railroad be a party, but it is not error for the trial judge to order that the lessor road be made a party and the cause proceeded with therein. *State v. Southern Ry. Co.*, 196 N. C. 190, 145 S. E. 19 (1928).

Interstate and Intrastate Carriers.—The order of the Commission for the joint erection by an intrastate carrier and an interstate carrier of a union station at a junction cannot be regarded as objectionable so far as it relates to the intrastate carrier, as a burden on interstate commerce, when it appears that the Commission was passing upon the petition of only a few cities or towns in the State separately and not as a part of a State-wide scheme, and the expenditures required were in amount too small to affect such commerce. *State v. Southern R. Co.*, 185 N. C. 435, 117 S. E. 563 (1923).

Same—Federal Transportation Act Prospective.—The Federal Transportation Act was held prospective in its enforcement, and did not relate back to a final order of the Commission, not appealed from, for the erection of a union station where the lines of an intrastate and interstate carrier crossed each other, the execution of which had been stayed by the Commission until after the passage of the federal statute solely for the advantage of the carriers at their request. *State v. Southern R. Co.*, 185 N. C. 435, 117 S. E. 563 (1923).

Cited in *Cole v. Atlantic Coast Line R. Co.*, 211 N. C. 591, 191 S. E. 353 (1937).

§ 62-44. To provide for separate waiting rooms for races.—The Commission is empowered and directed to require the establishment of separate waiting rooms at all stations for the white and colored races. (1899, c. 64, s. 2, subsec. 14; Rev., s. 1097; C. S., s. 1043; 1933, c. 134, s. 8; 1941, c. 97.)

Cross References.—As to separate accommodations for different races on train or steamboat, see § 60-94; on street rail-

ways, see § 60-135; on motor carriers, see § 62-121.71.

§ 62-45. To require construction of sidetracks.—The Commission is empowered and directed to require the construction of sidetracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such sidetrack is sufficient within five years to pay the expenses of its construction. This shall not be construed to give the Commission authority to require railroad companies to con-

struct sidetracks more than five hundred feet in length. (1899, c. 164, s. 2, subsec. 15; Rev., s. 1097; C. S., s. 1044; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to condemnation of land for industrial siding, see § 40-5.

Purpose of Section.—The General Assembly, while not prohibiting the carrier from continuing to establish sidings at its pleasure, deemed it wise to take the power of refusing to grant or continue such sidings out of the arbitrary will of the common carrier by authorizing the Commission to require the establishment of such sidings in proper cases. *Corporation Comm. v. Seaboard Air Line Railroad*, 140 N. C. 239, 52 S. E. 941 (1905).

Not Interference with Interstate Commerce.—The establishment of an industrial siding under the authority of the Commission is not an interference with interstate commerce. *State v. Southern R. Co.*, 153 N. C. 559, 69 S. E. 621 (1910); *Missouri Pac. R. Co. v. State*, 216 U. S. 262, 30 S. Ct. 330, 54 L. Ed. 472 (1910).

Restriction upon Power.—The Commission can require a railroad company to build a sidetrack to an industrial plant only upon the company's right of way or when the right of way is tendered. *State v. Southern R. Co.*, 153 N. C. 559, 69 S. E. 621 (1910).

Restriction as to Revenue.—The power conferred upon the Commission to order a railroad company to build a sidetrack, is with the restriction that the revenue from such sidetrack shall be "sufficient within five years to pay the expenses of construction;" and the lower court having denied the authority of the Commission in this action, the presumption is in favor of its judg-

ment, and it will be affirmed in the absence of evidence tending to show that the revenue will be sufficient according to the terms of the statute. *State v. Southern R. Co.*, 153 N. C. 559, 69 S. E. 621 (1910).

Restriction as to Length.—The section confers upon the Commission the power to establish sidings under certain conditions, and restricts the exercise of such a right to 500 feet in length. *Hales v. Atlantic Coast Line R. Co.*, 172 N. C. 104, 90 S. E. 11 (1916).

Rights of Intervening Owners.—A railroad company, of its own initiative or by virtue of a contract with private persons, can acquire no right to construct and use sidetracks to private industries off their right of way and over the lands of intervening owners against the will of such owners. When they have once permanently located their line, they are, as a rule, restricted to that and the right of way incident to it. *Hales v. Atlantic Coast Line R. Co.*, 172 N. C. 104, 90 S. E. 11 (1916).

Nonresident Railroad without Power of Eminent Domain.—The Commission cannot confer the power of eminent domain, and when the legislature has not conferred such power upon a nonresident railroad company respecting the construction of a sidetrack over the lands of others, an order of the Commission for the railroad to build such a track is void. *Butler v. Penn Tobacco Co.*, 152 N. C. 416, 68 S. E. 12 (1910); *State v. Southern R. Co.*, 153 N. C. 559, 69 S. E. 621 (1910).

Cited in *Aileen Mills v. Norfolk-So. R. Co.*, 194 N. C. 647, 140 S. E. 306 (1927).

§ 62-46. To require trains to be run over railroads and connections at intersections.—The Commission is empowered and directed to require, when practicable and when the necessities of the traveling public, in the judgment of the Commission, demand, that any railroad in this State shall install and operate one or more passenger or freight trains over its road, and also require any two or more railroads having intersecting points to make close connection at such points: Provided, that no order under this section shall be made unless the business of the railroad justifies it. (1907, c. 469, s. 3; C. S., s. 1045; 1933, c. 134, s. 8; 1941, c. 97.)

Connection Contemplated One of Trains as Well as Tracks.—The connection required is one of trains as well as of tracks. The public cannot travel upon a track alone, nor upon a train without a track. Both are required to furnish facilities for traveling at all, and close connection of both to secure the convenience of the traveling public. *North Carolina Corp. Comm. v. Atlantic Coast Line R. Co.*, 137 N. C. 1, 49 S. E. 191 (1904).

Running Additional Trains.—It is within the power of the Commission to compel a railroad company to make reasonable connections with other roads so as to promote the convenience of the traveling public, and an order requiring the running of an additional train for that purpose, if otherwise just and reasonable, is not inherently unjust and unreasonable because the running of such train will impose some pecuniary loss on the company. *Atlantic Coast Line*

R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Private Persons May Not Maintain Action to Force Continuing Operation.—Persons asserting unliquidated damages past and prospective resulting to them as consignees and consignors from the abandonment of the operation of a railroad may not in their individual capacities maintain an action to force continuing operation of

the railroad by the appointment of a permanent operating receiver, since such damages, though possibly different in degree, are not different in kind from those sustained by the public generally, and since the power to require continuous operation in the public interest of the State is vested exclusively by statute in the Utilities Commission. *Sinclair v. Moore Cent. R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

§ 62-47. May authorize operation of fast mail trains; discontinuance of passenger service.—The Utilities Commission is hereby empowered, whenever it shall appear wise and proper to do so, to authorize any railroad company to run one or more fast mail trains over its road, which shall stop only at such stations on the line of the road as may be designated by the company: Provided, that in addition to such fast mail train such railroad company shall run at least one passenger train in each direction over its road on every day except Sunday, which shall stop at every station on the road at which passengers may wish to be taken up or put off: Provided further, that nothing in this section shall be construed as preventing the running of local passenger trains on Sunday. The Utilities Commission, or its successor, however, shall have and it is hereby vested with the power in any case in which the convenience and necessity of the traveling public do not require the running of passenger trains upon its railroad to authorize such railroad company to cease the operation of passenger trains as long as the convenience and necessity of the traveling public shall not require such operation: Provided that this section and any ruling hereafter made by the Utilities Commission, or its successors, shall not be construed as abrogating or repealing the provisions of any charter or franchise requiring such common carrier to furnish daily freight service over its lines, nor cause the discontinuance of daily freight service where now maintained. (1893, c. 97; Rev., s. 2614; C. S., s. 3481; 1933, c. 134, s. 8; c. 528; 1941, c. 97, s. 5.)

Editor's Note.—The 1933 amendment added the provision relating to discontinuance of passenger service.

§ 62-48. To inspect railroads as to equipment and facilities, and to require repair.—The Commission is empowered and directed, from time to time, to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the public's safety and convenience; and if any are found by it to be unsafe, it shall at once notify and require the railroad company to put the same in repair. (1907, c. 469, s. 3; C. S., s. 1046; 1933, c. 134, s. 8; 1941, c. 97.)

Cited in *Sinclair v. Moore Cent. R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

§ 62-49. To require installation and maintenance of block system and safety devices.—The Commission is empowered and directed to require any railroad company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road unless at least eight trains each way per day are operated on that part. (1907, c. 469, s. 1b; C. S., s. 1047; 1933, c. 134, s. 8; 1941, c. 97.)

Lack of "Block System" as Negligence.—The lack of a "block system", when required, is held to be negligence per se. *Gerringer v. North Carolina R. Co.*, 146 N.

C. 32, 59 S. E. 152 (1907), citing *Stewart v. Raleigh, etc., R. Co.*, 137 N. C. 687, 50 S. E. 312 (1905); *Stewart v. Railroad*, 141 N. C. 253, 53 S. E. 877 (1906).

§ 62-50. To regulate crossings and to abolish grade crossings.—

The Commission is empowered and directed to require the raising or lowering of any tracks or highway at any highway or railroad crossing, and to designate who shall pay for the same; and, when it thinks proper, partition the cost of abolishing grade crossings and the raising or lowering of said track or highway among the railroads and municipalities interested. (1907, c. 469, s. 1 (c); 1911, c. 197, s. 1; C. S., s. 1048; 1933, c. 34, s. 8; 1941, c. 97.)

Cross References.—See § 62-42 and note. As to municipal authority, see § 160-54 and note. As to intersection with highways, see § 60-42. As to obstructing highways and maintaining defective crossings, see § 60-43. As to cattleguards and private crossings, see § 60-48. As to the power of the State Highway Commission to require the installation of signals and other safety devices, see § 136-20.

Editor's Note.—The General Assembly can make the abolition of grade crossings by railroads imperative instead of leaving it, as now, unexercised in the discretion of the Corporation [now Utilities] Commission, and can place the cost of doing so upon the corporations, whose duty it is to remove them. *Northern Pac. R. Co. v. Minnesota*, 208 U. S. 583, 28 S. Ct. 341, 52 L. Ed. 630 (1908), cited in *Atlantic Coast Line Railroad v. Goldsboro*, 155 N. C. 356, 71 S. E. 514 (1911). In the meantime, like any collision, or a derailment, the act itself is *prima facie* negligence on the part of the railroad company. *Marcom v. Raleigh, etc., R. Co.*, 126 N. C. 200, 35 S. E. 423 (1900). This matter has heretofore been called to the public attention in *Cooper v. Railroad*, 140 N. C. 209, 52 S. E. 932 (1905); *Gerrin-*

ger v. Railroad, 146 N. C. 32, 59 S. E. 152 (1907); *Wilson v. Railroad*, 152 N. C. 333, 55 S. E. 257 (1910); *Atlantic Coast Line Railroad v. Goldsboro*, 155 N. C. 356, 71 S. E. 514 (1911), affirmed in 232 U. S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914); *McMillian v. Atlantic, etc., R. Co.*, 172 N. C. 853, 90 S. E. 683 (1916); *Borden v. Southern R. Co.*, 175 N. C. 179, 95 S. E. 146 (1918); *Goff v. Atlantic Coast Line R. Co.*, 179 N. C. 216, 102 S. E. 320 (1920).

Commission Vested with Full Power.—The Corporation (now Utilities) Commission is vested with full and complete power to compel the raising or lowering of the track, to remove all danger to those using the public roads. *Gerringer v. North Carolina R. Co.*, 146 N. C. 32, 59 S. E. 152 (1907).

Authority is conferred by statute upon the Corporation (now Utilities) Commission to abolish grade crossings by a railroad company when by the operation of the railroad they become dangerous or inconvenient to the public traveling along the highways or private ways. *Tate v. Seaboard Air Line R. Co.*, 168 N. C. 523, 84 S. E. 808 (1915).

§ 62-51. To require installation and maintenance of automatic signals at railroad intersections, etc.—The Commission is empowered and directed to require, when public safety demands, when and in case two or more railroads now cross or may hereafter cross each other at a common grade, or any railroad crosses any stream or harbor by means of a bridge, to install and maintain such a system of interlocking or automatic signals as will render it safe for engines and trains to pass over such crossings or bridge without stopping, and to apportion the cost of installation and maintenance between said railroads as may be just and proper. (1911, c. 197, s. 2; Ex. Sess. 1913, c. 63, s. 1; C. S., s. 1049; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-52. To require railroads to enter towns and maintain depots in certain cases.—Where two or more railroads may maintain freight depots and a union passenger depot within one mile of a town of two thousand population for the convenience of the inhabitants thereof, and do not enter the corporate limits of the town, it is the duty of the Utilities Commission, upon the petition of a majority of the qualified voters of the said town, which petition shall be properly sworn to by the signers thereof, to require and compel, where practicable, the said railroads to run their lines into or through the corporate limits of the said town, and construct, equip, and maintain suitable passenger and freight depots at some convenient place or places therein, and the passenger depot shall be a union station and be built and maintained by the several railroads according to a plan and in such a manner as shall be approved by the Commission.

When a petition is filed with the Utilities Commission as aforesaid, the Com-

mission shall set a day for the hearing thereof, which day shall be not more than twenty days from the filing of said petition, and shall immediately cause a notice to issue to the railroads interested in the matter set out in the petition, and after the hearing of the matter on the day named in the notice, the Commission, if it deem it practicable, shall thereupon cause an order to be made requiring the said railroads to build, equip, and maintain in a suitable manner roadbeds, yards and depots, and any other necessary buildings or equipment, at convenient places within the limits of said town, as to it seems proper for the needs and growth of the business and inhabitants of the said town.

The order of the Utilities Commission to the railroads shall name a time within which all the necessary work of entering the said town and construction of depots and other buildings shall be completed and opened to the public for the transaction of business, and the said railroads, for every day beyond the said time that they shall not be in operation according to the said order, shall pay the sum of fifty dollars for each and every day of such failure and neglect, to the board of commissioners or aldermen of said town, which shall be for the benefit of the said town, this amount to be recovered as in other actions.

This section shall also apply to any railroad that may hereafter enter into or run within one mile of the corporate limits of said town, and the Utilities Commission shall have the power to require such railroads to unite with the other railroads in maintaining the depots, tracks, and other structures, and also pay such part of the cost thereof as to the said Utilities Commission may seem proper.

The railroads have the power to condemn such quantity of lands, including gardens, yards, residences and the premises pertaining thereto, as are necessary for the purposes of this section, the condemnation proceedings to be had in the same manner as now provided by law. (1907, c. 465; C. S., s. 1050; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-53. To consent to abandonment or relocation of depots.—A railroad corporation which has established and maintained for a year a passenger station or freight depot at a point upon its road shall not abandon such station or depot, nor substantially diminish the accommodation furnished by the stopping of trains, except by consent of the Commission. Freight or passenger depots may be relocated upon the written approval of the Commission. (1899, c. 164, ss. 19, 20; Rev., s. 1098; C. S., s. 1051; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-54. To regulate crossings of telephone, telegraph, electric power lines and crossings of rights of way of railroads and other utilities by another utility.—The Utilities Commission upon its own motion or upon petition of any utility operating in this State and subject to regulation by the Utilities Commission under the provisions of this chapter or upon petition of the North Carolina Rural Electrification Authority on behalf of any electric membership corporation organized under chapter 291 of the Public Laws of 1935, as amended, or church or other place of public worship shall have the power and authority, after notice and hearing, to order the lines and right of way of any utility, railroad or electric membership corporation or church or other place of public worship to be crossed by any other utility or electric membership corporation, or church or other place of public worship. The Commission, in all such cases, may require any telephone, telegraph or electric power lines making such crossings to be constructed and maintained in a safe manner and in accord with accepted and approved standards of safety so that the wires of one line will not fall upon the other or that the wires of any telephone, telegraph or electric power lines shall not fall upon the track and right of way of any railroad, and to prescribe the manner in which such construction shall be done. The Commission shall also have the power and authority to discontinue and prohibit such crossings where they are unnecessary and can reasonably be avoided and to order changes in existing crossings when deemed necessary. In all cases in which the Commission

orders such crossings to be made or changed and when the parties affected cannot agree upon the cost of the construction of such crossings or the damages to be paid to one of the parties for the privilege of crossing the lines of such party, it shall be the duty of the Commission to apportion the cost of such construction and to fix the damage if any to be paid and to apportion the damages, if any, among the parties in such manner as may be just and equitable. Nothing in this section shall be construed to limit the right and power of the Utilities Commission in all cases in which it shall determine that any crossing of the lines of one utility over the lines of another has been rendered dangerous by the presence of high tension wire or wires of any electric power or light company to require the utility owning such high tension wire or wires to pay the entire cost of constructing and maintaining such crossing in a safe manner. This section shall not be construed to limit the right of eminent domain conferred upon railroads, utilities, electric membership corporations, churches and other places of public worship by the laws of this State or to limit the right and duty conferred by law with respect to crossing of railroads and highways or railroads crossing railroads, but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. Any party shall have the right of appeal from any final order or decision or determination of the Commission as provided by law for appeals from orders or decisions or final determinations of the Utilities Commission. (1913, c. 130, s. 1; C. S., s. 1052; 1933, c. 134, s. 8; 1941, c. 97; 1949, c. 1029, s. 1.)

Local Modification.—Ashe: 1929, c. 101.

Editor's Note.—The 1949 amendment rewrote this section. Chapter 291 of Public Laws 1935, referred to in the first sen-

tence, was codified as §§ 117-6 to 117-27.

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 493.

§ 62-55. To regulate delivery of freight, express, and baggage.—The Utilities Commission shall make reasonable and just rules—

1. For the handling of freight and baggage at stations.

2. As to charges by any company or corporation engaged in the carriage of freight or express for the necessary handling and delivery of the same at all stations. (1899, c. 164, s. 2, subsecs. 2, 7; Rev., s. 1094; C. S., s. 1053; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to penalty for failure to deliver freight upon tender of payment for carriage, see § 60-114.

§ 62-56. To prevent discriminations.—The Utilities Commission shall make reasonable and just rules and regulations—

1. To prevent discrimination in the transportation of freight or passengers, or in furnishing electricity, electric light, current, power or gas.

2. To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or the misleading or deceiving the public in any manner as to real rates charged for freight, express or passengers, or in furnishing electricity, electric light, current, power or gas. (1899, c. 164, s. 2, subsecs. 3, 5; Rev., s. 1095; 1913, c. 127, s. 6; C. S., s. 1054; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to discrimination in railroad rates, see §§ 60-5 to 60-8, 60-92 and 62-143.

Discrimination Defined.—Discrimination in freight tariffs by railroad companies, means to charge shippers of freight unequal sums for carrying the same quantity of freight equal distances; that is, more in proportion for a short than for a long dis-

tance. *Hines v. Wilmington, etc., Railroad*, 95 N. C. 434 (1886).

A railroad carrying logs to a sawmill cannot charge a shipper agreeing to ship the manufactured products by the same line less for the same service than it charges a shipper who makes no such agreement. *Lumber Co. v. Railroad*, 136 N. C. 479, 48 S. E. 813 (1904).

§ 62-56.1. To require extension or contraction of railroad switching limits.—1. Powers of Utilities Commission.—In addition to the powers and du-

ties conferred upon the North Carolina Utilities Commission by chapter 62 of the General Statutes of North Carolina, the said North Carolina Utilities Commission is hereby authorized and empowered to require the extension or contraction of the boundaries of the switching limits of any railroad company at any point where the Commission has information that a shipper or a prospective shipper is being discriminated against or subjected to unreasonable practices, or where it would be to the best interest of the shipper or prospective shipper to be included in the switching limits or excluded from the switching limits.

2. Application to Be Included within Switching Limits; Notice; Hearing and Order.—Upon the application of any shipper or prospective shipper to be included within the switching limits of a terminal or junction which is served by more than one railroad, the North Carolina Utilities Commission may cause notice to be given to the carrier or carriers serving such terminal. If upon investigation and hearing based upon such application the Commission finds that such shipper or prospective shipper should be within or without the switching limits of the terminal or junction, then the Commission is authorized and empowered to order the switching limits extended or contracted as the facts may warrant in each case.

3. Switching Limits to Be Observed Regardless of Character of Traffic.—The boundaries of switching limits which have been or may be established hereunder shall be the boundaries to be observed by the railroad company, carrier or carriers whether or not the traffic moving into said boundaries or out of said boundaries is either interstate or intrastate in character.

4. Penalties for Failure to Comply with Commission Orders, etc.—The failure or refusal of any railroad company, carrier or carriers to conform to or obey any decision, rule, regulation or order made by the Commission under the provisions of this section shall subject said railroad company, carrier or carriers refusing or failing to comply herewith to a penalty of five hundred dollars (\$500.00); and each day that such failure or refusal to conform to or obey any decision, rule, regulation or order of the Commission shall subject said railroad company, carrier or carriers to a separate and distinct penalty of five hundred dollars (\$500.00), the same to be certified to and prosecuted by the Attorney General as provided in chapter 62 of the General Statutes of North Carolina. (1947, c. 1075, ss. 1-4.)

§ 62-57. **To fix a standard for gas.**—The Utilities Commission shall fix, establish and promulgate a standard of quality for gas and prescribe rules and regulations for the enforcement of and obedience to the same. (1919, c. 32; C. S., s. 1055; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-58. **To regulate shipment of inflammable substances.**—The Utilities Commission is authorized and empowered to adopt and promulgate rules for the shipment of inflammable and explosive articles; cotton which has been partially consumed by fire, and such other like articles as in its opinion may be apt to render transportation dangerous. And after the promulgation of such rules, no common carrier shall be required to receive or transport any such articles except when tendered in accordance with the said rules; nor shall such common carrier be liable for any penalty for refusal to receive such article for shipment until all the rules prescribed by the Utilities Commission in regard to the shipments of the same shall be complied with. (1907, c. 471, s. 1; C. S., s. 1056; 1933, c. 134, s. 8; 1941, c. 97.)

The Commission is particularly authorized to regulate the carriage of inflammable articles as freight. *Tilley v. Norfolk, etc., R. Co.*, 162 N. C. 37, 77 S. E. 994 (1913).

§ 62-59. **To regulate demurrage, storage, placing, and loading of cars.**—The Commission shall make rules, regulations and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freights after

the same have been received by the transportation companies for shipment. (1903, c. 342; Rev., s. 1100; C. S., s. 1057; 1933, c. 134, s. 8; 1941, c. 97.)

Cross References.—As to time before charge for demurrage may be made, see § 60-123. As to reasonable time for transporting freight, see § 60-112.

Editor's Note.—For cases decided under the former statute which related to the duty of railroad companies to place cars for loading, see note to § 60-118.

§ 62-60. To fix rate of speed through towns; procedure.—If a railroad company is of the opinion that an ordinance of a city or town through which a line of its railroad passes regulating the speed at which trains may run while passing through said city or town, is unreasonable or oppressive, such railroad company may file its petition before the Utilities Commission, setting forth all the facts, and asking relief against such ordinance, and that the Utilities Commission prescribe the rate of speed at which trains may run through said municipality. Upon the filing of the petition a copy thereof shall be mailed, in a registered letter, to the mayor or chief officer of the town or municipality, together with a notice from the Utilities Commission, setting forth that on a day named in the notice the petition of the railroad company will be heard, and that the city or town named in the petition will be heard at that time in opposition to the prayer of the petition. And upon the return day of the notice the Utilities Commission shall hear the petition, but any hearing granted by the Utilities Commission shall be had at the town, city or locality where the conditions complained of are alleged to exist, or some member of the said Commission shall take evidence, both for the petition and against it, at such city, town or locality, and report to the full Commission before any decision is made by the Commission.

Either party, petitioner or respondent, has the right to introduce testimony and to be heard by counsel; and the Utilities Commission, after hearing the petition, answer, evidence and argument, shall render judgment thereon. If the Commission finds that such ordinance is reasonable and just the petition shall be dismissed, and the petitioner shall pay all the cost, to be taxed by the clerk to the Utilities Commission. If the Commission is of the opinion that the ordinance is unreasonable, it shall so adjudge; and in addition thereto it shall prescribe the maximum rates of speed for passing through such town. And thereafter the railroad company may run its trains through such town or city at speeds not greater than those prescribed by the Utilities Commission, and the ordinance adjudged to be unreasonable shall not be enforced against such railroad company.

If the judgment of the Utilities Commission is in favor of the petitioner, it shall be lawful for the Utilities Commission to make such order as to the payment of the costs as shall seem just. It may require either party to pay the same or it may divide the same. The costs in such proceeding shall be the same as are fixed by law for similar services in the superior court. (1903, c. 552; Rev., ss. 1101, 1102, 1103; C. S., s. 1058; 1933, c. 134, s. 8; 1941, c. 97.)

Local Modification.—Cumberland, Rockingham, Union, Wayne: C. S. 1058.

Regulation within Police Power of State.—In *Gladson v. Minnesota*, 166 U. S. 427, 17 S. Ct. 628, 41 L. Ed. 1064 (1897), the court said: "The state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road within the jurisdiction. It may pre-

scribe the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management in order to secure the object of its incorporation, and the safety, good order, convenience and comfort of its passengers and of the public." *North Carolina Corp. Comm. v. Atlantic Coast Line R. Co.*, 137 N. C. 1, 49 S. E. 191, 197 (1904).

§ 62-61. To hear and determine controversies submitted.—When a company or corporation embraced in this chapter has a controversy with another corporation or person, and all the parties to such controversy agree in writing to submit such controversy to the Commission as arbitrator, the Commission shall act as such, and after due notice to all parties interested shall proceed to hear

the same, and its award shall be final. Such award in cases where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county in which said land is situated, and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall be a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrator. (1899, c. 164, s. 25; Rev., s. 1073; C. S., s. 1059; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to power of Utilities Commission to settle dispute between railroad and drainage district, see § 156-91.

§ 62-62. To investigate accidents.—The Commission may investigate the causes of any accident on a railroad or steamboat which it may deem to require investigation, and any evidence taken upon such investigation shall be reduced to writing, filed in the office of the Commission, and be subject to public inspection. (1899, c. 164, s. 24; Rev., s. 1065; C. S., s. 1061; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-63. To notify of violation of rules and institute suit.—The Commission, whenever in its judgment any public utility has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient. (1899, c. 164, s. 8; Rev., s. 1113; C. S., s. 1062; 1933, c. 134, s. 8; 1941, c. 97.)

This section must be construed as being mandatory. The statute makes it clearly the duty of the Attorney General, when called upon, to prosecute any suit or action which may be deemed necessary to secure the enforcement of the laws of the State, in

regard to the fixing of maximum rates. *Southern R. Co. v. McNeill*, 155 F. 756 (1907).

Private Persons May Not Maintain Action to Force Continuing Operation of Railroad.—See note to § 62-46.

§ 62-64. Utilities Commission authorized to enter agreement of indemnity as to oyster beds in New River.—The Utilities Commission is authorized and empowered to enter into a contract with the United States or the Secretary of War on behalf of the State of North Carolina, by the terms of which it shall be agreed that the State of North Carolina will save the United States free from liability for damages to oyster beds in New River arising from the dredging and maintenance of a channel ten feet deep and ninety feet wide therein, between the Inland Waterway and Jacksonville: Provided, the liability of the State of North Carolina under such contract shall not exceed the total sum of five thousand dollars (\$5,000).

The enactment of this statute shall not be treated or considered as any admission on the part of the State that the owner of such oyster beds who have not executed waivers or releases prior to February 24, 1939, shall be entitled to any damages by reason of the dredging and maintenance of the said channel, and no payment shall be made on account of such claims unless and until the owners of such oyster beds shall show that there has been sustained actual damages to such oyster beds on account of the dredging and maintenance of said channel. (1939, c. 51; 1941, c. 97.)

ARTICLE 4.

Public Utilities Act of 1933.

§ 62-65. Definitions.—(a) The term "corporation," when used in this article, includes a private corporation, an association, a joint stock association or a business trust.

(b) The term "person," when used in this article, includes a natural person, a partnership or two or more persons having a joint or common interest, and a corporation as hereinbefore defined.

(c) The term "municipality," when used in this article, includes a city, a county,

a village, a town, and any other public corporation existing, created or organized as a governmental unit under the Constitution or laws of the State.

(d) The term "Commission" shall mean the Utilities Commission.

(e) The term "public utility," when used in this article, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this State equipment or facilities for:

(1) Producing, generating, transmitting, delivering or furnishing gas, electricity, steam or any other agency for the production of light, heat or power to or for the public for compensation;

(2) Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation;

(3) Transporting persons or property by street, suburban or interurban railways for the public for compensation;

(4) Transporting persons or property by motor vehicles for the public for compensation, but not including taxicab, operating on call, or truck transfer service in cities or towns;

(5) Transporting or conveying gas, crude oil or other fluid substance by pipe line for the public for compensation;

(6) Conveying or transmitting messages or communications by telephone or telegraph, where such service is offered to the public for compensation;

(7) The term "public utility" shall for rate making purposes only include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

The term "public utility" shall not include any person not otherwise a public utility, who furnishes the services or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others. The business of any public utility other than of the character defined in subdivisions 1 to 7, inclusive, of subdivision (e) of this section is not subject to the provisions of this article.

(f) The term "rate," when used in this article, means and includes every compensation, charge, fare, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service, product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, toll, rental or classification. (1933, c. 134, s. 8; c. 307, s. 1; 1941, c. 97.)

Article Not in Conflict with Chapter 75.—The provisions of this article as to rate regulation are not in conflict with chapter 75. *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240 (1937).

Transit Co., 227 N. C. 391, 42 S. E. (2d) 398 (1947).

Cited in *Russ v. Western Union Tel. Co.*, 222 N. C. 504, 23 S. E. (2d) 681 (1943).

Applied in *City Coach Co. v. Gastonia*

§ 62-66. Rates must be just and reasonable.—Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable. (1933, c. 307, s. 2.)

§ 62-67. Service.—Every public utility shall furnish adequate, efficient and reasonable service. (1933, c. 307, s. 3.)

§ 62-68. To file rate schedules with Commission.—Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, schedules showing all rates established by it and collected or enforced, or to be collected or enforced within the jurisdiction of the Commission. The utility shall keep copies of such schedules open to public inspection under such rules and regulations as the Commission may prescribe. (1933, c. 307, s. 4.)

Cited in *Russ v. Western Union Tel. Co.*, 222 N. C. 504, 23 S. E. (2d) 681 (1943); *High Point v. Duke Power Co.*, 34 F. Supp. 339 (1940).

§ 62-69. **Rates varying from schedule prohibited.**—No public utility shall directly or indirectly, by any device whatsoever, or in anywise charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this article, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules. (1933, c. 307, s. 5.)

At termination of contract between city and electric company, city officials were doubtful whether it would be advantageous to adopt new schedule of electric company and elected to take current on basis from month to month. It was held that the electric company was not exacting an un-

lawful rate by billing the city for current on rates contained in the old contract rather than under the new schedule. *High Point v. Duke Power Co.*, 34 F. Supp. 339 (1940).

Cited in *Russ v. Western Union Tel. Co.*, 222 N. C. 504, 23 S. E. (2d) 681 (1943).

§ 62-70. **Discrimination prohibited.**—No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may determine any questions of fact arising under this section. (1933, c. 307, s. 6.)

Editor's Note.—For discussion of this and related sections, see 11 N. C. Law Rev. 246.

Party Entitled to Injunctive Relief.—Where certain carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodities, it was held that the basis for injunctive re-

lief must be an interference or threatened interference with a legal right of the petitioner, not of a third party and that the shippers would be the real parties in interest, not the contract truck carriers. *Carolina Motor Service v. Atlantic Coast Line R. Co.*, 210 N. C. 36, 185 S. E. 479, 104 A. L. R. 1165 (1936).

§ 62-71. **Change of rates.**—Unless the Commission otherwise orders, no public utility shall make any changes in any rate which has been duly established under this article, except after thirty days' notice to the Commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The utility shall also give such notice of the proposed changes to other interested persons as the Commission in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The Commission, for good cause shown, may allow changes in rates, without requiring the thirty days' notice, under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such public utility.

Whenever there is filed with the Commission by any public utility any schedule stating a new rate or rates, the Commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than ninety (90) days beyond the time when such rate or rates would otherwise go into effect unless the Commission shall find that a longer time will be required, in which case the Commission may extend the period for not to exceed six (6) months: Provided, and notwithstanding any such order of suspension, the public utility may put such suspended rate or rates into effect on the date when it or they would have become effective, if not so suspended, by filing with

the Commission a bond in a reasonable amount approved by the Commission, with sureties approved by the Commission, conditioned upon the refund, in a manner to be prescribed by order of the Commission to the persons entitled thereto of the amount of the excess, if the rate or rates so put into effect are finally determined to be excessive; or there may be substituted for such bond, other arrangements satisfactory to the Commission for the protection of the parties interested. If the public utility fails to make refund within thirty (30) days after such final determination any person entitled to such refund may sue therefor, in any court of this State of competent jurisdiction and be entitled to recover, in addition to the amount of the refund due, all court costs, but no suit may be maintained for that purpose unless instituted within two years after such final determination. Any number of persons entitled to such refund may join as plaintiffs and recover their several claims in a single action; in which action the court shall render a judgment severally for each plaintiff as his interest may appear. During any such period of suspension the Commission may, in its discretion, require that the public utility involved shall furnish to its consumers or patrons a certificate or other evidence of payments made by them. (1933, c. 307, s. 7.)

Optional Schedules.—A public service schedules. *High Point v. Duke Power corporation* has a right to maintain optional Co., 34 F. Supp. 339 (1940).

§ 62-72. Changing unreasonable rates after hearing.—Whenever the Commission, after a hearing had after reasonable notice upon its own motion or upon complaint, finds that the existing rates in effect and collected by any public utility for any service, product, or commodity, are unjust, unreasonable, insufficient or discriminatory, or in anywise in violation of any provision of law, the Commission shall determine the just, reasonable and sufficient rates to be thereafter observed and in force, and shall fix the same by order as hereinafter provided. (1933, c. 307, s. 8.)

§ 62-73. Compelling telephone and telegraph companies to form continuous lines to certain points.—The Commission may upon complaint, in writing, by any person, or on its own initiative after a hearing on reasonable notice, by order require any two or more telephone or telegraph companies whose lines or wires form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points, between different localities which cannot be communicated with or reached by the lines of either company alone, where such service is not already established or provided, to establish and maintain through lines within the State between two or more such localities. The rate for such service shall be just and reasonable and the Commission shall have power to establish the same, and declare the portion thereof to which each company affected thereby is entitled and the manner in which the same must be secured and paid. All necessary construction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such division of expense and labor as may be required by the Commission. (1933, c. 307, s. 9.)

§ 62-74. Compelling efficient service, extension of services and facilities, additions and improvements.—Whenever the Commission, after reasonable notice and a hearing had upon its own motion or upon complaint, finds that the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or that persons are not served who may reasonably be served, or that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, or of any two or more public utilities ought reasonably to be made or that it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public or to

do any other act necessary to secure reasonably adequate service or facilities and to reasonably and adequately serve the public convenience and necessity, the Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or effected within a reasonable time prescribed in the order; and if such order is directed to two or more public utilities, the utilities so designated shall be given such reasonable time as the Commission may grant within which to agree upon the portion or division of the cost of such additions, extensions, repairs, improvements or changes which each shall bear. If at the expiration of the time limited in the order of the Commission, the utility or utilities named in the order shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense, the Commission shall have the authority, after further hearing in the same proceedings, to make an order fixing the portion of such cost or expense to be borne by each public utility affected and the manner in which the same shall be paid or secured. (1933, c. 307, s. 10; 1949, c. 1029, s. 2.)

Editor's Note.—The 1949 amendment rewrote this section. For brief comment on amendment, see 27 N. C. Law Rev. 493.

Cited in *Sinclair v. Moore Cent. R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

§ 62-75. Fixing standards, classifications, etc.; testing service.—The Commission may, after hearing upon reasonable notice had upon its own motion or upon complaint, ascertain and fix just and reasonable standards, classifications, regulations, practices or service to be furnished, imposed, observed and followed by any or all public utilities; ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product, commodity or service furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such product, commodity or service and for the measurement thereof; establish or approve reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any product, commodity or service of any public utility. (1933, c. 307, s. 11.)

§ 62-76. Valuing and revaluing utility property.—The Commission may, on hearing after reasonable notice, ascertain and fix the value of the whole or any part of the property of any public utility insofar as the same is material to the exercise of the jurisdiction of the Commission, and may make revaluations from time to time and ascertain the value of all new construction, extension and additions to the property of every public utility. (1933, c. 307, s. 12.)

§ 62-77. Establishment of accounting system.—The Commission may establish a system of accounts to be kept by the public utilities, subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner in which such accounts shall be kept. (1933, c. 307, s. 13.)

§ 62-78. Visitorial and inspection powers of Commission.—The commissioners and the officers and employees of the Commission may during all reasonable hours enter upon any premises occupied by any public utility, for the purpose of making the examinations and tests and exercising any power provided for in this article, and may set up and use on such premises any apparatus and appliances necessary therefor. Such public utility shall have the right to be represented at the making of such examination, tests and inspections. (1933, c. 307, s. 14.)

§ 62-79. Annual reports.—The Commission may require any public utility to file annual reports in such form and of such content as the Commission

may require and special reports concerning any matter about which the Commission is authorized to inquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the Commission. (1933, c. 307, s. 15.)

§ 62-80. Investigation into management of utilities.—The Commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or any particular utility. In conducting such investigations the Commission may proceed either with or without a hearing as it may deem best, but it shall make no order without affording the parties affected thereby a hearing. (1933, c. 307, s. 16.)

§ 62-81. Permission to pledge assets or pay fees.—No public utility shall pledge its faith, credit, moneys or property for the benefit of any holder of its preferred or common stocks or bonds, nor for any other business interest with which it may be affiliated through agents or holding companies or otherwise by the authority of the action of its stockholders, directors, or contract or other agents, the compliance or result of which would in any manner deplete, reduce, conceal, abstract or dissipate the earnings or assets thereof, decrease or increase its liabilities or assets, without first making application to the Commission and by order obtain its permission so to do; nor shall any such utility pay any fees, commissions or compensation of any description whatsoever to any holding, managing, operating, constructing, engineering, financing, or purchasing company or agency including subsidiary or affiliated companies, for services rendered or to be rendered without first filing copies of all proposed agreements and contracts with the Commission and obtaining its approval. (1933, c. 307, s. 17.)

§ 62-82. Assumption of certain liabilities and obligations to be approved by Commission; refinancing of utility securities.—No utility shall issue any securities, or assume any liability or obligation as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect to the securities of any other person unless and until, and then only to the extent that, upon application by the utility, and after investigation by the Commission of the purposes and uses of the proposed issue, and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object within the corporate purposes of the utility, (b) is compatible with the public interest, (c) is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public as such utility and will not impair its ability to perform that service, and, (d) is reasonably necessary and appropriate for such purpose. Any such order of the Commission shall specify the purposes for which any such securities or the proceeds thereof may be used by the utility making such application. Furthermore, in the event of an application by a utility for the refinancing of its outstanding shares of stock by exchanging or redeeming such outstanding shares, the exchange or redemption of such shares of any dividend rate or rates, class or classes, may be made, in whole or in part, in the manner and to the extent approved by the Commission, notwithstanding any provisions of law applicable to corporations in general: Provided, that the proposed transactions are found by the Commission to be in the public interest and in the interest of consumers and investors, and provided that any redemption shall be at a price or prices, not less than par, and at a time or times, stated or provided for in the utility's charter or stock certificates. (1933, c. 307, s. 18; 1945, c. 656.)

Editor's Note.—The 1945 amendment added the last sentence and proviso thereto.

§ 62-83. Commission may approve in whole or in part or refuse approval.—The Commission, by its order, may grant or deny the application provided for in the preceding section as made, or may grant it in part or deny it in part or may grant it with such modification and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises and may, from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate and may, by any such supplemental order, modify the provisions of any previous order as to the particular purposes, uses, and extent to which or the conditions under which any securities so theretofore authorized or the proceeds thereof may be applied; subject always to the requirements of the foregoing section. (1933, c. 307, s. 19.)

§ 62-84. Contents of application for permission.—Every application for authority for such issue or assumption shall be made in such form and contain such matters as the Commission may prescribe. Every such application and every certificate of notification hereinafter provided for shall be made under oath, signed and filed on behalf of the utility by its president, a vice-president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the utility. (1933, c. 307, s. 20.)

§ 62-85. Applications to receive immediate attention; continuances.—All applications for the issuance of securities or assumption of liability or obligation shall be placed at the head of the Commission's docket and disposed of promptly, and all such applications shall be disposed of in thirty (30) days after the same are filed with the Commission, unless it is necessary for good cause to continue the same for a longer period for consideration. Whenever such application is continued beyond thirty (30) days after the time it is filed, the order making such continuance must state fully the facts necessitating such continuance. (1933, c. 307, s. 21.)

§ 62-86. Notifying Commission as to disposition of securities.—Whenever any securities set forth and described in any such application for authority or certificate of notification as pledged or held unincumbered in the treasury of the utility shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of, by the utility, such utility shall, within ten days after such sale, pledge, repledge, or other disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission. (1933, c. 307, s. 22.)

§ 62-87. No guarantee on part of State.—Nothing herein shall be construed to imply any guarantee or obligation as to such securities on the part of the State of North Carolina. (1933, c. 307, s. 23.)

§ 62-88. Article not applicable to note issues; renewals likewise excepted.—The provisions of the foregoing sections shall not apply to notes issued by a utility for the proper purposes and not in violation of law, payable at a period of not more than two (2) years from the date thereof, and shall not apply to like notes issued by a utility payable at a period of not more than two (2) years from date thereof, to pay, retire, discharge, or refund in whole or in part any such note or notes and shall not apply to renewals thereof from time to time not exceeding in the aggregate six (6) years from the date of the issue of the original note or notes so renewed or refunded. No such notes payable at a period of not more than two (2) years from the date thereof, shall, however, in whole or in part, directly or indirectly, be paid, retired, discharged or refunded by any issue of securities of another kind of any term or character or from the proceeds thereof without the approval of the Commission. (1933, c. 307, s. 24.)

§ 62-89. Not applicable to debentures of court receivers; notice to Commission.—Nothing contained in this article shall limit the power of any court having jurisdiction to authorize or cause receiver's certificates or debentures to be issued according to the rules and practice obtaining in receivership proceedings in courts of equity. Within ten (10) days after the making of any such notes, so payable at periods of not more than two (2) years from the date thereof, the utility issuing the same shall file with the Commission a certificate of notification, in such form as may from time to time be determined and prescribed by the Commission. (1933, c. 307, s. 25.)

Receiver's Certificates Maturing More than Two Years after Date.—Under this section it would seem that the legislature has withdrawn from the courts the right to

authorize the issuance of receiver's certificates maturing more than two years after date of issue. *Sinclair v. Moore* Cent. R. Co., 228 N. C. 389, 45 S. E. (2d) 555 (1947).

§ 62-90. Periodical or special reports.—The Commission shall require periodical or special reports from each utility hereafter issuing any security including such notes payable at periods of not more than two (2) years from the date thereof, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds thereof. (1933, c. 307, s. 26.)

§ 62-91. Failure to obtain approval not to invalidate securities or obligations.—(a) Securities issued and obligations and liabilities assumed by a utility, for which under the provisions of this article the authorization of the Commission is required, shall not be invalidated because issued or assumed without such authorization therefor having first been obtained or because issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption. (b) Securities issued or obligations or liabilities assumed in accordance with all the terms and conditions of the order of authorization therefor shall not be affected by a failure to comply with any provision of this article or rule or regulation of the Commission relating to procedure and other matters preceding the entry of such order of authorization or order supplemental thereto. (c) A copy of any order made and entered by the Commission as in this article provided (duly certified by the clerk of the Commission) approving the issuance of any securities or the assumption of any obligation or liability by a utility shall, in and of itself, be sufficient evidence, for all purposes, of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order. (d) Any utility which willfully issues any such securities, or assumes any such obligation or liability, or makes any sale or other disposition of securities, or applies any securities or the proceeds thereof to purposes other than the purposes specified in an order of the Commission with respect thereto, contrary to the provisions of this article, shall be liable to a penalty of not more than ten thousand dollars, but such utility is only required to specify in general terms the purpose for which any securities are to be issued, or for which any obligation or liability is to be assumed, and the order of the Commission with respect thereto shall likewise be in general terms. (1933, c. 307, s. 27.)

§ 62-92. Commission may act jointly with agency of another state where utility operates.—If a commission or other agency or agencies is empowered by another state to regulate and control the amount and character of securities to be issued by any public utility within such other state, then the Utilities Commission of the State of North Carolina shall have the power to agree with such commission or other agency or agencies of such other state on the issue of stocks, bonds, notes or other evidences of indebtedness by a public utility owning or operating a public utility both in such state and in this State, and

shall have the power to approve such issue jointly with such commission or other agency or agencies and to issue joint certificate of such approval: Provided, however, that no such joint approval shall be required in order to express the consent to an approval of such issue by the State of North Carolina if said issue is separately approved by the Utilities Commission of the State of North Carolina. (1933, c. 134, s. 8; c. 307, s. 28; 1941, c. 97.)

§ 62-93. Willful acts of employees deemed those of utility.—The willful act of any officer, agent, or employee of a utility, acting within the scope of his official duties of employment, shall, for the purpose of this article be deemed to be the willful act of the utility. (1933, c. 307, s. 29.)

§ 62-94. Actions to recover penalties.—Actions to recover penalties under this article shall be brought in the name of the State of North Carolina, in the county in which the offense was committed. Whenever any utility is subject to a penalty under this article, the Commission shall certify the facts to the Attorney General, who shall institute and prosecute an action for the recovery of such penalty: Provided, the Commission may compromise such action and dismiss the same on such terms as the court will approve. (1933, c. 307, s. 30.)

§ 62-95. Penalties to school fund.—All penalties recovered by the State in such action shall be paid into the State treasury to the credit of the school fund. (1933, c. 307, s. 31.)

§ 62-96. Abandonment and reduction of service.—Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a utility realizing sufficient revenue from the service to meet its expenses, the Commission shall have power, after petition, notice and hearing, to authorize by order any utility to abandon or reduce its service or facilities. (1933, c. 307, s. 32.)

Order Must Be Obtained.—Where a power company discontinued its service for nonpayment of charges, the customer, upon payment of the charges, is entitled to restoration of the service where the company did not obtain an order under this

section. *Sweetheart Lake v. Carolina Power, etc., Co.*, 211 N. C. 269, 189 S. E. 785 (1937).

Cited in *Sinclair v. Moore Cent. R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

§ 62-97. Water gauging stations.—The Commission may require the location, establishment, maintenance and operation of water gauging stations, and the Commission and the North Carolina Department of Conservation and Development may co-operate with each other as to such locations, construction and reports and upon the results of operation. (1933, c. 307, s. 33.)

§ 62-98. Reports from municipalities operating own utilities.—Every municipality engaged in operating any works or systems for the manufacture and supplying of gas or electricity, or purchasing same for distribution and resale, or operating telephone exchanges, shall make an annual report to the Commission, verified by the oath of the general manager or superintendent thereof, on the same blanks as now provided for reports of privately owned utilities, giving the same information as required of such utilities. (1933, c. 307, s. 34.)

§ 62-99. Refusal to permit Commission to inspect records made misdemeanor.—Any public utility, its officers or agents in charge thereof, that fails or refuses upon the written demand of the Commission, or a majority of said Commission, and under the seal of the Commission, to permit the Commission, its authorized representatives or employees to examine and inspect its books, records, accounts and documents, or its plant, property, or facilities, as provided for by law, shall be guilty of a misdemeanor. Each day of such failure or refusal shall constitute a separate offense and each such offense shall be punishable

by a fine of not less than five hundred and not more than five thousand dollars. (1933, c. 307, s. 35.)

§ 62-100. Willful disobedience to orders of Commission incurs forfeiture.—Every public utility and the officers, agents and employees thereof shall obey, observe and comply with every order made by the Commission under authority of this article so long as the same shall be and remain in force. Any such person or corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this article, shall forfeit to the State of North Carolina not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order or of this article shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense.

No present provision of law shall be deemed to be repealed by this article except such as are directly in conflict therewith. (1933, c. 307, ss. 36, 37.)

ARTICLE 5.

Miscellaneous Provisions as to Public Utilities.

§ 62-101. Certificate of convenience and necessity.—No person, or corporation, their lessees, trustees or receivers shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control of, either directly or indirectly, without first obtaining from the Utilities Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to new construction in progress on May 27, 1931, nor to construction into territory contiguous to that already occupied and not receiving similar service from another utility, nor to construction in the ordinary conduct of business.

The Utilities Commission is hereby empowered to make rules governing the application for, and the issuance of such certificates of public convenience and necessity. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to necessity for certificate of convenience and necessity for housing projects, see § 157-28.

Editor's Note.—See article in 16 N. C. Law Rev. 46.

This section is not applicable to an electric membership corporation organized under the provisions of §§ 117-6 to 117-27. And by reason of the provisions of § 117-27 there was no error in holding that the defendant electric membership corporation was not required to obtain from the Utili-

ties Commissioner (now Utilities Commission) of North Carolina a certificate of public convenience and necessity. *Carolina Power, etc., Co. v. Johnston County Elec. Membership Corp.*, 211 N. C. 717, 192 S. E. 105 (1937).

Cited in *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48 (1941); *Tennessee Elec. Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 59 S. Ct. 366, 83 L. Ed. 543 (1939).

§ 62-102. Contracts of public service corporations.—All public service corporations when requested by the Utilities Commission shall submit copies of contracts made with any person, firm or corporation classed as a holding, managing or operating company or selling service of any kind, and the Utilities Commission shall have the right to disapprove any such contract, after hearing, if in its judgment it is found to be unjust or unreasonable, and designed, or entered into for the purpose of concealing, abstracting, or dissipating the net earnings of the public service corporation receiving such services. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

ARTICLE 6.

Motor Carriers Generally.

§§ 62-103 to 62-121: Repealed by Session Laws 1949, c. 1132, s. 38.

Editor's Note.—The repealing section is codified as § 62-121.79. The repealed sections related to motor vehicle carriers of persons or property. Such carriers are now covered by §§ 62-121.1 through 62-121.79.

ARTICLE 6A.

Insurance and Safety Regulations for Motor Vehicles Carrying Passengers for Hire.

§ 62-121.1. **Insurance and approval of equipment prerequisite to transporting passengers for compensation.**—No person, firm, partnership, or corporation, or the agent of either, shall transport persons for compensation in the State of North Carolina without having first filed with the North Carolina Utilities Commission such insurance as said Commission may require, nor use any equipment in such transportation as has not been approved by the said Commission for use in the transportation of persons. (1947, c. 1025, s. 1.)

Editor's Note.—For brief discussion of this article, see 25 N. C. Law Rev. 384.

§ 62-121.2. **Certificate required for issuance of license; cancellation of license.**—The Motor Vehicle Department shall not issue any license for use upon any motor vehicle for the transportation of persons for compensation until it shall have received from the North Carolina Utilities Commission a certificate that there has been filed with said Commission such insurance as it may require, and that the equipment to be used is safe for the transportation of persons for compensation. When any license shall have been issued by the Motor Vehicle Department, and the required insurance shall not then be effective, or the Commission shall have found that the equipment being used is unsafe for the transportation of persons for compensation, upon certificate from the North Carolina Utilities Commission, the license shall be canceled by the Motor Vehicle Department. (1947, c. 1025, s. 2.)

§ 62-121.3. **Exemptions from application of article.**—This article shall not apply to motor vehicle carriers regulated under article 6, chapter 62, General Statutes of North Carolina, nor to taxicabs, nor to motor vehicles used exclusively in the transportation of bona fide employees of an industrial plant to and from the places of their regular employment. (1947, c. 1025, s. 3.)

§ 62-121.4. **Fee for certificate.**—The North Carolina Utilities Commission shall charge a fee of one dollar (\$1.00) for each vehicle certified to the Motor Vehicle Department under the provisions of this article. (1947, c. 1025, s. 4.)

ARTICLE 6B.

Motor Carriers of Property.

§ 62-121.5. **Declaration of policy.**—Upon investigation, it has been determined that the transportation of property by motor carriers for compensation over the public highways of the State is a business affected with the public interest; that there has been shown a definite public need for the continuation and preservation of all existing motor carrier service, and to that end, it is hereby declared to be the policy of the State of North Carolina to preserve and continue all motor carrier transportation services now afforded this State, and to provide fair and impartial regulations of motor carriers of property in the use

of the public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportation; to promote adequate, economical and efficient service to all of the communities of the State by motor carriers engaged in the transportation of property over the public highways for compensation; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to encourage and promote harmony among motor carriers of property, between such carriers and carriers of property by rail or water, and between all carriers of property and the shipping public; to foster a co-ordinated State-wide motor carrier service; to conform with the national transportation policy and the federal motor carrier acts insofar as the same may be found practical and adequate for application to intrastate commerce; and to co-operate with other states and with the federal government in promoting and co-ordinating intrastate and interstate commerce by motor carriers. (1947, c. 1008, s. 1.)

Editor's Note.—The act from which this article was codified became effective on October 1, 1947. Its title purported to amend and restate the provisions of article 6 of this chapter insofar as the same ap-

plied to motor carriers of property. See § 62-121.79.

As to purpose of former article 6, see *State v. Andrews*, 191 N. C. 545, 132 S. E. 568 (1926).

§ 62-121.6. Delegation of jurisdiction.—Full power and authority to administer and enforce the provisions of this article, and to make and enforce reasonable and necessary rules and regulations to that end, are hereby vested in the North Carolina Utilities Commission. (1947, c. 1008, s. 2.)

§ 62-121.7. Definitions.—When used in this article, unless the language or context clearly indicate that different meanings are intended:

(1) "State" means the State of North Carolina.

(2) "Commission" means the North Carolina Utilities Commission.

(3) "Person" means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, or personal representative thereof.

(4) "Highway" means any road or street in this State used by the public or dedicated or appropriated to public use.

(5) "Motor vehicle," "vehicle," or "truck" mean any vehicle, machine, tractor, semitrailer, or any combination thereof determined by the Commission, which is propelled or drawn by mechanical power and used upon the highways within the State in the transportation of property for compensation in intrastate commerce, but does not include vehicles designed for and used in the transportation of passengers by certificated passenger carriers in which baggage, mail, newspapers, and light express are transported at the same time with passengers.

(6) "Intrastate commerce" means the transportation of property by motor vehicle for compensation between points and over a route or within a territory wholly within the State, which transportation is not a part of a prior or subsequent movement to or from points outside of the State in interstate or foreign commerce, and includes all transportation of property by motor vehicles within the State for compensation in interstate or foreign commerce which has been exempted from regulation under the Interstate Commerce Act.

(7) The term "interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

(8) The term "foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

(9) "Intrastate operations" means the transportation of property by motor vehicle for compensation in intrastate commerce.

(10) "Service," "transportation," and "operations" means the transportation of property by a motor carrier over the highways of the State in intrastate commerce for compensation, and includes all services, vehicles, equipment, and facilities used in connection therewith.

(11) "Certificate" means a certificate of public convenience and necessity issued by the Commission pursuant to the provisions of this article to a common carrier by motor vehicle.

(12) "Permit" means a permit issued by the Commission pursuant to the provisions of this article to a contract carrier by motor vehicle.

(13) "Common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of property or any class or classes thereof for compensation, whether over regular or irregular routes.

(14) "Contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation, other than transportation referred to in paragraph (13), by motor vehicle of property in intrastate commerce for compensation.

(15) "Motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(16) "Private carrier" means any person not included in definitions of common carrier or contract carrier, which transports in intrastate commerce in its own vehicle or vehicles property of which such person is the owner, leasee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or when such transportation is purely an incidental adjunct to some other established private business owned and operated by such person other than the transportation of property for compensation. (1947, c. 1008, s. 3.)

§ 62-121.8. Exemption from regulations.—(1) Nothing in this article shall be construed to include persons and vehicles engaged in one or more of the following services if not engaged at the time or at other times in the transportation of other property by motor vehicle for compensation: (a) transportation of property for or under the control of the United States government, or the State of North Carolina, or any political subdivision thereof, or any board, department or commission of the State, or any institution owned and supported by the State; (b) transportation in bulk of sand, gravel, dirt, debris, and other aggregates, or ready-mixed paving materials for use in street or highway construction or repair; (c) transportation of newspapers; (d) transportation of household effects of a family from one residence to another, or to or from a place of storage; (e) transportation of farm, dairy or orchard products from farm, dairy or orchard to warehouse, creamery, or other original storage or market; (f) transportation for and under the control of co-operative associations organized and operating under the Federal Agricultural Marketing Act, U. S. C. A. Title 12, § 1141(j), or under the State Co-operative Marketing Act, chapter 54, subchapter 5, General Statutes of North Carolina of 1943, as amended, or for any federation of such co-operative associations; provided, such federation possesses no greater powers or purposes than such co-operative associations; (g) transportation of livestock, or fish, including shellfish and shrimp, but not including manufactured products thereof; (h) transportation of raw products of the forest, including firewood, logs, crossties, stavebolts, pulpwood, and rough lumber, but not including manufactured products therefrom; (i) pickup, delivery, and transfer service for railroads, express companies, water carriers and motor carriers in connection with their respective line-haul services within the commercial zone of any city or town, as defined by the Commission between their terminals and places of collection or delivery of freight; (j) transportation by a bona

fide private carrier, as defined in this article; (k) transportation of property when the movement is within a municipality, or within contiguous municipalities, and within a zone adjacent to and commercially a part of such municipality or contiguous municipalities; provided, the Commission shall have power, in its discretion, in any particular case, to fix the limits of any such zone; provided, further, that nothing herein shall be construed as an abridgment of the police powers of any municipality over such operation wholly within any such municipality; (l) transportation of any commodity anywhere of a character not hauled in the ordinary course of business by a common carrier by motor vehicle.

(2) Nothing in this section or in this article shall be so construed as to deny the Commission the right at any time to require of any person or carrier purporting to operate under the provisions of this section satisfactory proof that such person or carrier is, in fact, so operating, and to that end the Commission may conduct such investigations and make such orders as it deems necessary to enforce compliance with this section. (1947, c. 1008, s. 4.)

As to motor vehicles carrying mail under former statute, see *Winborne v. Browning*, 206 N. C. 557, 174 S. E. 579 (1934).

§ 62-121.9. General powers and duties of the Commission.—The Commission is hereby vested with power and it shall be its duty:

(1) To supervise and regulate common carriers by motor vehicle as provided in this article, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, uniform systems of accounts, records, reports and the preservation of records.

(2) To supervise and regulate contract carriers as provided in this article, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, reports and the preservation of records, but shall not require, and nothing in this article shall be construed to require, contract carriers to become common carriers.

(3) To supervise and regulate motor carriers, as defined in this article, in all matters affecting the relationship between such carriers, or the relationship between such carriers and the shipping public, in any manner necessary to promote harmony among such carriers, safety and efficiency of service to the public.

(4) To determine, upon its own motion, or upon motion by a motor carrier, or any other party in interest, whether the transportation in intrastate commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation in this State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in intrastate commerce in effectuating the transportation policy declared in this article. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this article, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in intrastate commerce performed by the carrier or class of carriers designated in such certificate will be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of intrastate transportation by motor carriers in effectuating the transportation policy declared in this article. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in intrastate commerce held by such carrier or carriers at the time the certificate of

exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this paragraph, except after reasonable opportunity for hearing to interested parties.

(5) To administer, execute, and enforce all the provisions of this article, to make and enforce all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration.

(6) For the purpose of the administration of the provisions of this article, to inquire into the management of the business of motor carriers and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that such persons have a pecuniary interest in the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this article.

(7) To prescribe qualifications and maximum hours of service of employees of carriers, and safety of operation and equipment, and in the interest of uniformity of intrastate and interstate rules and regulations applicable within the State of North Carolina with respect to maximum hours of service of truck drivers and/or their helpers, and safety of operation and equipment, the Commission may adopt and enforce the rules and regulations adopted and promulgated by the Interstate Commerce Commission with respect thereto, insofar as the Commission finds the same to be practical and advantageous for application in this State, and to that end the Commission may avail itself of the assistance of any other agency of the State having special knowledge of such matters, to make such investigations and tests as may be deemed necessary to promote safety of equipment and operation of trucks upon the highways.

(8) To relieve the highways of all undue burdens and safeguard traffic thereon by promulgating and enforcing reasonable rules, regulations and orders designed and calculated to minimize the dangers attending transportation on the highways of all commodities including explosives or highly inflammable or combustible liquids, substances or gases.

(9) The Commission may from time to time establish such just and reasonable classifications of groups of carriers included in the term "common carrier by motor vehicle" or contract carrier by motor vehicle as the special nature of the service performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this article, to be observed by such carriers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

(10) Upon complaint in writing to the Commission by any person, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier has failed to comply with any provision of this article, or with any requirement pursuant thereto; and if the Commission finds upon such investigation, after due notice and hearing, that the motor carrier has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier to comply therewith. The Commission may dismiss such complaint without investigation when it is of the opinion that the complainant does not state reasonable grounds for investigation and action on its part. (1947, c. 1008, s. 5.)

§ 62-121.10. Issuance of certificates in lieu of outstanding certificates.—It shall be the duty of the Commission under this article to issue a certificate, as a matter of course and without further proceedings, to each carrier operating on the effective date of this article under a certificate heretofore issued by the Commission, granting to each such carrier the same operating rights held and exercised by it under its outstanding certificate, including amendments thereto which have heretofore been or may hereafter be authorized by the Com-

mission on applications heard before the effective date of this article, and such certificate shall be deemed issued until prepared and actually issued by the Commission, and in the issuance of such certificate to a regular route common carrier of general commodities, the Commission may, in its discretion, delete therefrom any or all so-called "closed door operations;" that is to say, any or all restrictions appearing in such carrier's outstanding certificate which prohibit such carrier from receiving and/or delivering freight at certain points, or between certain points, along the highways over which such carrier is authorized to perform regular route operations; provided, that nothing herein shall relieve any common carrier by motor vehicle from compliance with the provisions of §§ 62-121.18, 62-121.19 and 62-121.20 within such reasonable time as the Commission may require. (1947, c. 1008, s. 6.)

§ 62-121.11. Issuance of certificates to qualified common carriers by motor vehicle operating on and continuously since January 1st, 1947.

—(1) Generally.—Subject to § 62-121.20, if any carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on January 1st, 1947, over the route or routes or within the territory for which application is made under this section, and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on January 1st, 1947, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue a certificate to such carrier without requiring further proof that public convenience and necessity will be served by such operation, if such carrier qualifies itself in the following manner.

(2) Duty of Carrier.—This section shall not apply to a carrier unless the carrier on or before the effective date of this article files with the Commission on forms furnished by it an application under oath for a certificate under this section, giving such information and in such detail as the Commission may require, including the following:

(a) The full name and address of each person owning an interest in the transportation business of the carrier, the date when each such interest was acquired if subsequent to January 1st, 1946, and the name and address of the carrier's predecessor in interest, if any.

(b) A full and complete report of the operations of the carrier or its predecessor for one or more full calendar months during the year 1946 chosen by the carrier as being representative of the nature, extent, and frequency of its continuous operations from January 1st, 1947, to the date the application is filed, which report for the month or months covered shall give the date of each intra-state shipment, the waybill number, or other identification number, if any, the point of origin, point of destination, a general description of the commodity transported, its weight and the transportation charges received.

(c) An accurate description of the highways over which and the termini between which the carrier, during the month or months covered by its report, performed regular route operations.

(d) An accurate description of the territory within which the carrier, during the month or months covered by its report, performed irregular route operations.

(e) The make, type, and carrying capacity of each truck or other units of equipment owned, operated by, or licensed in name of the carrier or predecessor in interest, for the years 1946 and 1947, respectively.

(f) A current balance sheet showing the assets, liabilities, and net worth of the carrier.

(3) Duty of Commission.—The Commission shall issue a certificate to such carrier authorizing the regular route operations and the irregular route opera-

tions for which application is made, as provided in this section, but only to the extent that the Commission finds from the application that the operations of such carrier were reasonably frequent and continuous throughout the period covered by the report of operations filed with and made a part of the application, and to that end the application so filed shall be received in evidence by the Commission; provided, however, the Commission may require such supporting or additional evidence as it may desire as to the verity of the facts stated in the application; provided, further, that the Commission may deny such certificate upon a finding from competent evidence that the applicant is unfit, or otherwise disqualified, to perform the service for which application is made. In the event no protest is filed within such time as may be prescribed by the rules of the Commission, the necessary findings may be made and certificate issued without a hearing. (1947, c. 1008, s. 7.)

§ 62-121.12. Issuance of permits to qualified contract carriers operating on and continuously since January 1st, 1947.—(1) Generally.—Subject to § 62-121.20, if any carrier or predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on January 1st, 1947, over the route or routes, or within the territory for which application is made under this section, and has so operated since that time, or, if engaged in furnishing seasonal service only, was in bona fide operation on January 1st, 1947, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue a permit to such carrier, if such carrier qualifies itself in the following manner.

(2) Duty of Carrier.—This section shall not apply to a carrier unless the carrier on or before the effective date of this article files with the Commission on forms furnished by it an application under oath for a permit under this section, giving such information and in such detail as the Commission may require, including the following:

(a) The full name and address of each person owning an interest in the transportation business of the carrier.

(b) The number of consignors served as a contract carrier during the month of January, 1947, and the points of origin and points of destination from and to which the carrier operated during said month.

(c) The make, type and carrying capacity of each truck, or other unit of equipment, owned, operated by, or licensed in the name of the carrier during the month of January, 1947, and for each month thereafter up to the filing of said application.

(d) A true copy of each contract between the carrier and a shipper in force on the date of such application. (No such contract shall be open to inspection by other carriers or by the public, except by order of court or by order of the Commission in a proceeding involving the violation of some law or valid regulation of the Commission in which such contract becomes material.)

(e) A current balance sheet showing the assets, liabilities, and net worth of the carrier.

(3) Duty of Commission.—The Commission shall issue a permit to such carrier, authorizing operations for which application is made under this section, but only to the extent that the Commission finds from the application that the applicant was a bona fide contract carrier on January 1st, 1947, and has continued to so operate since that time, seasonal service and unavoidable interruptions considered; and to that end, the application so filed shall be received in evidence by the Commission; provided, however, the Commission may require such supporting or additional evidence as it may desire as to the verity of the facts stated in the application; provided further, that the Commission may deny such permit upon a finding from competent evidence that the applicant is unfit

or otherwise disqualified to perform the service for which application is made. In the event no protest is filed within such time as may be prescribed by the rules of the Commission, the necessary findings may be made and permit issued without a hearing. (1947, c. 1008, s. 8.)

§ 62-121.13. Issuance of certificates to persons whose operations were abandoned because of service with the armed forces. — (1) Any person who was regularly engaged in the transportation business as a common carrier by motor vehicle subsequent to January 1st, 1940, of which such person was a principal owner, and who abandoned such transportation business because of entry into the armed forces of the United States, shall be entitled to a certificate, as provided in this section, authorizing the operations so abandoned; provided, however, that such person on or before the effective date of this article files with the Commission on forms furnished by it an application under oath for a certificate under this section, giving such information and in such detail as the Commission may require, including the following:

(a) The full name and address of each person owning an interest in such transportation business at the time the same was abandoned and the interest owned by each.

(b) The date when such business was abandoned, the date when the applicant entered the armed forces, and the date when he was discharged therefrom.

(c) The names and addresses of the shippers served by the applicant during one or more full calendar months of the last year of regular operations chosen by the applicant as being fairly representative of the nature, extent, and frequency of his operations at the time the same were abandoned, and the points to and from which shipments were made by the applicant for the month or months so chosen.

(d) An accurate description of the highways over which, and the termini between which, such person performed regular route operations during the calendar month or months chosen, as herein provided.

(e) An accurate description of the territory within which such person performed irregular route operations during the calendar month or months chosen, as herein provided.

(f) The make, type, and carrying capacity of each truck or other unit of equipment owned, operated by, or licensed in the name of the applicant during the last month of regular operations.

(g) A current balance sheet showing the assets, liabilities and net worth of the applicant.

(2) If the Commission finds from the application that the applicant abandoned a bona fide operation as a common carrier by motor vehicle under the conditions set out in this section, it shall issue a certificate to such applicant authorizing the regular route operations and the irregular route operations for which application is made, as provided in this section, but only to the extent that it finds from the application that the operations of such person were reasonably frequent and continuous throughout the period covered by its application, seasonal service and unavoidable interruptions considered, and to that end, the application so filed shall be received in evidence by the Commission; provided, however, the Commission may require such supporting or additional evidence as it may desire as to verity of the facts stated in the application; provided further, the Commission may deny such certificate upon a finding from competent evidence that the applicant is unfit or otherwise disqualified to perform the service for which application is made. In the event no protest is filed within such time as may be prescribed by the rules of the Commission, the necessary findings may be made and certificate issued without a hearing. (1947, c. 1008, s. 9.)

§ 62-121.14. Issuance of temporary authority.—Upon the filing of an application in good faith for a certificate, or permit, as provided in §§ 62-121.11, 62-121.12 and 62-121.13, respectively, the Commission shall, pending its final decision on the application, issue to the applicant appropriate temporary authority to operate as a common carrier by motor vehicle, or as a contract carrier by motor vehicle, as the case may be, under such just and reasonable conditions and limitations as the Commission deems necessary or desirable to impose in the public interest; provided, however, that pending such final decision on the application, the applicant shall comply with all the provisions of this article, and with the lawful orders, rules and regulations of the Commission promulgated thereunder, applicable to holders of certificates or permits, and upon failure of an applicant so to do, after reasonable notice from the Commission requiring compliance therewith in the particulars set out in the notice, and after hearing, the application may be dismissed by the Commission without further proceedings, and temporary authority issued to such applicant revoked. (1947, c. 1008, s. 10.)

§ 62-121.15. Applications and hearings.—(1) Except as otherwise provided in §§ 62-121.8, 62-121.10 to 62-121.14 and 62-121.21, no person, after the effective date of this article, shall engage in the transportation of property in intrastate commerce or continue in any such operations until and unless such person shall have applied to and obtained from the Commission a certificate or permit authorizing such operations, and it shall be unlawful for any person to knowingly or willfully operate in intrastate commerce in any manner contrary to the provisions of this article, or of the rules and regulations of the Commission made pursuant thereto.

(2) Applications for certificates or permits shall be made to the Commission in writing on forms furnished by the Commission, shall be verified under oath by the applicant, and shall contain such information and in such form and detail as the Commission may require.

(3) Upon filing of an application for a certificate or a permit, the Commission shall, within a reasonable time, fix a time and place for hearing such application not less than thirty (30) days after such filing. The Commission shall cause notice of the time and place of hearing to be given by mail to the applicant, to other motor carriers holding certificates or permits and operating in the territory proposed to be served by the applicant, to other carriers who have pending applications to so operate, and to rail carriers operating in such territory.

(4) The notice herein required shall be given at least twenty (20) days prior to the date fixed for the hearing and shall be deemed given on the date the same is mailed, but failure of any such person, other than the applicant, to receive any such notice shall not, for that reason, invalidate the action of the Commission in granting or denying such application.

(5) The Commission may, by general regulation, require parties desiring to protest the granting an application for a certificate or permit, in whole or in part, to mail or deliver to the Commission and to the applicant, within such reasonable time prior to the date fixed for the hearing as the Commission may by regulation require, written protests under oath specifying the grounds for such protests and the particular way and manner in which the protestant will be adversely affected by the granting of the application. If no such protest is filed within the time required, the Commission may make the necessary findings and issue the certificate or permit without a hearing; otherwise, except as provided in §§ 62-121.10 to 62-121.13, no certificate or permit shall be issued, or amended so as to enlarge the scope of operations, without a hearing on an application therefor, as provided in this section.

(6) If the application is for a certificate, the burden of proof shall be upon the applicant to show to the satisfaction of the Commission, (a) that a public demand and need exists for the proposed service in addition to existing authorized transportation service, and (b) that the applicant is fit, willing and able to

properly perform the proposed service, consideration being given to the financial ability of the applicant to furnish adequate service and to the probability of its continuation.

(7) If the application is for a permit, the Commission shall give due consideration to (a) whether the proposed operations conform with the definition in this article of a contract carrier, (b) whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates and/or rail carriers, (c) whether the proposed service will unreasonably impair the use of the highways by the general public, (d) whether the applicant is fit, willing and able to properly perform the service proposed as a contract carrier, (e) whether the proposed operations will be consistent with the public interest and the transportation policy declared in this article, and (f) other matters tending to qualify or disqualify the applicant for a permit. (1947, c. 1008, s. 11.)

§ 62-121.16. Terms and conditions of certificate.—Any certificate issued under this article shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under § 62-121.9; provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require. (1947, c. 1008, s. 12.)

§ 62-121.17. Issuance of permits, terms and conditions.—The Commission shall specify in the permit, or amendment thereto, the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under § 62-121.9; provided, that no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, as the development of the business and the demands of the public may require. (1947, c. 1008, s. 13.)

§ 62-121.18. Issuance of partnership certificates or permits.—No certificate or permit shall be issued under this article to two or more individuals until such individuals shall have executed a partnership agreement and recorded the same in the office of the clerk of the superior court in the county in which the principal office of the partnership is located, a certified copy of which agreement shall be filed with the Commission. (1947, c. 1008, s. 14.)

§ 62-121.19. The same or similar trade names prohibited.—No carrier holding or operating under a certificate or permit issued under this article shall adopt or use the same trade name used by any other such carrier, or the name of any corporation holding or operating under a certificate or permit, or any name so similar to the trade or corporate name of another carrier as to mislead or confuse the public, and the Commission may, upon complaint, or upon its own initiative, in any such case require the carrier to discontinue the use of such

trade name, preference being given to the carrier first adopting and using such trade name. (1947, c. 1008, s. 15.)

§ 62-121.20. Dual operations.—Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the transportation policy declared in this article:

(1) No person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and

(2) No person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory. (1947, c. 1008, s. 16.)

§ 62-121.21. Emergency operating authority.—To meet unforeseen emergencies, the Commission may, upon its own initiative, or upon written request by any shipper, group or organization of shippers, department or agency of the State, or of any county, city or town, with or without a hearing, grant appropriate authority to any owner of a duly licensed truck or trucks, whether such owner holds a certificate or permit or not, to transport such commodities between such points, or within such area, during the period of the emergency and to the extent necessary to relieve the same, as the Commission may fix in its order granting such authority: provided, the Commission finds from such request, or from its own knowledge of conditions, that a real emergency exists and that relief to the extent authorized in its order is immediate, pressing and necessary in the public interest, and that the carrier so authorized has the necessary equipment and is willing to perform the emergency service as prescribed by the order. (1947, c. 1008, s. 17.)

§ 62-121.22. Deviation from regular route operations.—Any common carrier by motor vehicle, now or hereafter holding a certificate issued by the Commission authorizing the transportation of general commodities over regular routes between fixed termini, may, under such rules and regulations as the Commission may prescribe, (1) transport from origin to destination, over any convenient highway or highways, shipments in truckloads originating at or destined to points on the regular routes of such carrier, and (2) move shipments in truckloads from any point on its regular routes to any other points on its regular routes over any convenient highway or highways between such points, whether over the routes of another carrier or not, where such movement over the carrier's own routes would otherwise be unnecessarily circuitous. In no event shall the operation of empty equipment by any carrier over any route or highway be construed as a violation of the rights of any carrier. (1947, c. 1008, s. 18.)

§ 62-121.23. Security for protection of the public.—No certificate or permit shall be issued to any motor carrier, or remain in force until such carrier shall have procured and filed with the Commission such security for the protection of the public as the Commission shall by regulation determine and require. (1947, c. 1008, s. 19.)

§ 62-121.24. Joinder of causes of action.—To expedite the settlement of claims between shippers and motor carriers, a shipper may join in the same

complaint against a motor carrier any number of claims for overcharges, or a motor carrier may join in the same complaint any number of claims against a shipper for undercharges, whether such claims arose at the same time or in the course of shipments at different times; provided, that each such claim shall be so identified that the same and the allegations with respect thereto may be distinguished from other claims so joined in the complaint, and in cases in which the right of subrogation may be invoked the judgment shall specify the amount of recovery, if any, on each such claim. For the purpose of jurisdiction under this section the aggregate amount set out in the complaint shall be deemed the sum in controversy. (1947, c. 1008, s. 20.)

§ 62-121.25. Notice of claims and limitations for loss, damage or injury to goods.—Any claim for loss, damage, or injury to goods while in the possession of a carrier shall be filed by the claimant with the adverse party in writing within nine (9) months after the same occurred, and the cause of action with respect thereto shall be deemed to have accrued at the expiration of thirty (30) days after the date of such notice, and action for the recovery thereon may be commenced immediately thereafter or at any time within two (2) years after notice in writing shall have been given to the claimant by the adverse party that the claim or any part thereof specified in such notice has been disallowed, and neither party shall by any rule, regulation, contract, or otherwise, provide for a shorter time for filing such claims, or for commencing actions thereon than the periods set out in this section. (1947, c. 1008, s. 21.)

§ 62-121.26. Transfers of certificates and permits.—No certificate or permit issued under the provisions of this article shall be sold, assigned, pledged, transferred, or any rights thereunder leased, nor shall any merger or combination affecting any motor carrier be made through acquisition of control by stock purchases or otherwise, except after application to and written approval by the Commission, and no sale of a certificate or permit shall be approved by the Commission until the seller shall have filed with the Commission a statement under oath of all debts and claims against the seller, of which such seller has any knowledge or notice, (a) for gross receipt taxes, use or privilege taxes, due or to become due the State, as provided in the current Revenue Act, (b) for wages due employees of the seller, other than salaries of officers, (c) for unremitted C. O. D. collections due shippers, (d) for loss or damages of goods transported, or received for transportation, (e) for overcharges on property transported, and (f) for interline accounts due other carriers, together with a bond payable to the State, executed by a surety company authorized to do business in the State, in an amount double the aggregate of all such debts and claims, conditioned upon the payment of the same within the amount of such bond as the amounts and validity of such debts and claims are established by agreement of the parties, or by judgment; provided, that it shall be considered against the policy declared in § 62-121.5 for any person to obtain a certificate or permit for the purpose of transferring the same to another, and an offer of such transfer within one year after the same was obtained shall be prima facie evidence that such certificate or permit was obtained for the purpose of sale. (1947, c. 1008, s. 22.)

§ 62-121.27. Suspension or revocation of certificates and permits.—(1) Certificates and permits issued under the provisions of this article shall be effective from the date issued unless otherwise specified therein, and shall remain in effect until terminated under the terms thereof, or until suspended or revoked as herein provided.

(2) Any certificate or permit may be suspended or revoked, in whole or in part, in the discretion of the Commission, upon application of the holder thereof; or may be suspended or revoked, in whole or in part, upon complaint, or upon the Commission's own initiative, after notice and hearing, for willful failure to comply with any provision of this article, or with any lawful order, rule, or regulation

of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate or permit; provided, however, that any such certificate or permit may be suspended by the Commission upon notice to the holder or lessee thereof without a hearing for any one or more of the following causes:

(a) For failure to provide and keep in force at all times security for the protection of the public as required in § 62-121.23.

(b) For failure to file and keep on file with the Commission applicable tariffs or schedules of charges as required in §§ 62-121.29 and 62-121.30.

(c) For failure to pay any gross receipt taxes, use or privilege taxes, due the State of North Carolina within thirty (30) days after demand in writing from the agency of the State authorized by law to collect the same; provided, that this paragraph shall not apply to instances in which there is a bona fide controversy as to tax liability.

(d) For failure for a period of sixty (60) days after execution to pay any final judgment rendered by a court of competent jurisdiction against any holder or lessee of a certificate or permit for any debt or claim specified in (a) to (f), inclusive, in § 62-121.26.

(e) For failure to begin operations as authorized by the Commission within the time specified by order of the Commission, or for suspension of authorized operations for a period of thirty (30) days without the written consent of the Commission. (1947, c. 1008, s. 23.)

§ 62-121.28. Rates and charges of common carriers. — (1) It shall be the duty of every common carrier by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in intrastate commerce; to establish, observe, and enforce just and reasonable regulations and practices relating thereto, and to the manner and method of presenting, marking, packing and delivering property for transportation in intrastate commerce, the facilities for such transportation, and all other matters relating to or connected with the transportation of property in intrastate commerce.

(2) Except under special conditions and for good cause shown every common carrier by motor vehicle authorized to transport general commodities over regular routes shall establish reasonable through routes and joint rates, charges, and classifications with other such common carriers by motor vehicle, and with the approval of the Commission, may do so with irregular route common carriers by motor vehicle, common carriers by railroad and/or express and/or water. In case of joint rates and charges between common carriers of any class or kind whatsoever, it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein, which shall not unduly prefer or prejudice any of such participating carriers. Upon investigation and for good cause, the Commission may, in its discretion, prohibit the establishment of joint rates or service.

(3) All charges made for services rendered or to be rendered by any common carrier by motor vehicle in the transportation of property in intrastate commerce or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in intrastate commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, place, locality, territory, or description of traffic, in any respect whatsoever, or to subject any particular person, place, locality, territory, or description of traffic, to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; provided, however, that this paragraph shall not be construed to apply to discriminations, prejudices, or disadvantage to the traffic of any other carrier of whatever description.

(4) Any person, organization, or body politic may make complaint in writing

to the Commission that any such rate, charge, classification, rule, regulation, or practice in effect or proposed to be put into effect, is or will be in violation of this section or of § 62-121.29. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle, or by any such common carrier or carriers in conjunction with any common carrier or carriers by railroad and/or express and/or water, for transportation of property in intrastate commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate or charge or the value of the service thereunder, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate or charge, or the minimum or maximum, or the minimum and maximum rate or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective.

(5) Whenever, after hearing, upon complaint or upon its own initiative the Commission is of the opinion that the divisions of joint rates or charges applicable to the transportation of property in intrastate commerce by common carriers by motor vehicle or by such carriers in conjunction with common carriers by railroad and/or express and/or water, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or any of them or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable division thereof to be received by the several carriers; and in cases where the joint rate or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers in accordance with the order from the date of filing the complaint or entry of order of investigation or such other dates subsequent as the Commission finds justified, and in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

(6) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, charge, or classification for the transportation of property in intrastate commerce by any common carrier or carriers by motor vehicle or by any such carrier or carriers in conjunction with the common carrier or carriers by railroad and/or express and/or water, or any rule, regulation, or practice affecting such rate or charge or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once, and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon, the Commission, by filing such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reason for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate or charge, or such rule, regulation, or practice, but not for a longer period in the aggregate than 180 days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with respect thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate or charge or classification, rule, regulation, or practice

shall go into effect at the end of such period. At any hearing involving a change in the rate, charge, or classification, or any rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, charge, classification, rule, regulation, or practice is just and reasonable.

(7) In the exercise of its power to prescribe just and reasonable rates and charges for the transportation of property in intrastate commerce by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon movement of traffic by the carrier or carriers for which rates are prescribed; to the need in the public interest of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; to the need of revenues sufficient to enable such carriers under honest, economical, and efficient management to provide such service.

(8) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. (1947, c. 1008, s. 24.)

§ 62-121.29. Tariffs of common carriers.—(1) Every regular route common carrier of general commodities by motor vehicle shall file with the Commission, and print, and keep open for public inspection tariffs showing all rates and charges for the transportation of property in intrastate commerce, and all services in connection therewith between points on its own routes and between points on its own routes and points on the routes of other such common carriers, and if it establishes joint rates and charges with common carriers by railroad and/or express and/or water, then in that event it shall include in its tariffs so filed such joint rates and charges.

(2) Every irregular route common carrier by motor vehicle shall file with the Commission, and print, and keep open for public inspection tariffs showing all rates and charges for the transportation of property in intrastate commerce between points within the area of its authorized operations, and if it establishes joint rates and charges with common carriers by railroad and/or express and/or water, then in that event it shall include in its tariffs so filed such joint rates and charges between points within the area of its own authorized operation and points on the line or route of such carriers by railroad and/or express and/or water.

(3) The tariffs required by this section or permitted thereunder with respect to joint rates and charges with common carriers by railroad and/or express and/or water shall be stated in lawful money of the United States and shall be published, filed, and posted in such form and manner and shall contain such information as the Commission by regulation may prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(4) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property in intrastate commerce or for any service in connection therewith between points enumerated in such tariff than the rates, and charges, specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or otherwise, any portion of the rates or charges so specified, or extend to any person any privilege or facilities for transportation of property in intrastate commerce except such as are specified in its tariffs.

(5) No change shall be made in any rate, charge, or classification, or any rule, regulation, or practice affecting such rate, charge or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle except after 30 days' notice of the proposed change filed and posted in accordance with this section. Such notice shall plainly state the change pro-

posed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow such change upon notice less than that herein specified or modify the requirements of this section with respect to the posting and filing of tariffs, either in specific instances or by general order applicable to special or peculiar circumstances or conditions.

(6) No common carrier by motor vehicle, unless otherwise provided by this article, shall engage in the transportation of property in intrastate commerce, unless the rates and charges upon which the same are transported by such carrier have been filed and published in accordance with the provisions of this article. (1947, c. 1008, s. 25.)

§ 62-121.30. Schedules of contract carriers.—(1) It shall be the duty of every contract carrier to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates and charges. It shall be the duty of every contract carrier to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of property in intrastate commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this article, shall engage in the transportation of property in intrastate commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this article. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after 30 days' notice of the proposed change filed in the aforesaid form and manner, but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed; provided, that any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the transportation policy declared in this article.

(2) Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of property or in connection therewith, contravenes the transportation policy declared in this article, or is in contravention of any provision of this article, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this article. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission,

shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this article, which the Commission may find to be undue or inconsistent with the public interest and the transportation policy declared in this article, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath.

(3) Whenever there shall be filed with the Commission by any such contract carrier any schedule stating a charge for a new service or a reduced charge, directly or by means of any rule, regulation, or practice, for the transportation of property in intrastate commerce, the Commission is hereby authorized and empowered upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such charge, or such rule, regulation, or practice, but not for a longer period in the aggregate than 180 days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the charge, or rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change in any charge or rule, regulation, or practice shall go into effect at the end of such period. The rule as to burden of proof specified in § 62-121.28, (6) shall apply to this paragraph. (1947, c. 1008, s. 26.)

§ 62-121.31. Liability for damage to property in transit.—Every common carrier by motor vehicle receiving property for transportation in intrastate commerce shall issue a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it, or by any carrier participating in the haul when transported on a through bill of lading, and any such carrier delivering said property so received and transported shall be liable to the lawful holder of said bill of lading or to any party entitled to recover thereon for such loss, damage, or injury, notwithstanding any contract or agreement to the contrary; provided, however, the Commission may, by regulation or order, authorize or require any such common carrier, to establish and maintain rates related to the value of shipments declared in writing by the shipper, or agreed upon as the release value of such shipments; such declaration or agreement to have no effect other than to limit liability and recovery to an amount not exceeding the value so declared or released, in which case, any tariff filed pursuant to such regulation or order shall specifically refer thereto; provided further, that nothing in this section shall deprive any lawful holder of such bill of lading of any remedy or right of action which such holder has under existing law; provided further, that the carrier issuing such bill of lading, or delivering such property so received and transported, shall be entitled to recover from the carrier on whose route the loss, damage, or injury shall have been sustained, the amount it may be required to pay to the owners of such property. (1947, c. 1008, s. 27.)

§ 62-121.32. Accounts, records and reports.—(1) The Commission is hereby authorized to require annual, periodical, or special reports from all motor carriers, and lessors (as defined in this section), to prescribe the manner and form

in which such reports shall be made, and to require from such carriers, and lessors, specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, or lessor, in such form and detail as may be prescribed by the Commission. The Commission may also require any motor carrier to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this article. The Commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest; provided, that if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier as required by § 62-121.30, the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof.

(2) Said annual reports shall contain all the required information for the period of twelve months ending on the thirty-first day of December in each year, unless the Commission shall specify a different date, and shall be made out under oath and filed with the Commission at its office in Raleigh within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission. Such periodical or special reports as may be required by the Commission under paragraph (1) hereof shall also be under oath, whenever the Commission so requires.

(3) The Commission may prescribe for motor carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and rates so prescribed. When the Commission shall have exercised its authority under the foregoing provisions of this paragraph, motor carriers shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a rate of depreciation other than that prescribed therefor by the Commission, and no such carrier shall include under operating expenses any depreciation charge in any form whatsoever other than as prescribed by the Commission.

(4) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by motor carriers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, and lessors, to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, stubs, correspondence, or documents of motor carriers, or lessors, as may after a reasonable time be destroyed, and prescribing the length of time they shall be preserved. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of motor carriers, and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, and lessors, and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. Motor carriers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and

copying authorized by this paragraph, and motor carriers, and lessors shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, auditor, inspector, or examiner of the Commission upon demand and the display of proper credentials.

(5) As used in this section, the words "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained; the term "lessor" means a lessor of any right to operate as a motor carrier; and the term "motor carrier," or "lessor," includes a receiver or trustee of any such motor carrier, or lessor. (1947, c. 1008, s. 28.)

§ 62-121.33. Orders, notices and service of process.—(1) It shall be the duty of every motor carrier operating under a certificate or permit issued under the provisions of this article to file with the Commission a designation in writing of the name and post-office address of a person upon whom or which service of notices or orders may be made under this article. Such designation may from time to time be changed by like writing similarly filed. Service of notices or orders in proceedings under this article may be made upon a motor carrier by personal service upon it or upon the person so designated by it, or by registered mail, return receipt requested, addressed to it or to such person at the address filed. In proceedings before the Commission involving the lawfulness of rates, charges, classifications, or practices, service of notice upon the person or agent who has filed a tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier.

(2) Except as otherwise provided in this article, all orders of the Commission shall take effect within such reasonable time as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. (1947, c. 1008, s. 29.)

§ 62-121.34. Unlawful operation.—(1) Any person, whether carrier, or any officer, employee, agent or representative thereof, knowingly and willfully violating any provisions of this article or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate or permit, for which a penalty is not otherwise herein provided, shall be guilty of a misdemeanor, and upon conviction thereof be fined not more than \$100.00 for the first offense and not more than \$500.00 for any subsequent offense.

(2) If any motor carrier operates in violation of any provision of this article (except as to the reasonableness of rates or charges and the discriminatory character thereof), or of any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the resident superior court judge of any judicial district where such motor carrier operates, or to any superior court judge holding court in any such judicial district, for the enforcement of such provision of this article, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or its officers, agents, employees, and representatives from further violation of such provision of this article or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

(3) Any person, whether carrier, shipper, consignee, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this article, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of

property subject to this article for less than the applicable rate, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this article provided for motor carriers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than \$500.00 for the first offense and not more than \$2,000.00 for any subsequent offense.

(4) It shall be unlawful for any special agent, accountant, auditor, inspector, or examiner to knowingly and willfully divulge any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of § 62-121.32, except as he may be directed by the Commission or by a court or judge thereof.

(5) It shall be unlawful for any motor carrier engaged in intrastate commerce or any officer, receiver, trustee, lessee, agent, or employee of such carrier, or for any other person authorized by such carrier, to receive information, knowingly to disclose to, or permit to be acquired by any person other than the shipper or consignee without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such motor carrier for such transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

(6) Nothing in this article shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the State or of the government of the United States, in the exercise of his power, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

(7) Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this article, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject for each offense to a fine of not more than \$5,000.00. As used in this subsection the words "kept" and "keep" shall be construed to mean made, prepared, or compiled, as well as retained. (1947, c. 1008, s. 30.)

§ 62-121.35. Collection of rates and charges.—No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in intrastate commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice; provided, that the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported

for the United States, for any department, bureau, or agency thereof, or for the State, or political subdivision thereof. Where any common carrier by motor vehicle is instructed by a shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and had no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper and consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. (1947, c. 1008, s. 31.)

§ 62-121.36. Allowance to shippers for transportation services.—If the owner of property transported under the provisions of this article directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in the tariffs or schedules filed in the manner provided in this article and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. (1947, c. 1008, s. 32.)

§ 62-121.37. Embezzlement of C. O. D. shipments.—Property received by any motor carrier to be transported in intrastate commerce and delivered upon collection on such delivery and remittance to the shipper of the sum of money stated in the shipping instructions to be collected and remitted to the shipper, and the money collected upon delivery of such party, is hereby declared to be held in trust by any carrier having possession thereof or the carrier making the delivery or collection, and upon failure of any such carrier to account for the property so received, either to the shipper to whom the collection is payable or the carrier making delivery to any carrier handling the property or making the collection, within fifteen (15) days after demand in writing by the shipper, or carrier, or upon failure of the delivering carrier to remit the sum so directed to be collected and remitted to the shipper, within fifteen (15) days after collection is made, shall be prima facie evidence that the property so received, or the funds so received, has been willfully converted by such carrier to its own use, and the carrier so offending shall be guilty of a felony and upon conviction shall be punished by fine or imprisonment, or both, in the discretion of the court, and such carrier may be indicted, tried, and punished in the county in which such shipment was delivered to the carrier or in any other county into or through which such shipment was transported by such carrier. (1947, c. 1008, s. 33.)

§ 62-121.38. Evidence; joinder of surety.—No report by any carrier of any accident arising in the course of the operations of such carrier, made

pursuant to any requirement of the Commission, and no report by the Commission of any investigation of any such accident, shall be admitted as evidence, or used for any other purpose in any suit or action for damages growing out of any matter mentioned in such report or investigation; nor shall the discharge by any carrier of any truck driver or other employee after any such accident be offered or admitted in evidence for any purpose in any suit or action against such carrier for damages arising out of any such accident; nor shall any insurance company or surety executing any insurance policy, bond, or other security for the protection of the public, as provided in § 62-121.23, or as provided in § 62-121.26, be joined with the assured carrier in any action or suit for damages, debt, or claim thereby secured; nor shall evidence of any such policy, bond, or other security be offered or received in any such action or suit against the carrier, but the surety or insurer shall be obligated within the amount of such policy, bond or other security to pay any final judgment against the carrier. (1947, c. 1008, s. 34.)

§ 62-121.39. **Interstate carriers.**—(1) This article shall apply to persons and vehicles engaged in interstate commerce over the highways of this State, and the Commission may, in its discretion, require such carriers to file with it copies of their respective interstate authority, registration of their vehicles operated in this State, and the observance of such reasonable rules and regulations as the Commission may deem advisable in the administration of this article and for the protection of persons and property upon the highways of the State, except insofar as the provisions of this article may be inconsistent with, or shall contravene, the Constitution and laws of the United States.

(2) The Commission or its authorized representative is authorized to confer with and hold joint hearings with the authorities of other states or with the Interstate Commerce Commission or its representatives in connection with any matter arising under this article, or under the Federal Motor Carrier Act, which may directly or indirectly affect the interests of the people of this State or the transportation policy declared by this article or by the Interstate Commerce Act. (1947, c. 1008, s. 35.)

§ 62-121.40. **Fees and charges.**—The following fees and charges shall be paid to the Commission under the provisions of this article:

(1) \$25.00 with each application for a certificate or permit, and with each application for an amendment to a certificate or permit for new or additional operating rights, but credit shall be given for fees paid on applications filed under the existing law and heard after this article becomes effective.

(2) \$10.00 for each application for approval of a sale, assignment, pledge, hypothecation, transfer of a certificate or permit, or lease of any right or interest under a certificate or permit, or for approval of any merger combination or change of control of the operating rights under a certificate or permit through stock transfer or otherwise.

(3) \$1.00 for registration of each motor vehicle of a certificate or permit holder added to its rolling equipment after the effective date of this article.

(4) Twenty-five cents for annual reregistration of each motor vehicle operated by a certificate or permit holder.

(5) Such reasonable charges for copies of transcripts of testimony, or for copies of other papers, records, or documents, or for certifying records, as the Commission shall prescribe in its rules of practice and procedure. All fees and charges received by the Commission under this section shall be in addition to any other tax or fee provided by law and shall be paid forthwith to the State Treasurer. (1947, c. 1008, s. 36.)

§ 62-121.41. **Allocation of funds.**—Sufficient funds shall be provided in the budget and allocated to the Commission to be disbursed under the supervision of the Director of the Budget for the administration and enforcement of

the provisions of this article, including the employment of such additional personnel as may be required for that purpose. (1947, c. 1008, s. 37.)

§ 62-121.42. **Title.**—This article shall be known and may be cited as the North Carolina Truck Act. (1947, c. 1008, s. 38.)

ARTICLE 6C.

Bus Act of 1949.

§ 62-121.43. **Short title.**—This article shall be known and may be cited as The Bus Act of 1949. (1949, c. 1132, s. 1.)

Local Modification.—Cabarrus: 1947, c. 532; 1949, c. 1132, § 39.

Effective Date.—Section 40 of the act inserting this article made it effective on October 1, 1949, except that subsection (13) of § 62-121.48 became effective as of April 22, 1949.

Editor's Note.—For a discussion of this article, see 27 N. C. Law Rev. 467. As to application of former article of similar import, see *City Coach Co. v. Gastonia Transit Co.*, 227 N. C. 391, 42 S. E. (2d) 398 (1947).

§ 62-121.44. **Declaration of policy.**—Upon investigation, it has been determined that the transportation of passengers by motor carriers for compensation over the public highways of the State is a business affected with a public interest, and is hereby declared to be the policy of the State of North Carolina among other things, to provide fair and impartial regulation of motor carriers of passengers in the use of the public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportation; to promote adequate economical and efficient service to all of the communities of the State by motor carriers engaged in the transportation of passengers over the public highways for compensation; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to encourage and promote harmony among motor carriers of passengers, between such carriers and carriers of passengers by rail or water, and between all carriers of passengers and the traveling public; to foster a coordinated State-wide motor carrier service; to conform with the national transportation policy and the Federal Motor Carrier Act insofar as the same may be found practical and adequate for application to intrastate commerce; and to co-operate with other states and with the federal government in promoting and coordinating intrastate and interstate commerce by motor carriers. (1949, c. 1132, s. 2.)

§ 62-121.45. **Delegation of jurisdiction.**—Full power and authority to administer and enforce the provisions of this article, and to make and enforce reasonable and necessary rules and regulations to that end, are hereby vested in the North Carolina Utilities Commission. (1949, c. 1132, s. 3.)

§ 62-121.46. **Definitions.**—When used in this article, unless the language or context clearly indicate that different meanings are intended:

(1) "Broker" means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carriers, who or which as principal or agent engages in the business of selling or offering for sale any transportation by motor carrier, or negotiates for or holds himself, or itself, out by solicitation, advertisement, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(2) "Certificate" means a certificate of public convenience and necessity issued by the Commission pursuant to the provisions of this article to a common carrier by motor vehicle.

(3) "Charter party" means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger carrying motor vehicle to travel together as a group from a point of origin to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin.

(4) "Commission" means the North Carolina Utilities Commission.

(5) "Common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of passengers for compensation over regular routes and between fixed termini.

(6) "Contract carrier by motor vehicle" means any person not included in the definition of "common carrier by motor vehicle" which, under individual contracts or agreements, engages in the transportation by motor vehicle of passengers in intrastate commerce for compensation. Such contracts (a) must be in writing, (b) must provide for the transportation of particular persons or group of persons, (c) must be bilateral and impose specific obligations upon both the carrier and the other contracting parties, (d) must cover a series of trips in contrast to a single trip, and (e) a copy of which must be preserved by the carrier until terminated by its terms and at least one year thereafter.

(7) "Highway" means any road or street in this State used by the public or dedicated or appropriated to public use.

(8) "Intrastate commerce" means commerce between points and over a route or within a territory wholly within this State, which commerce is not a part of a prior or subsequent movement to or from points outside of this State in interstate or foreign commerce, and includes all transportation of passengers by motor vehicle within this State for compensation in interstate or foreign commerce which has been exempted from regulation under Part II, the Interstate Commerce Act, regulating motor carriers.

(9) "Intrastate operations" means the transportation of passengers by motor vehicle for compensation in intrastate commerce.

(10) "Interstate commerce" means commerce between any place in this State and any place in another state or between places in this State through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, water, or air.

(11) "Motor carrier" includes a common carrier by motor vehicle and a contract carrier by motor vehicle.

(12) "Motor vehicle," "vehicle," or "bus" means any vehicle, machine, tractor, semitrailer, or any combination thereof determined by the Commission, which is propelled or drawn by mechanical power and used upon the highways within this State in the transportation of passengers for compensation in intrastate commerce.

(13) "Municipality" means any collection of people incorporated pursuant to the provisions of section 4, article 8, of the Constitution of North Carolina.

(14) "Permit" means a permit issued by the Commission pursuant to the provisions of this article to a contract carrier by motor vehicle.

(15) "Person" means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, or personal representative thereof.

(16) "Service," "transportation," and "operations" mean the transportation of passengers by a motor carrier over the highways of this State in intrastate commerce for compensation, and includes all services, vehicles, equipment and facilities used in connection therewith.

(17) "State" means the State of North Carolina.

(18) "Town" means any unincorporated community, or collection of people having a geographical name by which it may be generally known and is so generally designated. (1949, c. 1132, s. 4.)

Service.—As to "service" rendered in v. Andrews, 191 N. C. 545, 132 S. E. 568 contemplation of former statute, see State (1926).

§ 62-121.47. Exemptions from regulations.—(1) Nothing in this article shall be construed to include persons and vehicles engaged in one or more of the following services if not engaged at the time or other times in the transportation of other passengers by motor vehicle for compensation: (a) transportation of passengers for or under the control of the United States government, or the State of North Carolina, or any political subdivision thereof, or any board, department or commission of the State, or any institution owned and supported by the State; (b) transportation of passengers by taxicabs or other motor vehicles performing bona fide taxicab service and carrying not more than six passengers in a single vehicle at the same time and not operated on a regular route or between fixed termini; provided, no taxicab while operating over the regular route of a common carrier outside of a town or a municipality and a residential and commercial zone adjacent thereto, as such zone may be determined by the Commission as provided in (h) of this paragraph, shall solicit passengers along such route, but nothing herein shall be construed to prohibit a taxicab operator from picking up passengers along such route upon call, sign or signal from prospective passengers, (c) transportation by motor vehicles owned or operated by or on behalf of hotels while used exclusively for the transportation of hotel patronage between hotels and local railroad or other common carrier stations; (d) transportation of passengers to and from airports and passenger airline terminals when such transportation is incidental to transportation by aircraft; (e) transportation of passengers by trolley buses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service; (f) transportation by motor vehicles used exclusively for the transportation of passengers to or from religious services; (g) transportation of bona fide employees of an industrial plant to and from their regular employment; (h) transportation of passengers when the movement is within a town or municipality exclusively, or within contiguous towns or municipalities and within a residential and commercial zone adjacent to and a part of such town or municipality or contiguous towns or municipalities; provided, the Commission shall have power in its discretion, in any particular case, to fix the limits of any such zone.

The Commission shall have and retain jurisdiction to fix rates and charges of carriers operating under (e) and (h) of this subsection, and shall have jurisdiction to hear and determine controversies with respect to extensions and services, and the Commission's rules of practice shall include appropriate provisions for bringing such controversies before the Commission and for the hearing and determination of the same, provided nothing in this paragraph shall include taxicabs.

(2) The Commission may conduct investigations to determine whether any person or carrier purporting to operate under the exemption provisions of this section is, in fact, so operating, and make such orders as it deems necessary to enforce compliance with this section.

(3) None of the provisions of this section nor any of the other provisions of this article shall apply to motor vehicles used for the transportation of passengers to or from religious services and/or in the transportation of bona fide employees of an industrial plant to and from places of their regular employment.

(4) Provided, that venue for any action commenced to enforce compliance with the terms of this article against any person, firm or corporation purporting to operate under any of the exemptions provided in this section shall be in

one of the counties of the judicial district wherein the violation is alleged to have taken place and such person, firm or corporation shall be entitled to trial by jury. (1949, c. 1132, s. 5.)

§ 62-121.48. General powers and duties of the Commission.—The Commission is hereby vested with power and it shall be its duty:

(1) To supervise and regulate common carriers by motor vehicle and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage, newspapers, mail, and light express, uniform system of accounts, records and reports and preservation of records.

(2) To supervise and regulate contract carriers by motor vehicle, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports and preservation of records.

(3) To supervise and regulate motor carriers, as defined in this article, in all matters affecting the relationship between such carriers, or the relationship between such carriers and the public, in any manner necessary to promote harmony among such carriers, safety and efficiency of service to the public.

(4) To supervise the operation of passenger bus stations in any manner necessary to promote harmony among the carriers using such stations and efficiency of service to the traveling public.

(5) To transmit to the legislature, from time to time, such recommendations as to additional legislation relating to such carriers as the Commission may deem necessary.

(6) To prescribe qualifications and maximum hours of service of drivers and their helpers, and rules regulating safety of operation and equipment; and in the interest of uniformity of intrastate and interstate rules and regulations applicable within the State of North Carolina with respect to maximum hours of service of vehicle drivers and their helpers, and safety of operation and equipment, the Commission may adopt and enforce the rules and regulations adopted and promulgated by the Interstate Commerce Commission with respect thereto, insofar as the Commission finds the same to be practical and advantageous for application in this State and not in conflict with this article. In order to promote safety of operation of motor carriers, the Commission may avail itself of the assistance of any other agency of the State having special knowledge of such matters and it may make such investigations and tests as may be deemed necessary to promote safety of equipment and operation of vehicles upon the highways.

(7) For the purpose of carrying out the provisions of this article, the Commission may avail itself of the special information of the State Highway and Public Works Commission in promulgating safety requirements and in considering applications for certificates or permits with particular reference to conditions of the public highway or highways involved, and the ability of the said public highway or highways to carry added traffic; and the State Highway and Public Works Commission, upon request of the Commission, shall furnish such information.

(8) The Commission shall maintain in its offices a docket of pending proceedings under this article, separate from dockets of other proceedings, which docket shall at all times be open for public inspection and for the information of all persons having an interest therein. The Commission shall cause to be filed and recorded in said docket of pending proceedings, immediately upon the institution thereof, the title of the proceedings, the names of the parties thereto, a brief description of the purpose thereof and any other information deemed to be material to the identification of any official file containing all the original pleadings, petitions and other official records pertaining thereto. The Commission shall also maintain an official register in its offices, in which shall be recorded all general orders, rules, regulations and requirements made and entered by the Com-

mission under the provisions of this article, which register shall at all times be open for inspection by the public and any person having an interest therein. The Commission may from time to time, and in its discretion, cause all of its general orders, rules, regulations and requirements promulgated under the provisions of this article to be printed either separately or in conjunction with other official orders, rules, regulations and requirements of the Commission promulgated by it as authorized by law, and to distribute the same for the information of the public and the guidance of all persons affected thereby.

(9) Before the Commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more motor carriers by name, the motor carrier or carriers to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the Commission, at least twenty days' notice of the time and place when and where the contemplated action in the premises will be considered and disposed of, and such carriers shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, and shall have process to enforce the attendance of witnesses, to the end that justice may be done. Before the Commission shall make or prescribe any general order, rule, regulation or requirement not directed against any specific motor carrier or carriers by name, the contemplated general order, rule, regulation or requirement shall first be published in substance not less than once each week for four consecutive weeks in one or more newspapers of general circulation published in the city of Raleigh, North Carolina, together with notice of the time and place when and where the Commission will hear any objections which may be urged by any interested persons against the proposed order, rule, regulation or requirement, and shall forthwith record in its docket of pending proceedings a copy of such notice or description thereof sufficient to advise all interested persons of the time and place of such hearing and shall mail at least thirty days prior to such hearing, a copy of said notice to each motor carrier operating in this State under the provisions of this article. Every such general order, rule, regulation or requirement made and entered by the Commission shall be forthwith recorded verbatim in its official register, showing thereon the effective date of such general order, rule, regulation or requirement which shall be not less than ten days subsequent to the entry thereof in said official register and shall also file a copy of same with the Secretary of State as required by chapter 143, article 18, General Statutes of North Carolina of 1943. The Commission may, without prior notice and hearing, make and enter any order, rule, regulation, or requirement, not affecting rates, charges, or tariffs, upon a unanimous finding by the Commission of the existence of an emergency and order such order, rule, regulation or requirement in effect upon notice given to each affected motor carrier by registered mail, pending a hearing thereon as provided in this subsection. Any such emergency order, rule, regulation or requirement shall be subject to continuation, modification, change, or revocation after notice and hearing as in this section provided and all such emergency orders, rules, regulations, and requirements shall be supplanted and superseded by any final order, rule, regulation or requirement entered by the Commission after such notice and hearing.

(10) The Commission shall also regulate brokers and make and enforce reasonable requirements respecting their licenses, financial responsibility, accounts, records, reports, operations and practices.

(11) Upon complaint in writing to the Commission by any person, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier has failed to comply with any provisions of this article, or with any rate, charge, classification, order, rule, regulation or requirement prescribed or fixed by the Commission pursuant thereto; and if the Commission finds upon such investigation, after due notice and hearing that the motor carrier has failed to comply with any such provision of this

article, or with any such rate, charge, classification, order, rule, regulation or requirement prescribed or fixed by the Commission pursuant thereto, the Commission shall issue an appropriate order to compel the carrier to comply therewith. The Commission may dismiss such complaint without investigation when it is of the opinion that the complainant does not state reasonable grounds for investigation and action on its part.

(12) The Commission and its duly authorized inspectors and agents shall have authority at any time to enter upon the premises of any motor carrier, subject to the provisions of this article, for the purpose of inspecting any motor vehicles and equipment used by such motor carriers in the transportation of passengers, and to prohibit the use by any motor carrier of any motor vehicle or parts thereof or equipment thereon adjudged by such agents and inspectors to be unsafe for use in the transportation of passengers upon the public highways of this State; and when such agents or inspectors shall discover any motor vehicle of such motor carrier in actual use upon the highways in the transportation of passengers to be unsafe or any parts thereof or any equipment thereon to be unsafe, such agents or inspectors may, if they are of the opinion that further use of such vehicle, parts or equipment are imminently dangerous, stop such vehicle and require the operator thereof to discontinue its use and to substitute therefor a safe vehicle, parts or equipment at the earliest possible time and place, having regard for both the convenience and the safety of the passengers. When an inspector or agent stops a motor vehicle on the highway, under authority of this section, and the motor vehicle is in operative condition and its further movement is not dangerous to the passengers and to the users of the highways, it shall be the duty of the inspector or agent to guide the vehicle to the nearest point for substitution or correction of the defect. Such agents or inspectors shall also have the right to stop any motor vehicle which is being used upon the public highways for the transportation of passengers by a motor carrier subject to the provisions of this article and to eject therefrom any driver or operator who shall be operating or be in charge of such motor vehicle while under the influence of intoxicating liquors. It shall be the duty of all inspectors and agents of the Commission to make a written report, upon a form prescribed by the Commission, of inspections of all motor equipment and a copy of each such written report, disclosing defects in such equipment, shall be served promptly upon the motor carrier operating the same, either in person by the inspector or agent or by mail. Such agents and inspectors shall also make and serve a similar written report in cases where a motor vehicle is operated in violation of the laws of this State or of the orders, rules and regulations of the Commission. Except as provided in this subsection safety rules and regulations shall be enforced as provided in subsection (11).

(13) All general orders, rules, regulations and requirements promulgated by the Commission prior to the enactment of this article affecting motor carriers shall remain in full force and effect until revoked, modified, or changed as provided in this subsection. Prior to October 1, 1949, the Commission shall mail notice to all motor carriers subject to regulation under this article and shall publish notice of time and place of hearing in one or more newspapers of general circulation published in the city of Raleigh, that the Commission will at the time and place fixed in said notice consider and decide what revisions, modifications and changes in said general orders, rules, regulations and requirements are necessary to make the same comply with the provisions of the article, or deemed reasonably necessary in the administration of this article. Said orders, rules, regulations and requirements as amended, modified, changed or readopted shall then become effective on October 1, 1949. The Commission may at the same time and place also consider and adopt such new general orders, rules, regulations and requirements as it may find necessary for the effective administration of this article, but notice and hearing shall be provided with respect to any such new

orders, rules, regulations or requirements, as provided in subsection (9) of this section. (1949, c. 1132, s. 6.)

§ 62-121.49. Issuance of certificates in lieu of outstanding certificates.—Notwithstanding any exemptions contained in § 62-121.47 of this article, it shall be the duty of the Commission to issue a certificate, as a matter of course and without further proceedings, to any person holding a certificate issued by the Commission prior to the effective date of this article and in force on such date, granting to each such person the same operating rights held and exercised by it, under its outstanding certificate, including amendments thereto which have heretofore been or may hereafter be authorized by the Commission on applications heard before the effective date of this article, and such certificate shall be deemed issued until prepared and actually issued by the Commission. Nothing in this section shall relieve any common carrier from compliance with the provisions of §§ 62-121.56, 62-121.57 and 62-121.58 within such reasonable time as the Commission may require. (1949, c. 1132, s. 7.)

§ 62-121.50. Issuance of permits to qualified contract carriers operating on and continuously since October 1, 1948.—(1) Generally.—Subject to §§ 62-121.56, 62-121.57 and 62-121.58, if any carrier or predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on October 1st, 1948, over the route or routes, or within the territory for which application is made under this section, and has so operated since that time except for interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue a permit to such carrier, if such carrier qualifies itself in the following manner:

(2) Duty of Carrier.—This section shall not apply to a carrier unless the carrier shall before October 1, 1949, file with the Commission on forms furnished by it an application under oath for a permit under this section, giving such information and in such detail as the Commission may require, including the following:

(a) The full name and address of each person owning an interest in the transportation business of the carrier.

(b) The make, type and carrying capacity of each vehicle, or other unit of equipment, owned, operated by, or licensed in the name of the carrier during the month of October, 1948, and at the time of filing application.

(c) A true copy of each contract in force on the date of such application between the carrier and the other contracting party or parties whom the carrier is serving. No such contract shall be open to inspection by other carriers or by the public, except by order of court, or by order of the Commission in a proceeding involving the violation of some law or valid regulation of the Commission in which such contract becomes material or in a proceeding conducted under this section.

(d) A current balance sheet showing the assets, liabilities, and net worth of the carrier.

(3) Duty of Commission.—The burden shall be upon each applicant for a permit as a contract carrier under this section to satisfy the Commission that the applicant was operating as a contract carrier, as defined in this article, on October 1, 1948, and has continued to so operate since that time, seasonal service and unavoidable interruptions considered; and to that end the Commission may require the applicant to furnish further supporting evidence in addition to that set forth in the application. The Commission may deny such permit upon a finding from substantial evidence that the applicant is unfit or otherwise disqualified to perform the service for which the application is made. Any motor carrier subject to the provisions of this article may file protest to the issuance of a permit under this section and in such event the application shall be set for hearing at a time and in a manner prescribed by the rules of the Commission. When no protest is filed within the time as may be prescribed by the rules of

the Commission, the Commission may proceed to issue or decline to issue the permit without a hearing. (1949, c. 1132, s. 8; c. 1283.)

§ 62-121.51. Issuance of temporary authority.—Upon the filing of an application in good faith for a permit, as provided in § 62-121.50, the Commission shall, pending its final decision on the application, issue to the applicant appropriate temporary authority to operate as a contract carrier by motor vehicle, under such just and reasonable conditions and limitations as the Commission deems necessary or desirable to impose in the public interest; provided, however, that pending such final decision on the application, the applicant shall comply with all the provisions of this article, and with the lawful orders, rules and regulations of the Commission promulgated thereunder, applicable to holders of permits, and upon failure of an applicant so to do, after reasonable notice from the Commission requiring compliance therewith in the particulars set out in the notice, and after hearing, the application may be dismissed by the Commission without further proceedings, and the temporary authority issued to such applicant revoked. (1949, c. 1132, s. 9.)

§ 62-121.52. Applications and hearings.—(1) Except as otherwise provided in §§ 62-121.47, 62-121.49 to 62-121.51, and 62-121.59, no person, after the effective date of this article, shall engage in the transportation of passengers in intrastate commerce or continue in any such operations until and unless such person shall have applied to and obtained from the Commission a certificate or permit authorizing such operations, and it shall be unlawful for any person knowingly or willfully to operate in intrastate commerce in any manner contrary to the provisions of this article, or of the rules and regulations of the Commission made pursuant thereto.

(2) Applications for certificates or permits shall be made to the Commission in writing on forms furnished by the Commission, shall be verified under oath by the applicant, and shall contain such information and in such form and detail as the Commission may require.

(3) Upon filing of an application for a certificate or a permit, the Commission shall, within a reasonable time fix a time and place for hearing such application. The Commission shall cause notice of the time and place of hearing to be given by mail to the applicant, to other motor carriers holding certificates or permits to operate in the territory proposed to be served by the applicant, and to other motor carriers who have pending applications to so operate. The notice herein required shall be given at least twenty (20) days prior to the date fixed for such hearing, but the failure of any such person, other than applicant, to receive any such mailed notice shall not, for that reason, invalidate the action of the Commission in granting or denying the application.

(4) The Commission shall cause notice of the time and place of such hearing, together with a brief description of the purpose of said hearing and the exact route or routes and authority applied for, to be published not less than once each week for two successive weeks in one or more newspapers of general circulation in the territory proposed to be served. A copy of the notice by mail, required by subsection three (3) and a copy of the published notice required by this subsection shall be forthwith recorded in the Commission's docket of pending proceedings. In addition to the fees required to be paid by the applicant by the provisions of this article, such applicant shall, prior to the hearing upon his application, be required to pay into the office of the Commission the cost, as determined by the Commission, of the notices herein required to be published or mailed by the Commission.

(5) Any motor carrier desiring to protest the granting of an application for a certificate or permit, in whole or in part, may become a party to such proceedings by filing with the Commission, not less than ten (10) days prior to the date fixed

for the hearing, unless the time be extended by order of the Commission, its protest in writing under oath, containing a general statement of the grounds for such protest and the manner in which the protestant will be adversely affected by the granting of the application, in whole or in part. Such protestant may also set forth in his protest its proposal, if any, to render, either alone or in conjunction with other motor carriers, the service proposed by the applicant, either in whole or in part. Upon the filing of such protest it shall be the duty of the protestant to file four copies with the Commission, one of which copies the Commission shall cause to be forthwith mailed to the applicant. The protestant shall be required, at the time of filing such protest, to pay into the office of the Commission a filing fee of five dollars (\$5.00). When no protest is filed with the Commission within the time herein limited, or as extended by order of the Commission, the Commission may proceed to hear the application and make the necessary findings of fact and issue or decline to issue the certificate or permit applied for without further notice. Persons other than motor carriers shall have the right to appear before the Commission and give evidence in favor of or against the granting of any application, and with permission of the Commission may be accorded the right to examine and cross-examine witnesses. No certificate or permit shall be amended so as to enlarge or in any manner extend the scope of operations of a motor carrier without complying with the provisions of this section.

(6) If the application is for a certificate, the burden of proof shall be upon the applicant to show to the satisfaction of the Commission, (a) that public convenience and necessity requires the proposed service in addition to existing authorized transportation service, and (b) that the applicant is fit, willing and able to properly perform the proposed service, and (c) that the applicant is solvent and financially able to furnish adequate service on a continuing basis.

(7) No certificate shall be granted to an applicant proposing to serve a route already served by a previously authorized motor carrier unless and until the Commission shall find from the evidence that the service rendered by such previously authorized motor carrier or carriers on said routes is inadequate to meet the requirements of public convenience and necessity; and if the Commission shall find that the service being rendered by such certificate holder or holders on said routes is inadequate to meet the requirements of public convenience and necessity, such certificate holder or holders who have protested the application as provided in subsection (5) of this section, shall be given reasonable time to remedy such inadequacy before any certificate shall be granted to an applicant proposing to operate on such routes, unless the Commission finds that the previously authorized carrier, filing such protest, is either financially unable, or otherwise unqualified, or is unwilling to render, on a continuing basis, the service applied for or the service found by the Commission to meet the requirements of public convenience and necessity. In all cases in which applications affect local intracity bus service the Commission shall give consideration to all interests involved and make appropriate provision for the protection thereof, and to that end local intracity operators shall have the right to be heard as protestants, or intervenors, under such rules of practice as the Commission may provide.

(8) A certificate for the transportation of passengers may include authority to transport in the same vehicle with passengers the baggage of such passengers, newspapers, express parcels or United States mail when authorized so to do by the government of the United States of America; or to transport baggage of passengers in a separate vehicle. The Commission, in its discretion, may require through joint routes and rates for the transportation of newspapers and express parcels.

(9) Common carriers by motor vehicle transporting passengers under a certificate issued by the Commission may operate to any place in this State, pursuant to charter party or parties, trips originating on such common carrier's

authorized routes or in the territory served by its routes under such reasonable rules and regulations as the Commission may prescribe.

(10) If the application is for a permit, the Commission shall give due consideration to (a) whether the proposed operations conform with the definition in this article of a contract carrier, (b) whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates, (c) whether the proposed service will unreasonably impair the use of the highways by the general public, (d) whether the applicant is fit, willing and able to properly perform the service proposed as a contract carrier, (e) whether the proposed operations will be consistent with the public interest and the transportation policy declared in this article, and (f) other matters tending to qualify or disqualify the applicant for a permit.

(11) After the issuance of a certificate or permit as provided in this section, such certificate or permit may thereafter be amended, changed or modified, by requiring the holder to furnish more or less transportation service, or by changing the routes over which service has been authorized, or by imposing other reasonable terms, conditions, restrictions, and limitations as public convenience and necessity or reasonable regulation of bus traffic upon the highways may require; provided, that the procedure in all such cases as to notice and hearing shall be the same as provided in this section for the issuance of a certificate or permit.

(12) The Commission shall by general order, or rule, having regard for the public convenience and necessity, provide for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate. (1949, c. 1132, s. 10.)

Duplication of Service.—Under a former article of similar import, it was held that the Commission might, in its discretion, grant a franchise which would duplicate in whole or in part a previously authorized similar class of service; and, when it was shown to the satisfaction of the Commission that the existing operations were not providing sufficient service reasonably to meet the public convenience and necessity and the existing operators, after thirty days' notice, failed to provide the service required by the Commission, it would be the duty of the Commission to do so. *State v. Carolina Coach Co.*, 224 N. C. 390, 30 S. E. (2d) 328 (1944).

Municipality Has No Power to Grant Franchise.—A municipality granted an exclusive franchise for the operation of a motor bus transportation service over

specified streets within the city and "such other routes, with the consent and approval of the city council" as the public transportation might require. Thereafter the municipality approved a request for an additional route along a public highway from a point within the city to a point $\frac{7}{8}$ of a mile beyond the corporate limits. It was held that the "approval" of the proposed route did not amount to the granting of a franchise by the city since by former article 6 of this chapter the Utilities Commission alone had the power to grant the franchise over the route in controversy, and held further that the city had no authority to grant such a franchise either under § 160-203, or by virtue of its implied powers. *City Coach Co. v. Gastonia Transit Co.*, 227 N. C. 391, 42 S. E. (2d) 398 (1947).

§ 62-121.53. **Terms and conditions of certificate.**—Any certificate issued under this article shall specify the service to be rendered and the routes over which, the fixed termini between which, and the intermediate points at which the motor carrier is authorized to operate; and there shall, at the time of issuance, be attached to the privileges granted by the certificate such reasonable terms, conditions, restrictions, and limitations as the public convenience and necessity may require. The Commission may, from time to time, rewrite a certificate previously authorized for the purpose of conforming the description of routes and services with changes which have been made resulting from changes made in the designation and location of highways or in changes made pursuant to amendments lawfully ordered by the Commission. (1949, c. 1132, s. 11.)

§ 62-121.54. **Issuance of permits, terms and conditions.**—The Commission shall specify in the permit, or amendment thereto, the business of the

contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, such reasonable terms, conditions, and limitations consistent with the service of a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under § 62-121.48; provided, that no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, as the development of the business and the demands of the public may require. (1949, c. 1132, s. 12.)

§ 62-121.55. Application for broker's license. — (1) No person shall engage in the business of a broker in intrastate operations within this State unless such person holds a broker's license issued by the Commission.

(2) The Commission shall prescribe the form of application and such reasonable requirements and information as may in its judgment be necessary.

(3) Upon the filing of an application for license the Commission may fix a time and place for the hearing of the application and require such notices, publications, or other service as it may prescribe by general rule or regulation.

(4) A license shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this article and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the license, is or will be consistent with the public interest and policy declared herein.

(5) The Commission shall have the same authority over persons operating under and holding a brokerage license as it has over motor carriers under this article, and shall require a broker to furnish bond or other security approved by the Commission and sufficient for the protection of travelers by motor vehicle. (1949, c. 1132, s. 13.)

§ 62-121.56. Issuance of partnership certificates or permits. — No certificate or permit shall be issued under this article to two or more individuals until such individuals shall have executed a partnership agreement and recorded the same in the office of the clerk of the superior court in the county in which the principal office of the partnership is located, and filed a certified copy of such agreement with the Commission. (1949, c. 1132, s. 14.)

§ 62-121.57. The same or similar trade names prohibited. — No carrier holding or operating under a certificate or permit issued under this article shall adopt or use the same trade name used by any other such carrier, or the name of any corporation holding or operating under a certificate or permit, or any name so similar to the trade or corporate name of another carrier as to mislead or confuse the public, and the Commission may, upon complaint, or upon its own initiative, in any such case require the carrier to discontinue the use of such trade name, preference being given to the carrier first adopting and using such trade name. (1949, c. 1132, s. 15.)

§ 62-121.58. Dual operations. — From and after the effective date of this article, unless the Commission, in its discretion, finds that the public interest so requires, no person or any person controlling, controlled by, or under common control with such person, shall hold both a certificate as a common carrier and permit as a contract carrier. (1949, c. 1132, s. 16.)

§ 62-121.59. Emergency operating authority. — To meet unforeseen emergencies, the Commission may, upon its own initiative, or upon written request by any person, department or agency of the State, or of any county, city or town, with or without a hearing, grant appropriate authority to any owner of a duly licensed vehicle or vehicles, whether such owner holds a certificate or

permit or not, to transport passengers, baggage, mail, newspapers and light express between such points, or within such area during the period of the emergency and to the extent necessary to relieve the same, as the Commission may fix in its order granting such authority; provided, that unless the emergency is declared by the General Assembly or under its authority, the Commission shall find from such request, or from its own knowledge of conditions, that a real emergency exists and that relief to the extent authorized in its order is immediate, pressing and necessary in the public interest, and that the carrier so authorized has the necessary equipment and is willing to perform the emergency service as prescribed by the order. In all cases, under this section, the Commission shall first afford the holders of certificates or permits operating in the territory affected an opportunity to render the emergency service. Upon the termination of the emergency the operating privileges so granted shall automatically expire and the Commission shall forthwith withdraw all operating privileges granted to any person under this section. (1949, c. 1132, s. 17.)

§ 62-121.60. Deviation from regular route operations. — A common carrier by motor vehicle operating under a certificate issued by the Commission may occasionally deviate from the routes over which it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe. (1949, c. 1132, s. 18.)

§ 62-121.61. Insurance or bond required.—(1) The Commission shall, in granting a certificate or permit, require the applicant to procure and file with the Commission acceptable liability and property damage insurance in a company licensed to do business in this State; or, in lieu of such insurance may accept bond with solvent surety, on such motor vehicles to be used in such service, in such amount as the Commission may determine, insuring passengers and the public receiving personal injury by reason of an act of negligence arising from the operation of any motor vehicle by the applicant upon the public highways of this State; and insuring the passengers and the public receiving personal injury by reason of any act of negligence arising from the operation of any motor vehicle by the applicant upon the route designated in the applicant's certificate or permit, whether such motor vehicle shall be specifically named, numbered or designated in the insurance policy or bond, or not, and whether such motor vehicle be in regular or temporary use by the applicant. Such policy, or bond, shall contain such other conditions, provisions and limitations as the Commission may prescribe, and shall be kept in full force and effect.

(2) Before final judgment has been rendered by a court of competent jurisdiction, in any cause arising from the operation under any certificate or permit, no attachment shall lie against motor vehicles used in such operation by any motor vehicle carrier, who has filed with the Commission such damage liability policy, or bond, so long as such policy or bond is in full force and effect.

(3) In any action in the courts arising out of damage to person or property, the assurer shall not be joined in the action against the assured; but upon final judgment against the assured, the assurer shall be liable within the limitations of the policy for the amount recovered and all court costs.

(4) The Commission may permit the filing by any licensed assurer of a uniform master insurance policy contract, the terms of which shall conform to the foregoing, and when approved and accepted by the Commission, shall be applicable to all insurance policy contracts filed by such assurer for motor vehicle carriers under this article, and thereafter, so long as the master policy contract shall remain in force, carriers under this article may be permitted to file certificates, in such form as the Commission may prescribe, evidencing fleet coverage under the term of such master policy instead of filing a separate individual policy contract in each case. The Commission, when satisfied that passengers and the public will be fully protected against damage or loss, in the exercise

of its discretion, may permit a common carrier or a contract carrier to become a self-insurer upon such terms and conditions as the Commission may prescribe.

(5) Brokers shall be required to file bond to cover financial responsibility not in excess of amounts required by the Interstate Commerce Commission. (1949, c. 1132, s. 19.)

§ 62-121.62. Transfers of certificates and permits.—No certificates or permits issued under the provisions of this article shall be sold, assigned, pledged, transferred, or any rights thereunder leased, nor shall any merger or combination affecting any motor carrier be made through acquisition of control by stock purchases or otherwise, except after application to and written approval by the Commission as in this section provided. The applicant shall give not less than ten (10) days' written notice of such application by registered mail to all connecting and competing carriers. When the Commission is of the opinion that the transaction is consistent with the purposes of this article, the Commission may, in the exercise of its discretion, grant its approval, provided, however, that when such transaction will result in a substantial change in the service and operations of any motor carrier party to the transaction, or will substantially affect the operations and services of any other motor carrier, the Commission shall not grant its approval except upon notice and hearing as required in § 62-121.52 upon an application for an original certificate or permit. In all cases arising under this section it shall be the duty of the Commission to require the successor carrier to satisfy the Commission that the operating debts and obligations of the seller, assignor, pledgor, lessor or transferor, including taxes due the State of North Carolina or any political subdivision thereof are paid or the payment thereof is adequately secured. The Commission may attach to its approval of any transaction arising under this section such other conditions as the Commission may determine are necessary to effectuate the purposes of this article. It shall be considered against the policy declared in § 62-121.44 for any person to obtain a certificate or permit for the purpose of transferring the same to another, and an offer of such transfer within one year after the same was obtained shall be prima facie evidence that such a certificate or permit was obtained for the purpose of sale. (1949, c. 1132, s. 20.)

§ 62-121.63. Suspension or revocation of certificates and permits.—(1) The certificates and permits issued under the provisions of this article shall be effective from the date issued unless otherwise specified therein, and shall remain in effect until terminated under the terms thereof, or until suspended or revoked as herein provided.

(2) Any certificate or permit may be suspended or revoked, in whole or in part, upon complaint or upon the Commission's own initiative, after notice and hearing, for willful failure to comply with any provision of this article, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate or permit; provided, however, that any such certificate or permit may be suspended or revoked by the Commission upon notice to the holder or lessee thereof without a hearing for any one or more of the following causes:

(a) For failure to comply with § 62-121.61.

(b) For failure to file and keep on file with the Commission applicable tariffs or schedules of charges as required in §§ 62-121.64, 62-121.65 and 62-121.66.

(c) For failure to pay any gross receipt taxes, use or privilege taxes, due the State of North Carolina within six months after demand in writing from the agency of the State authorized by law to collect the same; provided, that this paragraph shall not apply to instances in which there is a bona fide controversy as to tax liability.

(d) For failure to begin operations as authorized by the Commission within the time specified by order of the Commission, or for suspension of authorized

operations for a period of thirty (30) days without the written consent of the Commission. (1949, c. 1132, s. 21.)

§ 62-121.64. Rates and charges of common carriers.—(1) It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers; and in case of such joint rates, fares, and charges, to establish just, reasonable and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any such participating carriers.

(2) All charges made for services rendered or to be rendered by any common carrier by motor vehicle in the transportation of passengers in intrastate commerce or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in intrastate commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, place, locality, territory, or description of traffic, in any respect whatsoever, or to subject any particular person, place, locality, territory, or description of traffic, to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; provided, however, that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(3) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of § 62-121.65. Whenever, after hearing upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water, and/or air, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes, and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated.

(4) Whenever, after hearing, upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers by common carriers in conjunction with common carriers by railroad and/or express, and/or water, and/or air are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers,

or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers; and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers, in accordance with the order, from the date of filing the complaint or entry of order of investigation or such other date subsequent as the Commission finds justified and, in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

(5) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water, and/or air or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than one hundred eighty days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice shall go into effect at the end of such period. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

(6) In any proceeding to determine the justness or reasonableness of any rate, fare, or charge of any such carrier, there shall not be taken into consideration or allowed as evidence any elements of value of the property of such carrier, good will, earning power, or the certificate under which such carrier is operating; and in applying for and receiving a certificate under this part any such carrier shall be deemed to have agreed to the provisions of this paragraph, on its own behalf and on behalf of all transferees on such certificate.

(7) In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service;

and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

(8) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. (1949, c. 1132, s. 22.)

§ 62-121.65. Tariffs of common carriers.—(1) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers between points on its own route and points on the route of any such carrier, or on the route of any common carrier by railroad and/or express and/or water and/or air when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(2) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in intrastate commerce except such as are specified in its tariffs.

(3) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after thirty days' notice of the proposed change filed and posted in accordance with paragraph (1) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow such change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(4) No common carrier by motor vehicle, unless otherwise provided by this article, shall engage in the transportation of passengers unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provision of this article. (1949, c. 1132, s. 23.)

§ 62-121.66. Rates and charges of contract carriers; schedules.—

(1) It shall be the duty of every contract carrier to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates and charges. It shall be the duty of every contract carrier to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers in intrastate commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this article, shall engage in the transportation of passengers in intrastate commerce

unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this article. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner, but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed; provided, that any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the transportation policy declared in this article.

(2) Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or in connection therewith, contravenes the transportation policy declared in this article, or is in contravention of any provision of this article, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this article. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this article, which the Commission may find to be undue or inconsistent with the public interest and the transportation policy declared in this article, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath.

(3) Whenever there shall be filed with the Commission by any such contract carrier any schedule stating a charge for a new service or a reduced charge, directly or by means of any rule, regulation, or practice, for the transportation of passengers in intrastate commerce, the Commission is hereby authorized and empowered upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such charge, or such rule, regulation, or practice, but not for a longer period in the aggregate than one hundred eighty days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the charge, or rule, regulation, or practice goes into effect,

the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and order made within the period of suspension, the proposed change in any charge or rule, regulation, or practice shall go into effect at the end of such period, provided, the carrier may voluntarily suspend such schedule, rule, regulation or practice for further periods beyond the one hundred eighty days and until the proceeding be concluded.

(4) At any hearing before the Commission under this paragraph, the burden of proof shall be upon the carrier to show that the changed rate, fare, charge, or classification or rule, regulation or practice, or the proposed changed rate, fare, charge, or classification, or the proposed rule, regulation, or practice, is just and reasonable. (1949, c. 1132, s. 24.)

§ 62-121.67. Accounts, records and reports.—(1) The Commission is hereby authorized to require annual, periodical, or special reports from all motor carriers, brokers, and lessors (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, brokers and lessors, specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, broker, or lessor, in such form and detail as may be prescribed by the Commission. The Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this article. The Commission shall not, however, make public any contract, agreement, or arrangement under the terms of which a contract carrier undertakes to transport passengers, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest; provided, that if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier as required by § 62-121.66, the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof.

(2) Said annual reports shall contain all the required information for the period of twelve months ending on the thirty-first day of December in each year, unless the Commission shall specify a different date, and shall be made out under oath and filed with the Commission at its office in Raleigh within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission. Such periodical or special reports as may be required by the Commission under paragraph (1) hereof shall also be under oath, whenever the Commission so requires.

(3) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by motor carriers, brokers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, brokers, and lessors, to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, stubs, correspondence, or documents of motor carriers, brokers, or lessors, as may after a reasonable time be destroyed, and prescribing the length of time they shall be preserved. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of motor carriers, brokers, and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, brokers, and

lessors, and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. Motor carriers, brokers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph, and motor carriers, brokers, and lessors, shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, auditor, inspector, or examiner of the Commission upon demand and the display of proper credentials.

(4) As used in this section, the words "keep," and "kept" shall be construed to mean made, prepared, or compiled, as well as retained; the term "lessor" means a lessor of any right to operate as a motor carrier; and the term "motor carrier," "broker," or "lessor," includes a receiver or trustee of any such motor carrier, broker, or lessor. (1949, c. 1132, s. 25.)

§ 62-121.68. Designation of process agent; service of notices and orders.—It shall be the duty of every motor carrier operating under a certificate or permit issued under the provisions of this article to file with the Commission a designation in writing of the name and post-office address of a person upon whom or which service of notices or orders may be made under this article. Such designation may from time to time be changed by like writing similarly filed. Service of notices or orders in proceedings under this article may be made upon a motor carrier by personal service upon it or upon the person so designated by it, or by registered mail, return receipt requested, addressed to it or to such person at the address filed. In proceedings before the Commission involving the lawfulness of rates, charges, classifications, or practices, service of notice upon the person or agent who has filed a tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier. (1949, c. 1132, s. 26.)

§ 62-121.69. Free transportation.—No carrier shall, directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, commission agents, employees, and members of their immediate families, and such persons as the Commission may designate in its employ, or the employ of the Motor Vehicle Department for the inspection of equipment and supervision of traffic upon the highways of the State: Provided, that motor carriers under this article may exchange free transportation within the limits of this section. (1949, c. 1132, s. 27.)

Cross Reference.—See §§ 62-133 and 62-134.

§ 62-121.70. Depots and stations.—Upon notice and hearing and upon a finding by the Commission that public convenience and necessity so requires, the Commission is authorized and empowered to compel any motor carrier operating under the provisions of this article and serving any municipality or town to establish and maintain a passenger depot or station for the security, accommodation and convenience of the traveling public. When two or more carriers operating under the provisions of this article shall serve any municipality or town, the Commission is authorized and empowered to require such carriers to establish and maintain a union passenger depot or station for the security, accommodation and convenience of the traveling public, and to unite in the joint undertaking and expense of securing, erecting, constructing and maintaining such union passenger depot or station, commensurate with the business and revenue of such motor carriers, on such terms, regulations, provisions and conditions as the Commission shall prescribe: Provided, that whenever the Commission shall require that a union depot or station shall be provided, it shall first allow the

carriers required to provide such station an opportunity to submit to the Commission for approval any agreement between or among such carriers for the securing, construction, maintenance and operation of such station or depot. The Commission shall approve such agreement or agreements, if the same be, in the Commission's discretion, reasonable and just and in the public interest. (1949, c. 1132, s. 28.)

§ 62-121.71. Separation of races.—The Commission shall require every common carrier by motor vehicle to provide separate but substantially equal accommodations for the white and colored races at passenger stations or waiting rooms where the carrier receives passengers of both races, and on all common carriers by motor vehicles operating on a route or routes over which such carrier transports passengers of both races. Provided, that any requirement as to separate accommodation for the races shall not apply to specially chartered motor vehicles or to negro servants and attendants and their employers, or to officers or guards transporting prisoners. (1949, c. 1132, s. 29.)

Cross References.—As to separate waiting rooms for races, see § 62-44. As to provisions for equal accommodations for the races traveling by railroad, see §§ 60-94 to 60-98.

Power of Commission to Require Bus Lines to Provide Equal Separate Accommodations for Races.—The Corporation Commission (now Utilities Commission) is given plenary power by statute (former § 62-109) to require bus lines operating between points within the State in carrying passengers for hire, which are public service corporations, to provide indiscriminatory separate accommodations for the carriage of white and negro passengers, and for their separate accommodations at the bus stations, the working out of the plans or details for the purpose being vested largely within the discretion of the Commission, and where this is done without

racial discrimination it is not objectionable as being in contravention of Thirteenth and Fourteenth Amendments to the federal Constitution. *Corporation Commission v. Transportation Committee*, 198 N. C. 317, 151 S. E. 648 (1930).

Nature of Segregation Provisions.—Former §§ 62-109 and 62-118, of similar import to this section and § 62-121.72, did not purport to deal with the enforcement of segregation, but made it mandatory on the part of the Utilities Commission to require transportation companies to provide equal accommodations for the white and colored races, in order that the settled policy of this State, which calls for the segregation of the white and colored races in the public institutions of the State, and on our intrastate transportation systems, might be enforced. *State v. Johnson*, 229 N. C. 701, 51 S. E. (2d) 186 (1949).

§ 62-121.72. Unlawful operation.—(1) Any person, whether carrier, or any officer, employee, agent or representative thereof, knowingly and willfully violating any provision of this article or any rule, regulation, requirement, or order thereunder, or any term of condition of any certificate or permit, for which a penalty is not otherwise herein provided, shall be guilty of a misdemeanor, and upon conviction thereof be fined not more than one hundred dollars (\$100.00) for the first offense and not more than five hundred dollars (\$500.00) for any subsequent offense.

(2) If any motor carrier, or any other person or corporation, shall operate a motor vehicle for the transportation of passengers for compensation in violation of any provision of this article, except as to the reasonableness of rates or charges and the discriminatory character thereof, or shall operate in violation of any rule, regulation, requirement or order of the Commission, or of any term or condition of any certificate or permit, the Commission or any holder of a certificate or permit duly issued by the Commission may apply to the resident superior court judge of any judicial district where such motor carrier or other person or corporation so operates, or to any superior court judge holding court in such judicial district, for the enforcement of any provision of this article, or of any rule, regulation, requirement, order, term or condition of the Commission. Such court shall have jurisdiction to enforce obedience to this article or to any

rule, order, or decision of the Commission by a writ of injunction or other process, mandatory or otherwise, restraining such carrier, person or corporation, or its officers, agents, employees and representatives from further violation of this article or of any rule, order, regulation, or decision of the Commission.

(3) Any person, whether carrier, passenger, shipper, consignee, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this article, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulations as in this article provided for motor carriers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than five hundred dollars (\$500.00) for the first offense and not more than two thousand dollars (\$2,000.00) for any subsequent offense.

(4) It shall be unlawful for any special agent, accountant, auditor, inspector, or examiner to knowingly and willfully divulge any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of § 62-121.67 of this article, except as he may be directed by the Commission or by a court or judge thereof. Nothing in this article shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the State or of the government of the United States, in the exercise of his power, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

(5) Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this article, or other applicable law, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject for each offense to a fine of not more than five thousand dollars (\$5,000.00). As used in this subsection the words "kept" and "keep" shall be construed to mean made, prepared, or compiled, as well as retained. It shall be the duty of the Commission to prescribe and enforce such general rules and regulations as it may deem necessary to compel all motor carriers to keep accurate records of all revenue received by them to the end that any tax levied and assessed by the State of North Carolina upon revenues may be collected. Any agent or employee of a motor carrier who shall willfully and knowingly make a false report or record of fares, charges, or other revenue received by a carrier or collected in its behalf shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1949, c. 1132, s. 30.)

Editor's Note.—The words "term of condition" in line four of subsection (1), which are in the language of the original act,

were probably intended to read "term or condition".

As to right of common carrier to apply

to court for injunctive relief against wrongful acts of another carrier under former article 6 of this chapter, repealed

and superseded by this article, see *Burke Transit Co. v. Queen City Coach Co.*, 228 N. C. 768, 47 S. E. (2d) 297 (1948).

§ 62-121.73. **Evidence; liability of surety or insurer.**—No report by any motor carrier of any accident arising in the course of the operations of such carrier, made pursuant to this article or to any requirement of the Commission, and no report by the Commission of any investigation of any such accident, shall be admitted as evidence, or used for any other purpose in any suit or action for damages growing out of any matter mentioned in such report or investigation; nor shall the discharge by any carrier of any vehicle driver or other employee after any such accident be offered or admitted in evidence for any purpose in any suit or action against such carrier for damages arising out of any such accident. No evidence of any policy, bond or other security required under § 62-121.61 shall be offered or received in any such action or suit against a motor carrier, but the surety or insurer shall be obligated within the amount of such policy, bond or other security to pay any final judgment against the carrier. (1949, c. 1132, s. 31.)

§ 62-121.74. **Interstate carriers.**—(1) Except insofar as the provisions of this article may be inconsistent with, or shall contravene, the Constitution and laws of the United States, this article shall apply to persons and vehicles engaged in interstate commerce over the highways of this State; and the Commission may, in its discretion, require such carriers to file with it copies of their respective interstate authority, registration of their vehicles operated in this State, and the observance of such reasonable rules and regulations as the Commission may deem advisable in the administration of this article and for the protection of persons and property upon the highways of this State.

(2) The Commission or its authorized representative is authorized to confer with and hold joint hearings with the authorities of other states or with the Interstate Commerce Commission or its representatives in connection with any matter arising under this article, or under the Federal Motor Carrier Act, which may directly or indirectly affect the interests of the people of this State or the transportation policy declared by this article. (1949, c. 1132, s. 32.)

§ 62-121.75. **Fees and charges.**—The following fees and charges shall be paid to the Commission under the provisions of this article:

(1) Twenty-five dollars (\$25.00) with each application for a certificate or permit, and with each application for the amendment to a certificate or permit for new or additional operating rights, but credit shall be given for fees paid on applications filed under the existing law and heard after this article becomes effective.

(2) Ten dollars (\$10.00) for each application for approval of a sale, assignment, pledge, hypothecation, transfer of a certificate or permit, or lease of any right or interest under a certificate or permit, or for any approval of any merger combination or change of control of the operating rights under a certificate of permit through stock transfer or otherwise.

(3) One dollar (\$1.00) for registration of each motor vehicle of a certificate or permit holder added to its rolling equipment after the effective date of this article.

(4) Twenty-five cents (\$.25) for annual reregistration of each motor vehicle operated by a certificate or permit holder.

(5) Twenty-five dollars (\$25.00) filing fee for each broker and twenty-five dollars (\$25.00) each year thereafter for each such broker in addition to any other tax or fee provided by law.

(6) Such reasonable charges for copies of transcripts of testimony, or for copies of other papers, records, or documents, or for certifying records, as the Commission shall prescribe in its rules of practice and procedure. All fees and

charges received by the Commission under this section shall be in addition to any other tax or fee provided by law and shall be paid forthwith to the State Treasurer. (1949, c. 1132, s. 33.)

Editor's Note.—The last word in line in the original act as "of", was probably four of subsection (2), which also appears intended to read "or".

§ 62-121.76. Applicability of Utilities Commission Procedure Act of 1949; appeals.—Except as otherwise provided in this article, the Utilities Commission Procedure Act of 1949, codified as G. S. §§ 62-11 to 62-26.15, shall apply to and govern the procedure in all cases and proceedings before the Commission arising under this article, including appeals from the Commission's orders and decisions. (1949, c. 1132, s. 34.)

§ 62-121.77. Construction of article.—Nothing herein contained shall be construed to relieve any motor carrier, as herein defined, from any regulation otherwise imposed by law or lawful authority, and this article shall not be construed to relieve any such motor carrier from any obligation or duty imposed by chapter 20 of the General Statutes of North Carolina of 1943, as amended. (1949, c. 1132, s. 35.)

Applied, as to former § 62-120, in *Kelly v. Hunsucker*, 211 N. C. 153, 189 S. E. 664 (1937).

§ 62-121.78. Allocation of funds.—Sufficient funds shall be provided in the budget and allocated to the Commission to be disbursed under the supervision of the director of the budget for the administration and enforcement of the provisions of this article, including the employment of such additional personnel as may be required for that purpose. (1949, c. 1132, s. 36.)

§ 62-121.79. Repeal of inconsistent acts.—This article regulating motor carriers of passengers, mail and light express and chapter 1008, Public Laws of 1947, now article 6B, chapter 62, General Statutes of North Carolina of 1943, regulating motor carriers of property shall be construed as superseding article 6, chapter 62 of the General Statutes of North Carolina of 1943 and said article 6 is hereby repealed. All other acts or parts of acts relating to motor carriers as defined in this article and in conflict or inconsistent with this article are hereby repealed to the extent of such conflict or inconsistency. (1949, c. 1132, s. 38.)

ARTICLE 7.

Rate Regulation.

§ 62-122. Commission to fix rates for public utilities.—Subject to the provisions as to passenger rates in the chapter Railroads, and as to railroad freight rates in this chapter, the Commission shall make reasonable and just rates and charges, in intrastate traffic, and regulate the same, of and for:

Cross References.—As to railroad passenger rates, see § 60-89 et seq. As to railroad freight rates, see § 62-135 et seq. As to authority to fix rates charged by public utilities, see also § 62-36. As to penalty for overcharge, see § 60-110. As to the regulation of rates for ferries connecting links of the State highway system, see §§ 136-84 and 136-85.

Editor's Note.—See 12 N. C. Law Rev. 289, for article on "Electric Rates."

General Rate Fixing Power.—By this section the Commission is given broad and general powers to make rates for freight

and passenger service. *Tilley v. Norfolk, etc., R. Co.*, 162 N. C. 37, 77 S. E. 994 (1913).

Duty to Fix Rates.—When the Commission is called upon, by either a corporation or those to whom the services are rendered, under its franchise to exercise its rate fixing power and authority, it is its duty to fix and establish just and reasonable rates to be charged for such services. *Corporation Comm. v. Henderson Water Co.*, 190 N. C. 70, 128 S. E. 465 (1925).

Power to Classify.—The legislature has absolutely no power to classify persons,

natural or artificial, engaged in precisely the same occupation, laying a tax upon some of them and exempting others, or imposing a tax not operating uniformly upon all. *Efland v. Southern R. Co.*, 146 N. C. 135, 59 S. E. 355 (1907).

Same—Must Not Be Arbitrary.—In *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 17 S. Ct. 255, 41 L. Ed. 666 (1897), it was said: "The mere fact of classification in rate regulating is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and

in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection." *Efland v. Southern R. Co.*, 146 N. C. 135, 59 S. E. 355 (1907).

"Traffic" Defined.—The word "traffic," used in the section includes the transportation and also the sale and distribution of the commodities affected. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178 (1923).

1. Railroads, street railways, steamboats, canal and express companies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

"Company" Defined.—The term "company" was used and intended to include all corporations, companies, firms or individuals who were engaged as common carriers in the transportation of freight. *Efland v. Southern R. Co.*, 146 N. C. 135, 59 S. E. 355 (1907).

Supervisory Power of Commission.—The Commission is given general supervision over railways, street railways, and the like companies of the State, and empowered to fix such rates, charges and tariffs as may be reasonable and just, having in view the value of the property, the cost of improvements and maintenance, the probable earning capacity under the proposed rates, the sums required to meet operating expenses, and other specific matters pertinent to such an inquiry, and these are police powers delegated to this Commission, governmental so far as they extend. In re *Southern Pub. Utilities Co.*, 179 N. C. 151, 101 S. E. 619 (1919).

When Fares of Street Railway May Be Raised.—A public service street railway

company, operating under a city charter, and under a contract with the city restricting the passenger fare authorized to be charged its patrons, may be authorized by the Commission to raise its charges to its passengers, when in the opinion of the Commission such is necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. In re *Southern Pub. Utilities Co.*, 179 N. C. 151, 101 S. E. 619 (1919).

Cannot Fix Fares by Contract.—A public service railway corporation operating in various localities may not by contract fix its passenger fares and thus prevent the Commission, under the authority conferred by statute, from determining what rates are, under the circumstances, just and reasonable, for such would authorize such companies to discriminate, unlawfully, among its patrons. In re *Southern Pub. Utilities Co.*, 179 N. C. 151, 101 S. E. 619 (1919).

2. The transmission and delivery of messages by any telegraph company, and for the rental of telephone and furnishing telephonic communication by any telephone company or corporation.

Telephone Company Must Not Discriminate.—In *Clinton-Dunn Tel. Co. v. Carolina Tel. Co.*, 159 N. C. 9, 74 S. E. 636 (1912), it was held that a telephone company is subject to public regulation and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions. See *Godwin v. Telephone Co.*, 136 N. C. 258, 48 S. E. 636 (1904); *Walls v. Strickland*, 174 N. C. 298, 93 S. E. 857 (1917).

A contract whereby a telegraph company gives to a railroad company a preference

of business over its line to the exclusion of others is an illegal discrimination. *Leavell v. Western Union Tel. Co.*, 116 N. C. 211, 21 S. E. 391 (1895).

Mandamus to Compel Telephonic Accommodations.—In *Godwin v. Telephone Co.*, 136 N. C. 258, 48 S. E. 636 (1904), it is held that a mandamus lies to compel a telephone company to place telephones and furnish telephonic facilities without discrimination for those who will pay for the same and abide by the reasonable regulations of the company. *Walls v. Strickland*, 174 N. C. 298, 93 S. E. 875 (1917).

When Telegram Transmitted over Lines of Another Company.—Where a telegraph

company has a continuous line between two points in this State, the fact that, in transmitting a message, it sent the message over the lines of another company does not excuse its violation of the rate prescribed by the Railroad Commission (now Utilities Commission) for the transmission of a message sent over the lines of one company. *Leavell v. Western Union Tel. Co.*, 116 N. C. 211, 21 S. E. 391 (1895).

Telegraphic Messages Traversing Another State.—Telegraphic messages transmitted by the company from and to points in this State, although traversing another state in the route, are subject to the tariff regulations of the Railroad [now Utilities] Commission. *State v. Western Union Tel. Co.*, 113 N. C. 213, 18 S. E. 389 (1893).

Facilities to Transmit All Messages Offered.—It is the duty of a telegraph com-

pany to have sufficient facilities to transmit all the business offered to it for all points at which it has offices, since it is not a mere private duty but a public duty which its franchise authorizes it to perform. *Leavell v. Western Union Tel. Co.*, 116 N. C. 211, 21 S. E. 391 (1895).

Power to Ascertain Corporation in Control.—The Commission has the incidental power (subject to the right of appeal) to ascertain what particular corporation is in the control of or operates any telegraph line in this State, in order that it may exercise its authority to fix rates, as well as to know against whom to proceed for a violation of its regulations. *State v. Western Union Tel. Co.*, 113 N. C. 213, 18 S. E. 389 (1893).

Cited in *Russ v. Western Union Tel. Co.*, 222 N. C. 504, 23 S. E. (2d) 681 (1943).

3. Persons, companies and corporations, other than municipal corporations, engaged in furnishing electricity, electric lights, current, power or gas, or owning or operating a public sewerage system in North Carolina.

Police Power of State.—The authority, conferred upon the Commission to establish reasonable and just rates of charges by a public service corporation for furnishings to its customers electrical power, comes within the police powers of the State, and contracts previously made are subordinate to the public interest that such rates be reasonable and just, and afford the corporation supplying the service a safe return upon its investments, having proper regard to the public interest that plants of this character should be properly run and maintained. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178 (1923).

Rates Coextensive with State's Jurisdiction.—When the Commission has finally established, under the provisions of the statute, rates to be charged by a public service corporation for furnishing electrical power, the rates are coextensive with the State's jurisdiction and territory, and conclusively bind all corporations, companies, or persons who are parties to the suit and have been afforded an opportunity to be heard. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178 (1923).

Sale of Electricity Generated in Another State.—While the generation of electricity in another state when transported to purchasers in this State may be regarded as interstate commerce, its distribution and sale here is local to the State, permitting the Commission to establish a just and reasonable rate of charge in conformity with the statutory powers, there being no

interfering act of Congress relating to the subject. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178 (1923).

Discrimination Remedied by Mandamus.—Where a public service corporation has discriminated among its patrons in its charges for electricity, mandamus will lie to compel it to charge a uniform or undiscriminating rate, for the question does not require the courts to fix a rate, or pass upon its reasonableness. *North Carolina Public Service Co. v. Southern Power Co.*, 179 N. C. 18, 101 S. E. 593 (1919).

Hydroelectric Company Authorized to Sell to Other Companies.—Where a hydroelectric company has been authorized by its charter to sell to other electric companies, power, etc., for retail or distribution among customers, it may not resist the jurisdiction of the courts upon the ground that it is not legally required to do so, though the distributing or retail company is in some sense a competitor, and has the charter right to generate or manufacture its own electricity. *North Carolina Pub. Service Co. v. Southern Power Co.*, 179 N. C. 18, 101 S. E. 593 (1919).

Fees and Charges Made by Municipality.—The Utilities Commission has no jurisdiction under subsection 3 of this section to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. *Atlantic Constr. Co. v. Raleigh*, 230 N. C. 365, 53 S. E. (2d) 165 (1949).

4. The through transportation of freight, express or passengers.

5. The use of railway cars carrying freight or passengers.

6. And shall make rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

7. And it shall make, require or approve for intrastate shipments what is known as milling-in-transit, or warehousing-in-transit rates on grain, or lumber to be dressed, or cotton or peanuts or tobacco.

Editor's Note.—The 1925 amendment added to subsection 7 the provision giving the Commission "authority to make, require and approve what is known as warehousing-in-transit rates on cotton." And the 1929 amendments changed the subsection to read as set out above.

"**Milling in transit**" is where freight is shipped a long distance and the carrier will, at his own cost, defray the expense of its change in form en route because of the

easier handling in a more compact shape, as, for example, *Cowan v. Bond*, 39 F. 54 (1889), where a railroad company receiving cotton in Louisiana for shipment to mills in New England had it compressed en route at Vicksburg at its own expense, charging the shipper no more than if it had carried the uncompressed cotton all the way, the same privilege being open to all shippers. *Lumber Co. v. Railroad*, 136 N. C. 479, 48 S. E. 813 (1904).

8. And, conjointly with such railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the State.

Nothing in this chapter shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the Commission.

The powers vested in the Commission by this section over the several subjects enumerated shall be the same as that vested in it in respect to railroads and other transportation companies. (1899, c. 164, ss. 2, 14; 1903, c. 683; Rev., ss. 1096, 1099; 1907, c. 469, s. 4; 1913, c. 127, s. 2; 1917, c. 194; C. S., s. 1066; 1925, c. 37; 1929, cc. 82, 91; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-123. **Rates established deemed just and reasonable.**—The rates or charges established by the Commission shall be deemed just and reasonable, and any rate or charge made by any corporation, company, copartnership or individual engaged in the businesses enumerated in the preceding section other than those so established shall be deemed unjust and unreasonable. Provided, however, that upon petition filed by any shipper or receiver of freight, and a hearing thereon, if the Commission shall find the rates or charges collected to be unjust, unreasonable, discriminatory or preferential, the Commission may enter an order awarding such petitioner a sum equal to the difference between such unjust, unreasonable, discriminatory or preferential rates or charges and the rates or charges found by the Commission to be just and reasonable, nondiscriminatory and nonpreferential upon all shipments made or received by said petitioner within two years prior to the filing of such petition; provided, however, that this shall only apply to charges assessed and collected on and/or after March 19, 1929. (1913, c. 127, s. 3; C. S., s. 1067; 1929, cc. 241, 342; 1933, c. 134, s. 8; 1941, c. 97.)

Editor's Note.—The 1929 amendments added the two provisos.

Rates Deemed Reasonable Until Modified.—Rates or charges fixed by an order of the Commission are to be considered just and reasonable unless and until they shall be changed or modified on appeal or by the further action of the Commission itself. In re Southern Pub. Utilities Co., 179 N. C. 151, 101 S. E. 619 (1919), approving State

v. Seaboard Air Line Ry. Co., 173 N. C. 413, 92 S. E. 150 (1917).

Rates Other than Those Fixed Deemed Unjust.—Including public service corporations furnishing their customers electricity for power, etc., the Commission is authorized by statute to fix just and reasonable rates or charges, and when they are so fixed, other or lower rates are to be deemed as unjust and unreasonable. *State v. Can-*

non Mfg. Co., 185 N. C. 17, 116 S. E. 178 (1923).

Where Rates Re-established upon Reconsideration.—Where the Utilities Commission, after due notice and hearing, had established rates for intrastate shipments of pulpwood which it found to be just and reasonable, and thereafter upon petition of defendant and other carriers for reconsideration, the rate so established was ordered "to remain in full force and effect," it was held that by virtue of this section these rates so established must be deemed the only just and reasonable rates for this

commodity over defendant's lines, rendering it unlawful for defendant to charge a greater amount. *State v. Atlantic Coast Line R. Co.*, 224 N. C. 283, 29 S. E. (2d) 912 (1944).

Burden of Proof.—One claiming that the rates or charges established by the Commission are unreasonable or excessive has the burden of proving his contention. *Corporation Comm. v. Henderson Water Co.*, 190 N. C. 70, 128 S. E. 465 (1925).

Cited in *Russ v. Western Union Tel. Co.*, 222 N. C. 504, 23 S. E. (2d) 681 (1943).

§ 62-124. How maximum rates fixed.—In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this chapter, the Commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the State; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation, and all other facts that will enable it to determine what are reasonable and just rates, charges and tariffs. (1899, c. 164, s. 2, subsec. 1; Rev., s. 1104; C. S., s. 1068; 1933, c. 134, s. 8; 1941, c. 97.)

Editor's Note.—See 12 N. C. Law Rev. 289, for comment on this section.

Section Controls.—In establishing rates, the Commission is governed and controlled by the provision of this section. *Southern R. Co. v. McNeill*, 155 F. 756 (1907).

Manner of Arriving at Rate.—Under the provisions of this section, which is a valid statute, the Commission, in fixing a reasonable and just rate of charges for public service corporations, may make a fair estimated value of the property presently used, and in relation thereto consider the tax valuation of the plant. *State v. Can-*

non Mfg. Co., 185 N. C. 17, 116 S. E. 178 (1923).

Word "Maximum" Explained.—The word "maximum," used in an order of the Commission for fixing the rates of charges allowed to a petitioning public service corporation, was not intended to mean that a descending rate therefrom was to be allowed under the contract set up by the customers or users, but to distinguish it from the word "minimum," which also was used in reference to the subject. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178 (1923).

§ 62-125. Hearing before Utilities Commission upon request for change of rates, etc.—Whenever there shall be filed with the Utilities Commission any schedule stating a change in any new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a public carrier or carriers by railroad, or express, or highway, or water, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing and its reasons for such suspension, may suspend the operation

of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, for a period of ninety days, and if the proceeding has not been concluded and a final order made within such period, the Commission may, from time to time, extend the period of suspension by order, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, may go into effect at the end of such period. At any hearing involving a rate, fare, charge, or classification, changed or sought to be changed, or involving a rule, regulation, or practice, resulting in a change, the burden of proof shall be upon the carrier to show that the changed rate, fare, charge, or classification, or rule, regulation, or practice, or the proposed changed rate, fare, charge, or classification, or the proposed rule, regulation, or practice, is just and reasonable. (1939, c. 365, s. 3; 1941, c. 97; 1945, c. 725.)

Editor's Note.—The 1945 amendment substituted near the beginning of the section the words "a change" for the words "an increase" and made similar changes in the last sentence.

Deferred Use of New Rates Pending Investigation.—After rates for certain intrastate shipments have been duly established by the Utilities Commission and defendant seeks to increase such rates by filing tariff schedules to that effect, whereupon the Commission, in a proceeding to which defendant was a party, by order of postponement, which was not objected to, deferred

use of the new increased rates, pending investigation, and also directed that the rates previously fixed should not be changed by subsequent tariffs or schedules until this investigation and suspension proceeding had been disposed of, continuing the investigation from time to time at the request of defendant, such action of the Commission is binding on the defendant. However, defendant should be given a reasonable time to comply with the order before penalties may be invoked. *State v. Atlantic Coast Line R. Co.*, 224 N. C. 283, 29 S. E. (2d) 912 (1944).

§ 62-126. Notice required for change in rates, etc.—No change shall be made in any rate, fare, charge, or classification, nor shall any change be made in any rule, regulation, or practice, which has been published and filed by any of the transportation companies named in the preceding section, except upon not less than thirty days' notice to the Commission and the public: Provided, that the Commission may, in its discretion, and for good cause shown, authorize the publication and filing of changed rates, fares, charges, or classification, or rules, regulations, or practices, upon less than thirty days' notice. (1939, c. 365, s. 4; 1941, c. 97; 1945, c. 725.)

Editor's Note.—Prior to the 1945 amendment notice was required only where there was an increase in rates.

Requirement as to Notice Implemented by Rule of Commission.—The requirement of this section that the thirty days' notice of an increase in rates to be given the Utilities Commission properly may be implemented by rule of the Commission requiring that the notice be in writing in triplicate. *State v. Atlantic Coast Line R. Co.*, 224 N. C. 283, 29 S. E. (2d) 912 (1944).

The Utilities Commission's rules of practice and procedure, promulgated under legislative authority, require a defendant, if it desires the vacation or modification of a previous order, to file a written notice of intention to make changes resulting in increases, which would seem to implement the requirements of this section that thirty days' notice of an increase be given the Commission. *State v. Atlantic Coast Line R. Co.*, 224 N. C. 283, 29 S. E. (2d) 912 (1944).

§ 62-127. Revision of rates.—The Commission shall from time to time, and as often as circumstances may require, change and revise or cause to be changed or revised any schedules of rates fixed by the Commission, or allowed to be charged by any carrier of freight, passengers, or express, or by any tele-

graph or telephone company. The powers of the Commission, under this section, shall be exercised with respect to railroad freight and passenger rates under the limitations prescribed by article 8 of this chapter and article 12 of the chapter entitled Railroads. (1899, c. 164, s. 7; Rev., s. 1106; C. S., s. 1071; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to limitation of powers of Commission over railroad passenger rates, see § 60-93.

Limitation on Rate Fixing Authority.—Article 8 herein referred to limits the authority of the Commission as to increasing the maximum rates for freight carriers. *Corporation Comm. v. Atlantic Coast Line R. Co.*, 187 N. C. 424, 121 S. E. 767 (1924).

Joint Rate between Lumber Railroad and

Connecting Carrier.—When a lumber railroad is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the Commission may make a valid order establishing a joint rate of transportation in the same cars between it and a connecting common carrier by rail to points beyond the initial road. *Corporation Comm. v. Atlantic Coast Line R. Co.*, 187 N. C. 424, 121 S. E. 767 (1924).

§ 62-128. Long and short hauls.—It shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Commission, such common carrier may in special cases be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, that nothing in this chapter contained shall be taken as in any manner abridging or controlling the rates of freight charged by any railroad in this State for conveying freight which comes from or goes beyond the boundaries of the State and on which freight less than local rates on any railroad carrying the same are charged by such railroads. (1899, c. 164, s. 14; Rev., s. 1107; Ex. Sess. 1913, c. 20, s. 9; 1915, c. 17, s. 1; C. S., s. 1072; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-129. Contracts as to rates.—All contracts and agreements between railroad companies as to rates of freight and passenger tariffs shall be submitted to the Commission for inspection and correction, that it may be seen whether or not they are a violation of law or the rules and regulations of said Commission, and all arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies shall be submitted to the Commission for inspection and approval insofar as they affect the rules and regulations made by the Commission to secure to all persons doing business with such companies just and reasonable rates of freight and passenger tariffs, and the Commission may make such rules and regulations as to such contracts and agreements as may then be deemed necessary and proper, and any such agreements not approved by the Commission, or by virtue of which rates shall be charged exceeding the rates fixed for freight and passengers, shall be deemed, held and taken to be violations of this chapter and shall be illegal and void. (1899, c. 164, s. 6; Rev., s. 1108; C. S., s. 1073; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-130. Rates to be published.—All carriers shall, whenever required by the Commission, file with it a schedule of their rates of charges for freight and passengers, and the Commission is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules, if it deems

it advisable. (1899, c. 164, s. 7; Rev., s. 1109; 1907, c. 217, s. 5; C. S., s. 1074; 1933, c. 134, s. 8; 1941, c. 97.)

§ **62-131. Interstate commerce.**—The Utilities Commission, or other body charged by law with the supervision and regulation of intrastate rates, is authorized and empowered upon its own investigation to bring such cases before the Interstate Commerce Commission, or other body of the national government supervising and regulating the interstate freight rates, rules and practices, as in its opinion may be necessary to secure for the receivers and shippers of freight in this State such just and reasonable schedule of freight rates as in its opinion may be necessary; and is authorized to maintain before the courts of this State, or the United States, such action as in its opinion may be necessary for the enforcement of just and reasonable schedules of freight rates. In the performance of this duty the said Commission shall receive upon application the services of the Attorney General of the State to represent it before the Interstate Commerce Commission or the courts of this State or the United States. (1899, c. 164, s. 14; Rev., s. 1110; 1907, c. 469, s. 5; C. S., s. 1075; 1929, c. 235; 1933, c. 134, s. 8; 1941, c. 97.)

Editor's Note.—The 1929 amendment rewrote this section.

Effect of Private Agreements.—The rates of transportation allowed carriers of freight are established by the Interstate Commerce Commission, and the State Corporation Commission, which may not be affected by any agreement to the contrary between the carriers or their agents

or employees and the shipper; and, notwithstanding such agreement, the carrier may demand and enforce the rates established by law. *Southern R. Co. v. Latham*, 176 N. C. 417, 97 S. E. 234 (1918).

Cited in *Inter-Island Steam Nav. Co. v. Hawaii*, 305 U. S. 306, 59 S. Ct. 202, 83 L. Ed. 189 (1938).

§ **62-132. Schedule of rates to be evidence.**—The schedule of rates fixed by statute or under this article shall, in suits brought against any company wherein is involved the charges of any company for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be taken in all courts as prima facie evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freight and cars upon the railroads. All such schedules shall be received and held in all suits as prima facie evidence of the schedules of the Commission without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the Commission that the same is a true copy of the schedule prepared or approved by it for the railroad company or corporation therein named. (1899, c. 164, s. 7; Rev., s. 1112; C. S., s. 1077; 1933, c. 134, s. 8; 1941, c. 97.)

Stated in *Tilley v. Norfolk, etc., R. Co.*, 162 N. C. 37, 77 S. E. 994 (1913).

§ **62-133. Commission entitled to free carriage.**—The Commission and its clerks shall be transported free of charge over all railroads and transportation lines which are under the supervision of the Commission; and when traveling on official business, they may take with them experts or other agents whose services they may deem temporarily of public importance. (Rev., s. 1105; C. S., s. 1069; 1933, c. 134, s. 8; 1941, c. 97.)

§ **62-134. Free carriage.**—Nothing in this chapter shall prevent or prohibit:

1. The carriage, storage, or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable or educational purposes; or for any corporation or association incorporated for the preservation and adornment of any historic spot, or to the employees or officers of such company or association while traveling in the performance of their duties,

provided they shall not travel further than ten miles one way on any one trip free of charge or to or from fairs or exhibitions for exhibition thereat.

2. The free carriage of destitute or homeless persons transported by charitable societies, and the necessary agents employed in such transportation; or the free transportation of persons traveling in the interest of orphan asylums or homes for the aged or infirm, or any department thereof, or traveling secretaries of Railroad Young Men's Christian Associations, or ex-Confederate soldiers attending annual reunions.

3. The use of passes for journeys wholly within this State which have been or may be issued for interstate journeys under the authority of the United States Interstate Commerce Commission.

4. The issuance of mileage, excursion or commutation passenger tickets.

5. Common carriers from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or State homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

6. Common carriers from giving free carriage to their own officers and employees and members of their families, or furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of such common carrier, and the remains of a person killed in the employment of a common carrier, and employees traveling for the purpose of entering the service of such common carrier, and the families of those persons named; also the families of persons killed, and the widows during widowhood, and minor children during minority of persons who died while in the service of such common carrier.

7. The principal officers of any common carrier from exchanging passes, franks or tickets with other common carriers for their officers or employees, and members of their families.

8. Transportation companies from contracting with newspapers for advertising space in exchange for transportation over their lines to such an extent as may be agreed upon between the parties for said consideration.

9. Transportation companies, if they so desire, from furnishing transportation to such agricultural extension and demonstration workers as are engaged in work in the field in efforts to increase production on the farm and to improve the farm home, when such workers are actually engaged in the performance of duties requiring travel.

10. Any common carrier that is operating under lease a railroad in this State, in which the State owns a majority of the capital stock, from giving free carriage, according to the contract of lease, to the officers and their families and the committees of the lessor owning such leased railroad, nor prevent such operating common carrier from issuing annually free transportation to ex-presidents of such lessor owning companies and their families in compliance with the contract of lease entered into by them or according to and for such period of time as may have been prescribed by any bylaw of the lessor which was in force at the time such lease was made. (1899, c. 164, s. 22; c. 642; 1901, c. 652; c. 679, s. 2; 1905, c. 312; Rev., s. 1105; 1911, cc. 49, 148; 1913, c. 100; 1915, c. 215; 1917, cc. 56, 160; C. S., s. 1070.)

Cross References.—As to free transportation by motor carriers, see § 62-121.69. As to accepting or giving free transportation illegally, see § 60-92.

Unlawful Transportation.—The transportation, by a common carrier, of any person except of the classes specified without charge, is unlawful, the offense being

the actual free transportation and not the issuance of the free pass. *State v. Southern R. Co.*, 122 N. C. 1052, 30 S. E. 133 (1898).

A gratuitous passenger is not in pari delicto with the common carrier. *McNeill v. Railroad Co.*, 135 N. C. 682, 47 S. E. 765 (1904).

Injury While Riding on Pass Illegally Issued.—The rights, privileges and protection attaching to the relation of the passenger are imposed by law upon common carriers upon consideration of the public policy, independent of contract, and arise from the nature of their public employment. Hence, one injured while riding on a pass illegally issued may recover from the railroad. *McNeill v. Railroad*

Co., 135 N. C. 682, 47 S. E. 725 (1904).

Construction of Penal Statute.—In construing a penal statute prohibiting discrimination between passengers, the construction placed on it by common carriers generally, and by private individuals and officials, will not be considered. *State v. Southern R. Co.*, 122 N. C. 1052, 30 S. E. 133 (1898).

ARTICLE 8.

Railroad Freight Rates.

§ 62-135. Charging or receiving greater rates forbidden.—No railroad company being engaged in the business of common carrier of property within the State of North Carolina shall charge, take, or receive any sum for carrying property entirely within the State of North Carolina between initial and terminal points which are within the State, greater than the amount specified by the Utilities Commission for the respective classes and commodities, and for the respective distances except in the manner and to the extent and on the conditions mentioned in this article. (Ex. Sess. 1913, c. 20, s. 5; C. S., s. 1082.)

Cross References.—As to penalty for discrimination in rates, see §§ 60-5 and 60-6. As to charging higher rates after rates re-established upon reconsideration, see § 62-123.

§ 62-136. Application for investigation of rates; appeal; rates pending appeal.—The Utilities Commission, or such commission or body upon which jurisdiction and power may be conferred to fix rates for the transportation of property to be charged by the railroads doing business in North Carolina, may, and upon request of any person directly interested in such charge shall, under rules and regulations fixed by law or prescribed and established by such Commission, hear evidence as to the reasonableness of the maximum rates fixed by law, or by such Commission or body, and establish such rates, in the manner prescribed and allowed by law, as may, in the judgment of said Commission, be just, subject to the limitations fixed by this article; and from such an order of such Commission any shipper or railroad company directly affected by such order may, under rules and regulations prescribed by law, or under reasonable rules and regulations prescribed by such Commission, appeal to the superior court of North Carolina: Provided, that pending the appeal of any railroad company from an order of such Commission fixing maximum rates, there shall be no suspension of such order of such Commission.

All incorporated cities and towns in the State are deemed to be directly interested in the rates charged for the transportation of property by railroads and other common carriers operating into and out of such municipalities and in any discrimination in such rates and services as between municipalities; and, their welfare being thereby affected, any incorporated city or town in North Carolina is authorized and empowered to file its petition with the Utilities Commission for investigation and determination of all matters affecting rates for the transportation of property by railroads and other common carriers to or from such municipality, and also to prevent or remove any unfair or unreasonable difference or discrimination, to its prejudice or disadvantage, between the rates or the services at, in or to another such municipality within the State; and such municipality shall have the right, as a party in interest, to be represented and appear before, and to appeal from any decision which may be rendered therein by the Utilities

Commission, in the manner provided by § 62-20. (Ex. Sess. 1913, c. 20, s. 7; C. S., s. 1083; 1933, c. 134, s. 8; 1937, c. 401; 1941, c. 97.)

Editor's Note.—The 1937 amendment added the second paragraph of this section.

Commission to Investigate Rates upon Request.—This section expressly confers authority upon the Commission to investigate rates upon the request of any person directly interested. It permits that body

to hear evidence as to the reasonableness of the maximum rates fixed by law or by the Commission, and to establish such rates as it may deem just. The authority conferred upon the Commission is plenary. *Corporation Comm. v. Atlantic Coast Line R. Co.*, 187 N. C. 424, 121 S. E. 767 (1924).

§ 62-137. Rates between points connected by more than one route.—When there is more than one railroad route between given points in North Carolina, and freight is routed or directed by the shipper or consignee to be transported over a shorter route, and it is in fact shipped by a longer route between such points, the rate fixed by law or by such Commission for the shorter route shall be the maximum rate which may be charged, and it shall be unlawful to charge more for transporting such freight over the longer route than the lawful charge for the shorter route. (Ex. Sess. 1913, c. 20, s. 11; C. S., s. 1085; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-138. Action for double amount of overcharge; penalty.—Any railroad company in the State of North Carolina which shall charge a rate for transporting property wholly within the State of North Carolina, between terminals within the State, in excess of that fixed by law or by the lawful order of such Commission or board, and which shall omit to refund the same within thirty days after written notice and demand of the person or corporation overcharged, shall be liable to an action for double the amount of such overcharge, and to a penalty of ten dollars per day for each day's delay after thirty days from such notice, in case of shipments of less than carload lots, and to a penalty of twenty dollars per day in the event of shipments of carload lots. (Ex. Sess. 1913, c. 20, s. 12; C. S., s. 1086; 1933, c. 134, s. 8; 1941, c. 97.)

Cross References.—As to overcharge and penalty therefor, see also §§ 60-110 and 62-148.

§ 62-139. Double penalty.—Any such railroad company so doing business in the State of North Carolina that shall knowingly charge a rate in excess of that fixed by law or by such board or Commission, for shipments wholly within the State, shall be subject to a penalty and shall pay double the penalty above prescribed. (Ex. Sess. 1913, c. 20, s. 13; C. S., s. 1087; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-140. Persons to receive penalties; accounts and receipts kept separate.—The penalties herein provided for shall be payable to the person or corporation who pays the freight or against whom the freight is charged, and such person or corporation may sue such railroad company and recover such penalty and the amount of such overcharge. The Commission shall require the railroad companies, and may require all other such public service companies as are mentioned in this chapter, to keep separate the cost of doing interstate and intrastate business in North Carolina, and to keep separate receipts from the respective classes, and to direct the manner of keeping the accounts, and to enforce, by penalties, contempt, or otherwise as the law provides, obedience to its orders. (Ex. Sess. 1913, c. 20, s. 14; C. S., s. 1088; 1933, c. 134, s. 8; 1941, c. 97.)

ARTICLE 9.

Penalties and Actions.

§ 62-141. For violating rules.—If any railroad company doing business in this State by its agents or employees shall be guilty of the violation of the rules

and regulations provided and prescribed by the Commission, and if after due notice of such violation given to the principal officer thereof, if residing in the State, or, if not, to the manager or superintendent or secretary or treasurer if residing in the State, or, if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation as may be directed by the Commission shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars. (1899, c. 164, s. 15; Rev., s. 1086; C. S., s. 1105; 1933, c. 134, s. 8; 1941, c. 97.)

Section Is Valid.—The section giving authority to the Commission after notice for failure of any railroad company to make full and ample recompense for the violation of such rules and regulations to proceed in the courts, to enforce the penalties to be prescribed herein for such violation is valid without providing in detail the methods of procedure. *Atlantic Exp. Co. v. Wilmington, etc., Railroad*, 111 N. C. 463, 16 S. E. 393 (1892).

Duty to Enforce Rules and Orders.—While the Commission has no power to render a judgment for the payment of money, etc., it is their duty to enforce their rules and orders, and the power to do so is given by this section. *State v. Southern R. Co.*, 147 N. C. 483, 61 S. E.

271 (1908).

Right to Investigate Complaint.—Under this section the Commission had the undoubted right and it was eminently proper for them to institute an inquiry and inform themselves as to whether a complaint was grounded in truth. They were not required to institute an action for the penalty simply because a citizen feeling himself aggrieved had made a complaint before them. They did right to investigate the matter for themselves, but the end of such investigation was simply to afford them information and enable them to act intelligently in determining whether they would sue for the penalty of \$500 given by the statute. *State v. Southern R. Co.*, 147 N. C. 483, 61 S. E. 271 (1908).

§ 62-142. Refusing to obey orders of Commission.—Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the Utilities Commission shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior court of Wake County, in the name of the State of North Carolina on the relation of the Utilities Commission; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the Utilities Commission shall be a separate offense. (1899, c. 164, s. 23; Rev., s. 1087; C. S., s. 1106; 1933, c. 134, s. 8; 1941, c. 97.)

Cited in *State v. Atlantic Coast Line R. Co.*, 224 N. C. 283, 29 S. E. (2d) 912 (1944).

§ 62-143. Discrimination between connecting lines.—All common carriers subject to the provisions of this chapter shall according to their powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freights to and from their several lines and those connecting therewith, and shall not discriminate in their rates, routes and charges against such connecting lines, and shall be required to make as close connection as practicable for the convenience of the traveling public. And common carriers shall obey all rules and regulations made by the Commission relating to trackage. (1899, c. 164, s. 21; Rev., s. 1088; C. S., s. 1107; 1933, c. 134, s. 8; 1935, c. 258; 1941, c. 97.)

Cross Reference.—See § 60-7.

Editor's Note.—The 1935 amendment inserted the word "routes" making the section applicable to discrimination as to routes.

As to the practice of specifying in pub-

lished tariffs particular routes formed with connecting carriers, see 13 N. C. Law Rev. 364.

Declaratory of Common Law.—A similar section in the act creating the former Railroad Commission was held, in *Atlan-*

tic Exp. Co. v. Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393 (1892), to be merely declaratory of the common law, and not to enlarge its scope.

May Require Trains to Make Connection.—The Commission has power to require a railroad company to have a train arrive at a certain station on its road at a certain schedule time, so as to connect with the train of another company. *Corp.*

Comm. v. Railroad, 137 N. C. 1, 49 S. E. 191 (1904).

Express Facilities.—A railroad company is not compelled to furnish express facilities to another to conduct an express business over its road the same as it provides for itself or affords to any other express company. *Atlantic Exp. Co. v. Wilmington, etc., Railroad*, 111 N. C. 463, 16 S. E. 393 (1892).

§ 62-144. **Failure to make reports.**—Every officer, agent or employee of any railroad company, express or telegraphic company, who shall willfully neglect or refuse to make and furnish any report required by the Commission for the purposes of this chapter, or who shall willfully or unlawfully hinder, delay or obstruct the Commission in the discharge of the duties hereby imposed upon it, shall forfeit and pay five hundred dollars for each offense, to be recovered in an action in the name of the State. A delay of ten days to make and furnish such report shall raise the presumption that the same was willful. (1899, c. 164, s. 18; Rev., s. 1089; C. S., s. 1108; 1933, c. 134, s. 8; 1941, c. 97.)

Construction of Similar Statute.—In construing a statute (Code of 1883, s. 1960) which provided a similar penalty against corporations for failure to make the returns into court, in *State v. Marietta, etc., Rail-*

road, 108 N. C. 24, 12 S. E. 1041 (1891), it was held that the penalty could only be recovered in an action brought by the State. A private relator could not maintain the action.

§ 62-145. **Offenses by railroads, not otherwise provided for.**—If any railroad company shall violate the provisions of this chapter not otherwise provided for, such railroad company shall incur a penalty of one hundred dollars for each violation, to be recovered by the party injured. (1899, c. 164, s. 17; Rev., s. 1090; C. S., s. 1109.)

Action Ex Contractu.—It would seem that an action for the penalty hereunder is an action ex contractu for breach of an implied contract to perform a statutory duty. *State v. Wilmington, etc., R. Co.*, 126 N. C. 437, 36 S. E. 14 (1900).

Construction of Penal Statute.—The rule that a penal statute must be strictly construed, means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of

the words and phraseology employed in search of an intention not certainly implied by them, and when there is reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. *Hines v. Wilmington, etc., Railroad*, 95 N. C. 434 (1886).

§ 62-146. **Violation of rules, causing injury; damages; limitation.**—If any railroad company doing business in this State shall, in violation of any rule or regulation provided by the Commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of willful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury. (1899, c. 164, s. 16; Rev., s. 1091; C. S., s. 1110; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-147. **Action for penalty; when and how brought.**—An action for the recovery of any penalty under this chapter shall be instituted in the county in which the penalty has been incurred, and shall be instituted in the name of the State of North Carolina on the relation of the Utilities Commission against the company incurring such penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the

State of North Carolina on the relation of the Utilities Commission upon the complaint of such injured person or corporation against the company incurring such penalty. Such action shall be instituted and prosecuted by the Attorney General or the solicitor of the judicial district in which such penalty has been incurred. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions. (1899, c. 164, s. 15; Rev., s. 1092; C. S., s. 1111; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-148. **Remedies, cumulative.**—The remedies given by this chapter to persons injured shall be regarded as cumulative to the remedies now given or which may be given by law against railroad corporations, and this chapter shall not be construed as repealing any statute giving such remedies. (1899, c. 164, s. 26; Rev., s. 1093; C. S., s. 1112.)

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Chapter 63.

Aeronautics.

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ARTICLE 1.

Municipal Airports.

§ 63-1. **Definition.**—Airport or landing field for the purposes of this ar-

ticle is defined as any plot of land or water formally set aside and designated as a place where aircraft may land or take off. (1929, c. 87, s. 1.)

Cross Reference.—For other provisions as to municipal airports, see §§ 63-48 to 63-58. **Cited in** *Goswick v. Durham*, 211 N. C. 687, 191 S. E. 728 (1937).

§ 63-2. Cities and towns authorized to establish airports.—The governing body of any city or town in this State is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft, either within or without the limits of such cities and towns and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city or town. (1929, c. 87, s. 2.)

Cross References.—See §§ 63-48 to 63-58. As to power of eminent domain, see §§ 63-5 and 63-6. As to airport zoning regulations, see § 63-31 et seq. **Cited in** *Turner v. Reidsville*, 224 N. C. 42, 29 S. E. (2d) 211 (1944).

§ 63-3. Counties authorized to establish airports.—The governing body of any county in this State is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such county. (1929, c. 87, s. 3.)

§ 63-4. Joint airports established by cities and towns and counties.—The governing bodies of any city, town and county in this State are hereby authorized to jointly acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such cities, towns and counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be jointly owned or controlled by such city, town and county. (1929, c. 87, s. 4.)

The legislature has power to create a municipal authority to construct, maintain and operate an airport, and county and cities located therein may lawfully join in the construction, maintenance and operation of an airport if each of them is benefited by it. *Greensboro-High Point Airport Authority v. Johnson*, 226 N. C. 1, 36 S. E. (2d) 803 (1946).

Section Not Repealed or Modified by Supplementary Acts.—This section, per-

mitting municipalities to act jointly in the creation of an airport authority, is not repealed or modified or its authority in any way affected by the supplementary public-local and private acts under which the purpose and policy of this section are carried out in the creation of a single airport authority to serve three municipalities. *Greensboro-High Point Airport Authority v. Johnson*, 226 N. C. 1, 36 S. E. (2d) 803 (1946).

§ 63-5. Airport declared public purpose; eminent domain.—Any lands acquired, owned, controlled, or occupied by such cities, towns, and/or counties, for the purposes enumerated in §§ 63-2, 63-3 and 63-4, shall and are hereby declared to be acquired, owned, controlled and occupied for a public purpose, and such cities, towns and/or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public purpose. (1929, c. 87, s. 5.)

§ 63-6. Acquisition of sites; appropriation of moneys.—Private property needed by a city, town and/or county for an airport or landing field may be acquired by gift or devise or shall be acquired by purchase if the city, town and/or county is or are able to agree with the owners on the terms thereof, and otherwise by condemnation, in the manner provided by law under which the city, town and/or county is or are authorized to acquire real property for public purposes, other than street purposes, or if there be no such law, in the manner pro-

vided for and subject to the provisions of the condemnation law. The purchase price, or award for property acquired for an airport or landing field may be paid for by appropriation of moneys available therefor, or wholly or partly from the proceeds of the sale of bonds of the city, town and/or county, as the governing body and/or bodies of such city, town and/or county shall determine. (1929, c. 87, s. 6.)

Cross References.—As to proceedings for eminent domain, see § 40-11 et seq. As to zoning regulations and acquisition of air rights, see §§ 63-31, 63-32 and 63-36.

§ 63-7. Airports already established declared public charge; regulations and fees for use of.—The governing body or bodies of a city, town and/or county which has or have established an airport or landing field, and acquired, leased, or set apart real property for such purpose, may construct, improve, equip, maintain, and operate the same. The expenses of such construction, improvement, maintenance, and operation shall be a city, town and/or county charge as the case may be. The governing body or bodies of a city, town and/or county may adopt regulations and establish fees or charges for the use of such airport or landing field. (1929, c. 87, s. 7.)

§ 63-8. Appropriations.—The governing body or bodies of a city, town and/or county to which this article is applicable, having power to appropriate, individually or jointly, money therein, are hereby authorized to annually appropriate and cause to be raised by taxation in such city, town and/or county or to use from the net proceeds derived from the operation, by such city, town or county, of any public utility a sum sufficient to carry out the provisions of this article in such proportion and upon such pro-rata basis as may be determined upon by a joint board to be appointed by and from the governing body or bodies of the city, town and/or the county or individually as the case may be. Provided, nothing herein shall be construed to permit the governing bodies of any county, city or town to issue bonds under the provisions of this article without a vote of the people. (1929, c. 87, s. 8.)

§ 63-9. Partial invalidity.—If any part or parts of this article shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this article. The General Assembly expressly declares that it would have passed the remaining parts of this article, if it had known that such part or parts thereof would be declared unconstitutional. (1929, c. 87, s. 9.)

ARTICLE 2.

State Regulation.

§ 63-10. Definition of terms.—In this article "aircraft" includes balloon, airplane, hydroplane, and every other vehicle used for navigation through the air. A hydroplane while at rest on water and while being operated on or immediately above water shall be governed by the rules regarding water navigation; while being operated through the air otherwise than immediately above water, it shall be treated as an aircraft. "Aeronaut" and "airman" includes aviator, pilot, balloonist, and every other person having any part in the operation of aircraft while in flight. "Passenger" includes any person riding in an aircraft but having no part in its operation. (1929, c. 190, s. 1.)

§ 63-11. Sovereignty in space.—Sovereignty in space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States. (1929, c. 190, s. 2.)

Stated in *United States v. Causby*, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).

§ 63-12. Ownership of space.—The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in § 63-13. (1929, c. 190, s. 3.)

Flight of Planes over Property as Taking.—Holding that flights by planes at low levels over plaintiff's land deprived plaintiffs of use and enjoyment of their property and constituted "taking" entitling them

to compensation was not inconsistent with this section. *United States v. Causby*, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946), discussed in 25 N. C. Law Rev. 64.

§ 63-13. Lawfulness of flight.—Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable as provided in § 63-14. (1929, c. 190, s. 4; 1947, c. 1001, s. 1.)

Editor's Note.—See 8 N. C. Law Rev. 281.

The 1947 amendment inserted in the first sentence the words "injurious to the health and happiness, or."

Section 63-14, referred to at the end of this section, has been repealed.

Stated in *United States v. Causby*, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).

§ 63-14: Repealed by Session Laws 1947, c. 1069, s. 3.

§ 63-15. Collision of aircraft.—The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land. (1929, c. 190, s. 6.)

§ 63-16. Jurisdiction over crimes and torts.—All crimes, torts, and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State; and the question whether damage occasioned by or to an aircraft while in flight over this State constitutes a tort, crime or other wrong by or against the owner of such aircraft shall be determined by the laws of this State. (1929, c. 190, s. 7.)

Cross References.—See § 63-24. As to criminal jurisdiction generally, see §§ 7-63 and 7-64.

§ 63-17. Jurisdiction over contracts.—All contractual and other legal relations entered into by aeronauts or passengers while in flight over this State shall have the same effect as if entered into on the land or water beneath. (1929, c. 190, s. 8.)

§ 63-18. Dangerous flying a misdemeanor.—Any aeronaut or passenger who, while in flight over a thickly inhabited area or over a public gathering within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall except while in landing or taking off, fly at such a low level as to disturb the public peace or the rights of private persons in the enjoyment of their homes, or injure the health, or endanger the persons or property on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars (\$500.00) or imprisonment for not more than one year, or both. (1929, c. 190, s. 9; 1947, c. 1001, s. 2.)

Editor's Note.—The 1947 amendment struck out the words "endanger the persons" formerly appearing near the middle of the section and inserted in lieu thereof

the words "disturb the public peace or health, or endanger the persons or property." the rights of private persons in the enjoyment of their homes, or injure the

§ 63-19: Repealed by Session Laws 1943, c. 543.

§ 63-20. **Qualifications of operator; federal license.**—The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that a person engaging within this State in operating aircraft, in any form of aerial navigation for which a license to operate aircraft issued by the United States Government would then be required if such aerial navigation were interstate, should have the qualifications necessary for obtaining and holding such a license, it shall be unlawful for any person to engage in operating aircraft within the State, in any such form of aerial navigation, unless he have such federal license. (1929, c. 190, s. 11.)

§ 63-21. **Possession and exhibition of license certificate.**—The certificate of the license, herein required, shall be kept in the personal possession of the licensee when he is operating aircraft within this State and must be presented for inspection upon the demand of any passenger, any peace officer of this State, or any official, manager or person in charge of any airport or landing field in this State upon which he shall land. (1929, c. 190, s. 12.)

§ 63-22. **Aircraft; construction, design and airworthiness; federal registration.**—The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that aircraft to be operated within this State should conform, with respect to design, construction and airworthiness, to standards then prescribed by the United States government with respect to aerial navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to operate an aircraft within this State unless it is registered pursuant to the lawful rules and regulations of the United States government then in force, if the circumstances of such aerial navigation are of a character that such registration would be required in the case of interstate aerial navigation. (1929, c. 190, s. 13.)

§ 63-23. **Penalties.**—A person who violates any provision of §§ 63-20, 63-21 or 63-22 of this article shall be guilty of a misdemeanor and punishable by a fine of not more than one hundred dollars (\$100.00), or by imprisonment for not more than ninety days, or both; provided, however, that acts or omissions made unlawful by §§ 63-20, 63-21 or 63-22 of this article shall not be deemed to include any act or omission which violates the laws or lawful regulations of the United States. (1929, c. 190, s. 14.)

§ 63-24. **Jurisdiction of State over crimes and torts retained.**—Provided that this article shall not be construed as a waiver of jurisdiction of the courts of the State of North Carolina over any crime or tort committed within the State of North Carolina, and provided, further, that the General Assembly of North Carolina may at any time amend, regulate or control any of the powers which may be assumed by the United States Department of Commerce under this article. (1929, c. 190, s. 15.)

ARTICLE 3.

Stealing, Tampering with, or Operating Aircraft While Intoxicated.

§ 63-25. **Taking of aircraft made crime of larceny.**—Any person who, under circumstances not constituting larceny shall, without the consent of the owner, take, use or operate or cause to be taken, used or operated, an airplane or

other aircraft or its equipment, for his own profit, purpose or pleasure, steals the same, is guilty of larceny and is punishable accordingly. (1929, c. 90, s. 1.)

Cross References.—As to larceny generally, see § 14-70 et seq. As to punishment, see § 14-2.

§ 63-26. **Tampering with aircraft made crime.**—Any person who shall, without the consent of the owner, go upon or enter, tamper with or in any way damage or injure any airplane or other aircraft shall be guilty of a misdemeanor and shall be punishable by fine of not more than one hundred (\$100.00) dollars or imprisonment of not more than sixty days, or both, in the discretion of the court and it shall not be necessary to conviction hereunder to show willful or malicious intent. (1929, c. 90, s. 2.)

§ 63-27. **Operation of aircraft while intoxicated made crime.**—Any person who operates an airplane or other aircraft, whether on the ground or in the air while in an intoxicated condition, shall be guilty of a misdemeanor and punishable by fine not to exceed one hundred dollars or by imprisonment not to exceed sixty days, or both, in the discretion of the court. (1929, c. 90, s. 3.)

§ 63-28. **Infliction of serious bodily injury by operation of aircraft while intoxicated made felony.**—Any person who, operating an airplane or other aircraft whether on the ground or in the air while in an intoxicated condition, does serious bodily injury to another shall be guilty of a felony. (1929, c. 90, s. 4.)

ARTICLE 4.

Model Airport Zoning Act.

§ 63-29. **Definitions.** — As used in this article, unless the context otherwise requires:

(1) "Airport" means any area of land or water designed for the landing and taking off of aircraft and utilized or to be utilized by the public as a point of arrival or departure by air.

(2) "Airport hazard" means any overhead power line, not constructed, operated and maintained according to standard engineering practices in general use, which interferes with radio communication between a publicly owned airport and aircraft approaching or leaving same, or any structure or tree which obstructs the aerial approaches of such an airport or is otherwise hazardous to its use for landing or taking off.

(3) "Political subdivision" means any municipality, city, town, county, or any municipal corporation, authority or commission created by the General Assembly of North Carolina for the purpose of owning, operating or regulating any airport or airports.

(4) "Person" means any individual, firm, co-partnership, corporation, company, association, joint stock association or body politic, and includes any trustee, receiver, assignee, or other similar representative thereof.

(5) "Structure" means any object constructed or installed by man, including, but without limitation, buildings, towers, smokestacks, and overhead transmission lines.

(6) "Tree" means any object of natural growth. (1941, c. 250, s. 1; 1945, c. 300.)

Cross Reference.—See note under § 63-31.

litical subdivision' means any municipality, city, county, or town."

Editor's Note.—Prior to the 1945 amendment subsection (3) read as follows: "Po-

For comment on this article, see 19 N. C. Law Rev. 548.

§ 63-30. **Airport hazards not in public interest.**—It is hereby found and declared that an airport hazard endangers the lives and property of users of

the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and is therefore not in the interest of the public health, public safety, or general welfare. (1941, c. 250, s. 2.)

§ 63-31. Adoption of airport zoning regulations.—(1) Every political subdivision may adopt, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations, which regulations shall divide the area surrounding any airport within the jurisdiction of said political subdivision into zones, and, within such zones, specify the land uses permitted, and regulate and restrict the height to which structures and trees may be erected or allowed to grow. In adopting or revising any such zoning regulations, the political subdivision shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the federal government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport.

(2) In the event that a political subdivision has adopted, or hereafter adopts, a general zoning ordinance regulating, among other things, the height of buildings, any airport zoning regulations adopted for the same area or portion thereof under this article, may be incorporated in and made a part of such general zoning regulations, and be administered and enforced in connection therewith, but such general zoning regulations shall not limit the effectiveness or scope of the regulations adopted under this article.

(3) Any two or more political subdivisions may agree, by ordinance duly adopted, to create a joint board and delegate to said board the powers herein conferred to promulgate, administer and enforce airport zoning regulations to protect the aerial approaches of any airport located within the corporate limits of any one or more of said political subdivisions. Such joint board shall have as members two representatives appointed by the chief executive officer of each political subdivision participating in the creation of said board and a chairman elected by a majority of the members so appointed.

(4) The jurisdiction of each political subdivision is hereby extended to the promulgating, adopting, administering and enforcement of airport zoning regulations to protect the approaches of any airport or landing field which is owned by said political subdivision, although the area affected by the zoning regulations may be located outside the corporate limits of said political subdivision. In case of conflict with any airport zoning or other regulations promulgated by any political subdivision, the regulations adopted pursuant to this section shall prevail.

(5) All airport zoning regulations adopted under this article shall be reasonable, and none shall require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations when adopted or amended, or otherwise interfere with the continuance of any nonconforming use, except as provided in § 63-32, subsection (1). (1941, c. 250, s. 3; 1945, cc. 300, 635.)

Editor's Note.—Session Laws 1945, c. 635, struck out former subsection (6) which provided: "Nothing herein contained shall be construed to prevent trees existing at the time any zoning regulations are adopted to continue their natural growth."

Session Laws 1945, c. 300 purported to amend only subsection (3) of § 63-29 and then proceeded to set out the amended subsection and an additional subsection

numbered (4), which has been inserted above in place of former subsection (4) of this section. The amendatory act made no reference to this section and only by reading it in conjunction with the amended act can it be surmised that an amendment of subsection (4) of this section was intended. Therefore, there is some doubt as to whether the subsection has been amended. The act inserted in the first sentence of

subsection (4) the words "adopting" and "or landing field." It also substituted in said sentence the words "although the area affected by the zoning regulation may be located" for the words "but located."

§ 63-32. Permits, new structures, etc., and variances.—(1) Permits.—Where advisable to facilitate the enforcement of zoning regulations adopted pursuant to this article, a system may be established by any political subdivision for the granting of permits to establish or construct new structures and other uses and to replace existing structures and other uses or make substantial changes therein or substantial repairs thereof. In any event, before any nonconforming structure or tree may be replaced, substantially altered or repaired, rebuilt, allowed to grow higher, or replanted, a permit must be secured from the administrative agency authorized to administer and enforce the regulations, authorizing such replacement, change or repair. No such permit shall be granted that would allow the structure or tree in question to be made higher or become a greater hazard to air navigation than it was when the applicable regulation was adopted; and whenever the administrative agency determines that a nonconforming structure or tree has been abandoned or more than eighty per cent torn down, destroyed, deteriorated, or decayed: (a) no permit shall be granted that would allow said structure or tree to exceed the applicable height limit or otherwise deviate from the zoning regulations; and (b) whether application is made for a permit under this paragraph or not, the said agency may by appropriate action compel the owner of the nonconforming structure or tree, at his own expense, to lower, remove, reconstruct, or equip such object as may be necessary to conform to the regulations or, if the owner of the nonconforming structure or tree shall neglect or refuse to comply with such order for ten days after notice thereof, the said agency may proceed to have the object so lowered, removed, reconstructed, or equipped. Except as indicated, all applications for permits for replacement, change or repair of nonconforming uses shall be granted.

(2) Variances.—Any person desiring to erect any structures, or increase the height of any structure, or permit the growth of any tree, or otherwise use his property, in violation of airport zoning regulations adopted under this article, may apply to the board of appeals, as provided in § 63-33, subsection (3), for a variance from the zoning regulations in question. Such variances shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of the regulations and this article.

(3) Obstruction Marking and Lighting.—In granting any permit or variance under this section, the administrative agency or board of appeals may, if it deems such action advisable to effectuate the purposes of this article and reasonable in the circumstances, so condition such permit or variance as to require the owner of the structure or tree in question to permit the political subdivision, at its own expense, to install, operate, and maintain suitable obstruction markers and obstruction lights thereon. (1941, c. 250, s. 4.)

§ 63-33. Procedure.—(1) Adoption of Zoning Regulations.—No airport zoning regulations shall be adopted, amended, or changed under this article except by action of the legislative body of the political subdivision in question, or the joint board provided for in § 63-31, subsection (3), after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the hearing shall be published in an official paper, or a paper of general circulation, in the political subdivision or subdivisions in which the airport is located.

(2) Administration of Zoning Regulations—Administrative Agency.—The legislative body of any political subdivision adopting airport zoning regulations under this article may delegate the duty of administering and enforcing such reg-

ulations to any administrative agency under its jurisdiction, or may create a new administrative agency to perform such duty, but such administrative agency shall not be or include any member of the board of appeals. The duties of such administrative agency shall include that of hearing and deciding all permits under § 63-32, subsection (1), but such agency shall not have or exercise any of the powers delegated to the board of appeals.

(3) Administration of Airport Zoning Regulations—Board of Appeals.—Airport zoning regulations adopted under this article shall provide for a board of appeals to have and exercise the following powers:

(a) To hear and decide appeals from any order, requirement, decision, or determination made by the administrative agency in the enforcement of this article or of any ordinance adopted pursuant thereto;

(b) To hear and decide special exceptions to the terms of the ordinance upon which such board may be required to pass under such ordinance;

(c) To hear and decide specific variances under § 63-32, subsection (2). Where a zoning board of appeals or adjustment already exists, it may be appointed as the board of appeals. Otherwise, the board of appeals shall consist of five members, each to be appointed for a term of three years and to be removable for cause by the appointing authority upon written charges and after public hearing.

The board shall adopt rules in accordance with the provisions of any ordinance adopted under this article. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the board and shall be a public record.

Appeals to the board may be taken by any person aggrieved, or by any officer, department, board, or bureau of the political subdivision affected, by any decision of the administrative agency. An appeal must be taken within a reasonable time, as provided by the rules of the board, by filing with the agency from which the appeal is taken and with the board, a notice of appeal specifying the grounds thereof. The agency from which the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal shall stay all proceedings in furtherance of the action appealed from, unless the agency from which the appeal is taken certifies to the board, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in its opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by a court of record on application on notice to the agency from which the appeal is taken and on due cause shown.

The board shall fix a reasonable time for the hearing of the appeal, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

The board may, in conformity with the provisions of this article, reverse or affirm, wholly or partly, or modify, the order, requirement, decision, or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the administrative agency from which the appeal is taken.

The concurring vote of a majority of the members of the board shall be sufficient to reverse any order, requirement, decision, or determination of the administrative agency, or to decide in favor of the applicant on any matter upon

which it is required to pass under any such ordinance, or to effect any variation in such ordinance. (1941, c. 250, s. 5.)

§ 63-34. Judicial review.—(1) Any person aggrieved by any decision of the board of appeals, or any taxpayer, or any officer, department, board, or bureau of the political subdivision, may present to the superior court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. Such petition shall be presented to the court within thirty days after the decision is filed in the office of the board.

(2) Upon presentation of such petition the court may allow a writ of certiorari directed to the board of appeals to review such decision of the board. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

(3) The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(4) The court shall have exclusive jurisdiction to affirm, modify, or set aside the decision brought up for review, in whole or in part, and if need be, to order further proceedings by the board of appeals. The findings of fact by the board, if supported by substantial evidence, shall be accepted by the court as conclusive, and no objection to a decision of the board shall be considered by the court unless such objection shall have been urged before the board, or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(5) Costs shall not be allowed against the board of appeals unless it appears to the court that it acted with gross negligence, in bad faith, or with malice, in making the decision appealed from. (1941, c. 250, s. 6.)

§ 63-35. Enforcement and remedies.—Each violation of this article or of any regulations, order, or ruling promulgated or made pursuant to this article, shall constitute a misdemeanor and shall be punishable by a fine of not more than fifty dollars (\$50.00) or imprisonment for not more than thirty days or by both such fine and imprisonment, and each day a violation continues to exist shall constitute a separate offense. In addition, the political subdivision within which the property is located may institute in any court of competent jurisdiction, an action to prevent, restrain, correct or abate any violation of this article, or of airport zoning regulations adopted under this article, or of any order or ruling made in connection with their administration or enforcement, and the court shall adjudge to the plaintiff such relief, by way of injunction (which may be mandatory) or otherwise, as may be proper under all the facts and circumstances of the case, in order fully to effectuate the purposes of this article and of the regulations adopted and orders and rulings made pursuant thereto. (1941, c. 250, s. 7.)

§ 63-36. Acquisition of air rights.—In any case in which: (1) it is desired to remove, lower, or otherwise terminate a nonconforming use; or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this article; or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the political subdivision within which the property or nonconforming use is located or the political subdivision owning the airport or served by it may acquire, in the manner provided by the law under which municipalities are authorized to acquire real property for public purposes, such an air right, easement, or other estate or interest in the property or nonconforming use in question as may be necessary to effectuate the purposes of this article.

If any political subdivision, or if any board or administrative agency appointed or selected by a political subdivision, shall adopt, administer or enforce any airport zoning regulations which results in the taking of, or in any other injury or damage to any existing structure, such political subdivision shall be liable therefor in damages to the owner or owners of any such property and the liability of the political subdivision shall include any expense which the owners of such property are required to incur in complying with any such zoning regulations. (1941, c. 250, s. 8.)

§ 63-37. **Short title.**—This article shall be known and may be cited as the “Model Airport Zoning Act.” (1941, c. 250, s. 10.)

ARTICLE 5.

Aeronautics Commission; Federal Regulations.

§§ 63-38 to 63-44: Repealed by Session Laws 1949, c. 865, s. 1.

§ 63-45. **Enforcement of article.**—It shall be the duty of every State, county and municipal officer charged with the enforcement of State and municipal laws to enforce and assist in the enforcement of this article. (1945, c. 198, s. 8.)

§ 63-46: Repealed by Session Laws 1949, c. 865, s. 2.

§ 63-47. **Enforcement of regulations of Civil Aeronautics Administration.**—In the general public interest and safety, the safety of persons receiving instructions concerning or operating, using or traveling in aircraft, and of persons and property on the ground, and in the interest of aeronautical progress, the public officers of the State, counties and cities shall enforce the rules and regulations of the Civil Aeronautics Administration. (1945, c. 198, s. 10.)

ARTICLE 6.

Public Airports and Related Facilities.

§ 63-48. **Definitions.**—For the purpose of this article the following words, terms, and phrases shall have the meanings herein given, unless otherwise specifically defined, or unless another intention clearly appears, or the context otherwise requires:

(a) “Aeronautics” means transportation by aircraft; the operation, construction, repair, or maintenance of aircraft, aircraft power plants and accessories, including the repair, packing, and maintenance of parachutes; the design, establishment, construction, extension, operation, improvement, repair, or maintenance of airports, restricted landing areas, or other air navigation facilities, and air instruction.

(b) “Aircraft” means any contrivance now known, or hereafter invented, used or designed for navigation of or flight in the air.

(c) “Public aircraft” means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any state, territory, or possession of the United States, or the District of Columbia, but not including any government owned aircraft engaged in carrying persons or property for commercial purposes.

(d) “Civil aircraft” means any aircraft other than a public aircraft.

(e) “Airport” means any area of land or water, except a restricted landing area, which is designed for the landing and take off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo, and all appurtenant areas used

or suitable for airport buildings or other airport facilities, and all appurtenant rights of way, whether heretofore or hereafter established.

(f) : Repealed by Session Laws 1949, c. 865, s. 3.

(g) "State" or "this State" means the State of North Carolina.

(h) "Restricted area" means any area of land, water, or both, which is used or is made available for the landing and take off of aircraft, the use of which shall, except in case of emergency, be only as provided from time to time by the Commission.

(i) "Air navigation facility" means any facility other than one owned or controlled by the federal government, used in, available for use in, or designed for use in aid of air navigation, including airports, restricted landing areas, and any structures, mechanisms, lights, beacons, marks, communicating systems, or other instrumentalities or devices used or useful as an aid, or constituting an advantage or convenience to the safe taking off, navigation, and landing of aircraft, or the safe and efficient operation or maintenance of an airport or restricted landing area, and any combination of any or all of such facilities.

(j) "Air navigation" means the operation or navigation of aircraft in the air space over this State, or upon any airport or restricted landing area within this State.

(k) "Operation of aircraft" or "operate aircraft" means the use of aircraft for the purpose of air navigation and includes the navigation or piloting of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of the statutes of this State.

(l) "Airman" means any individual who engages, as the person in command, or as pilot, mechanic, or member of the crew, in the navigation of aircraft while underway and (excepting individuals employed outside the United States, any individual employed by a manufacturer of aircraft, aircraft engines, propellers, or appliances to perform duties as inspector or mechanic in connection therewith, and any individual performing inspection or mechanical duties in connection with aircraft owned or operated by him) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air traffic control tower operator.

(m) "Air instruction" means the imparting of aeronautical information by any aeronautics instructor or in or by any air school or flying club.

(n) "Air school" means any person engaged in giving or offering to give instruction in aeronautics, either in flying or ground subjects, or both, for or without hire or reward, and advertising, representing, or holding himself out as giving or offering to give such instruction. It does not include any public school or university of this State, or any institution of higher learning duly accredited and approved for carrying on collegiate work.

(o) "Aeronautics instructor" means any individual engaged in giving instruction or offering to give instruction in aeronautics, either in flying or ground subjects, or both, for hire or reward, without advertising such occupation, without calling his facilities an "air school" or anything equivalent thereto, and without employing or using other instructors. It does not include any instructor in any public school or university of this State, or any institution of higher learning duly accredited and approved for carrying on collegiate work, while engaged in his duties as such instructor.

(p) "Flying club" means any person other than an individual which, neither for profit nor reward, owns, leases, or uses one or more aircraft for the purpose of instruction or pleasure, or both.

(q) "Person" means any individual, firm, partnership, corporation, company,

association, joint stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(r) "State airway" means a route in the navigable air space over and above the lands or water of this State designated by the Commission as a route suitable for air navigation.

(s) "Navigable air space" means air space above the minimum altitudes of flight prescribed by the laws of this State, or by regulations of the Commission consistent therewith.

(t) "Municipality" means any county, city, or town of this State, and any other political subdivision, public corporation, authority, or district in this State, which is or may be authorized by law to acquire, establish, construct, maintain, improve, and operate airports and other air navigation facilities.

(u) "Airport protection privileges" means easements through, or other interests in, air space over land or water, interests in airport hazards outside the boundaries of airports or restricted landing areas, and other protection privileges, the acquisition or control of which is necessary to insure safe approaches to the landing areas of airports and restricted landing areas and the safe and efficient operation thereof.

(v) "Airport hazard" means any structure, object of natural growth, or use of land, which obstructs the air space required for the flight of aircraft in landing or taking off at any airport or restricted landing area or is otherwise hazardous to such landing or taking off.

The singular shall include the plural, and the plural the singular. (1945, c. 490, s. 1; 1949, c. 865, s. 3.)

Editor's Note.—For discussion of the 1945 statute enacting this and the following sections, see 23 N. C. Law Rev. 327.

The 1949 act repealed subsection (f) which referred to the North Carolina Aeronautics Commission.

§ 63-49. Municipalities may acquire airports.—(a) Every municipality is hereby authorized, through its governing body, to acquire property, real or personal, for the purpose of establishing, constructing, and enlarging airports and other air navigation facilities and to acquire, establish, construct, enlarge, improve, maintain, equip, operate, and regulate such airports and other air navigation facilities and structures and other property incidental to their operation, either within or without the territorial limits of such municipality and within or without this State; to make, prior to any such acquisition, investigations, surveys, and plans; to construct, install, and maintain airport facilities for the servicing of aircraft and for the comfort and accommodation of air travelers; and to purchase and sell equipment and supplies as an incident to the operation of its airport properties. It may not, however, acquire or take over any airport or other air navigation facility owned or controlled by any other municipality of the State without the consent of such municipality. It may use for airport purposes any available property that is now or may at any time hereafter be owned or controlled by it. Such air navigation facilities as are established on airports shall be supplementary to and co-ordinated in design and operation with those established and operated by the federal government.

(b) All property needed by a municipality for an airport or restricted landing area, or for the enlargement of either, or for other airport purposes, may be acquired by purchase, gift, devise, lease or other means if such municipality is able to agree with the owners of said property on the terms of such acquisition, and otherwise by condemnation in the manner provided by the law under which such municipality is authorized to acquire like property for public purposes, full power to exercise the right of eminent domain for such purposes being hereby granted every municipality both within and without its territorial limits. If but one municipality is involved and the charter of such municipality prescribes a method of acquiring property by condemnation, proceedings shall be had pursuant to the provisions of such charter and may be followed as to property within or with-

out its territorial limits. The fact that the property needed has been acquired by any agency or corporation authorized to institute condemnation proceedings under power of eminent domain shall not prevent its acquisition by the municipality by the exercise of the right of eminent domain herein conferred when such right is exercised on the approach zone or on the airport site. For the purpose of making surveys and examinations relative to any condemnation proceedings, it shall be lawful to enter upon any land, doing no unnecessary damage. Provided that municipalities building airports after the ratification of this article shall not acquire by condemnation any property of any corporation engaged in the operation of a railroad or railroad bridge in this State if such property is used in the business of such corporation.

(c) Where necessary, in order to provide unobstructed air space for the landing and taking off of aircraft utilizing airports or restricted landing areas acquired or operated under the provisions of this article, every municipality is authorized to acquire, in the same manner as is provided for the acquisition of property for airport purposes, easements through or other interests in air space over land or water, interests in airport hazards, or airport hazards outside the boundaries of the airports or restricted landing areas and such other airport protection privileges as are necessary to insure safe approaches to the landing areas of said airports or restricted landing areas and the safe and efficient operation thereof. It is also hereby authorized to acquire, in the same manner, land for the removal of airport hazards and the right of easement for a term of years or perpetually, to place or maintain suitable marks for the daytime marking and suitable lights for the nighttime marking of airport hazards, including the right of ingress or egress to or from such airport hazards for the purpose of maintaining and repairing such lights and marks. This authority shall not be so construed as to limit any right, power or authority to zone property adjacent to airports and restricted landing areas under the provisions of any law of this State.

(d) It shall be unlawful for anyone to build, rebuild, create, or cause to be built, rebuilt, or created any object, or plant, cause to be planted, or permit to grow higher any tree or trees or other vegetation which shall encroach upon any airport protection privileges acquired pursuant to the provisions of this section. Any such encroachment is declared to be a public nuisance and may be abated in the manner prescribed by law for the abatement of public nuisances, or the municipality in charge of the airport or restricted landing area for which airport protection privileges have been acquired as in this section provided, may go upon the land of others and remove any such encroachment without being liable for damages in so doing. (1945, c. 490, s. 2; c. 810.)

Cross Reference.—For other provisions added the proviso at the end of subsection as to municipal airports, see §§ 63-1 to 63-9. (b).

Editor's Note.—Session Laws 1945, c. 810

§ 63-50. Airports a public purpose.—The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air navigation facilities, and the exercise of any other powers herein granted to municipalities, are hereby declared to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity, and such lands and other property, easements and privileges acquired and used by such municipalities in the manner and for the purposes enumerated in this article, shall and are hereby declared to be acquired and used for public, governmental and municipal purposes and as matter of public necessity. (1945, c. 490, s. 3.)

A municipality is liable for torts committed by it in the operation and maintenance of a municipal airport, since such activity is a proprietary or corporate function of the municipality, and this section, declaring such activity to be a public,

governmental and municipal function exercised for a public purpose, does not purport to exempt it from tort liability.

Rhodes v. Asheville, 230 N. C. 134, 52 S. E. (2d) 371 (1949).

§ 63-51. Prior acquisition of airport property validated.—Any acquisition of property within or without the limits of any municipality for airports and other air navigation facilities or of airport protection privileges heretofore made by any such municipality in any manner, together with the conveyance and acceptance thereof, is hereby legalized and made valid and effective. (1945, c. 490, s. 4.)

§ 63-52. Airport property and income exempt from taxation.—No municipality shall be required to pay any tax to the State of North Carolina or any other municipality on account of property, either real or personal, now owned or hereafter acquired for aeronautical purposes. (1945, c. 490, s. 5.)

§ 63-53. Specific powers of municipalities operating airports.—In addition to the general powers in this article conferred, and without limitation thereof, a municipality which has established or may hereafter establish airports, restricted landing areas or other air navigation facilities, or which has acquired or set apart or may hereafter acquire or set apart real property for such purpose or purposes is hereby authorized:

(a) To vest authority for the construction, enlargement, improvement, maintenance, equipment, operation and regulation thereof in an officer, a board or body of such municipality by ordinance or resolution which shall prescribe the powers and duties of such officer, board or body. The expense of such construction, enlargement, improvement, maintenance, equipment, operation and regulation shall be a responsibility of the municipality.

(b) To adopt and amend all needful rules, regulations and ordinances for the management, government and use of any properties under its control whether within or without the territorial limits of the municipality; to appoint airport guards or police with full police powers; to fix by ordinance, penalties for the violation of said ordinances and enforce said penalties in the same manner in which penalties prescribed by other ordinances of the municipality are enforced. It may also adopt ordinances designed to safeguard the public upon or beyond the limits of private airports or landing strips within such municipality or its police jurisdiction against the perils and hazards of instrumentalities used in aerial navigation. Such ordinances shall be published as provided by general law or the charter of the municipality for the publication of similar ordinances. They must conform to and be consistent with the laws of this State and shall be kept in conformity, as nearly as may be, with the then current federal legislation governing aeronautics and the regulations duly promulgated thereunder and rules and standards issued from time to time pursuant thereto.

(c) To lease such airports or other air navigation facilities, or real property acquired or set apart for airport purposes, to private parties, to any municipal or State government or to the national government, or to any department of either thereof, for operation; to lease to private parties, to any municipal or State government or to the national government, or any department of either thereof, for operation or use consistent with the purpose of this article, space, area, improvements, or equipment on such airports; to sell any part of such airports, other air navigation facilities or real property to any municipal government, or to the United States or to any department or instrumentality thereof, for aeronautical purposes or purposes incidental thereto, and to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities; provided that in each case in so doing the public is not deprived of its rightful, equal, and uniform use thereof.

(d) To sell or lease any property, real or personal, acquired for airport purposes and belonging to the municipality, which, in the judgment of its govern-

ing body, may not be required for aeronautic purposes in accordance with the laws of this State or the provisions of the charter of the municipality governing the sale or leasing of similar municipally owned property.

(e) To determine the charge or rental for the use of any properties under its control and the charges for any services or accommodations and the terms and conditions under which such properties may be used, provided that in all cases the public is not deprived of its rightful, equal, and uniform use of such property. Charges shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality. The municipality shall have and may enforce liens as provided by law for liens and enforcement thereof, for repairs to or improvement or storage or care of any personal property, to enforce the payment of any such charges.

(f) To exercise all powers necessarily incidental to the exercise of the general and special powers herein created. (1945, c. 490, s. 6.)

Where a night watchman at a municipal airport kills a person on the property in the nighttime, the question of whether he was acting in his capacity as servant or agent of the airport, or in his capacity as a police

officer, is a question of fact to be determined by the jury on an issue raised by proper pleadings. *Rhodes v. Asheville*, 230 N. C. 134, 52 S. E. (2d) 371 (1949).

§ 63-54. Federal aid.—(a) A municipality is authorized to accept, receive, and receipt for federal moneys and other moneys, either public or private, for the acquisition, construction, enlargement, improvement, maintenance, equipment, or operation of airports and other air navigation facilities and sites therefor, and to comply with the provisions of the laws of the United States and any rules and regulations made thereunder for the expenditures of federal moneys upon such airports and other air navigation facilities.

(b) The governing body of any municipality is authorized, if necessary, to comply with any federal law or regulation of any agency thereof to designate the North Carolina Aeronautics Commission as its agent to accept, receive, and receipt for federal moneys in its behalf for airport purposes. Such moneys as are paid over by the United States government shall be paid over to said municipality under such terms and conditions as may be imposed by the United States government in making such grant.

(c) All contracts for the acquisition, construction, enlargement, improvement, maintenance, equipment, or operation of airports or other air navigation facilities made by the municipality shall be made pursuant to the laws of this State governing the making of like contracts, provided, however, that where such acquisition, construction, improvement, enlargement, maintenance, equipment or operation is financed wholly or partly with federal moneys the municipality may let contracts in the manner prescribed by the federal authorities, acting under the laws of the United States and any rules or regulations made thereunder notwithstanding any other State law to the contrary. (1945, c. 490, s. 7.)

Editor's Note.—The Commission referred to in subsection (b) has been abolished. See Session Laws 1949, c. 865, repealing §§ 63-38 to 63-44, 63-46, and subsection (f) of § 63-48.

§ 63-55. Airports on public waters and reclaimed land.—(a) The powers herein granted to a municipality to establish and maintain airports shall include the power to establish and maintain such airports in, over, and upon any public waters of this State within the limits or jurisdiction of or bordering on the municipality, any submerged land under such public water, and any artificial or reclaimed land which before the artificial making or reclamation thereof constituted a portion of the submerged land under such public waters, and as well the power to construct and maintain terminal buildings, landing floats, causeways, roadways and bridges for approaches to or connecting with the airport, and landing floats and breakwaters for the protection of any such airport.

(b) All the other powers herein granted municipalities with reference to airports on land or granted to them with reference to such airports in, over, and upon public waters, submerged land under public waters, and artificial or reclaimed land. (1945, c. 490, s. 8.)

§ 63-56. **Joint operation of airports.**— (a) All powers, rights and authority granted to any municipality in this article may be exercised and enjoyed by two or more municipalities either within or without the territorial limits of either or any of said municipalities and within or without this State, or by any municipality acting jointly with any other municipality therein either within or without this State, provided the laws of such other state permit such joint action.

(b) Any two or more municipalities may enter into agreements with each other, duly authorized by ordinance or resolution, as may be appropriate, for joint action pursuant to the provisions of this section. Concurrent action by the governing bodies of the municipalities involved shall constitute joint action.

(c) Each such agreement shall specify its term; the proportionate interest which each municipality shall have in the property, facilities and privileges involved, and the proportion of preliminary costs, costs of acquisition, establishment, construction, enlargement, improvement and equipment, and of expenses of maintenance, operation and regulation to be borne by each, and make such other provisions as may be necessary to carry out the provisions of this section. It shall provide for amendments thereof and for conditions and methods of termination; for the disposition of all or any part of the property, facilities and privileges jointly owned if said property, facilities and privileges, or any part thereof, shall cease to be used for the purposes herein provided or if the agreement shall be terminated, and for the distribution of the proceeds received upon any such disposition, and of any funds or other property jointly owned and undisposed of, and the assumption or payment of any indebtedness arising from the joint venture which remains unpaid, upon any such disposition or upon a termination of the agreement.

(d) Municipalities acting jointly as herein authorized may create a board from the inhabitants of such municipalities for the purpose of acquiring property for establishing, constructing, enlarging, improving, maintaining, equipping, operating and regulating the airports and other air navigation facilities and airport protection privileges to be jointly acquired, controlled, and operated. Such board shall consist of members to be appointed by the governing body of each municipality involved, the number to be appointed by each to be provided for by the agreement for the joint venture. Each member shall serve for such time and upon such terms and as to compensation, if any, as may be provided for in the agreement.

(e) Each such board shall organize, select officers for terms to be fixed by the agreement, and adopt and from time to time amend rules of procedure.

(f) Such board may exercise, on behalf of the municipalities acting jointly by which it is appointed, all the powers of each of such municipalities granted by this article, except as herein provided, subject, however, to such limitations as may be contained in the agreement between such municipalities. Real property, airports, restricted landing areas, air protection privileges, or personal property costing in excess of a sum to be fixed by the joint agreement, may be acquired, and condemnation proceedings may be instituted, only by authority of the governing bodies of each of the municipalities involved. The total amount of expenditures to be made by the board for any purpose in any calendar year shall be determined by the municipalities involved by the approval by each. No real property and no airport, other air navigation facility, or air protection privilege, owned jointly, shall be disposed of by the board, by sale, or otherwise, except by authority of the appointed governing bodies, but the board may lease space, area or improvements and grant concessions on airports for aeronautical purposes or purposes incidental thereto.

(g) Each municipality is authorized and empowered to enact such ordinances as are provided for by this article, and to fix by such ordinances penalties for the violation thereof, which ordinances shall have the same force and effect within the municipality which enacted them, and on any property controlled by it, either separately or jointly with another municipality, or adjacent thereto, whether within or without the territorial limits of it, or either or any of them, as ordinances of the municipality involved, and may be enforced in such municipality in like manner as are its other ordinances.

(h) Condemnation proceedings may be instituted in the names of two or more municipalities jointly, and the property acquired by such joint condemnation proceedings shall be held by the municipalities as tenants in common, each municipality being entitled to a pro rata interest in said property as the value of its contribution to the acquisition of said property bears to the total cost of acquiring said property, and in the event one municipality desires to acquire property for expansion of or addition to the facilities, and the other or others do not elect to join in the acquisition of such property, such municipality may institute condemnation proceedings in its name individually, and all property now owned or hereafter acquired by a municipal corporation for additions to or expansions of aeronautical facilities operated jointly shall be and remain the sole property of the municipal corporation acquiring same.

(i) For the purpose of providing funds for necessary expenditures in carrying out the provisions of this section, a joint fund shall be created and maintained, into which each of the municipalities involved shall deposit its proportionate share as provided by the joint agreement, and into which shall be paid the revenues obtained from the ownership, control and operation of the airports and other air navigation facilities jointly controlled.

(j) All disbursements from such fund shall be made by order of the board, subject, however, to such limitations as shall be contained in the agreement between such municipalities.

(k) Specific performance of the provisions of any joint agreement entered into as provided for in this section may be enforced as against any party thereto by the other party or parties thereto.

(l) In the event any property is now held or may hereafter be acquired by two or more municipalities for aeronautical purposes, and such municipalities do not agree upon the terms of an agreement, as heretofore provided, and shall not agree to create a board as heretofore provided, then and in that event a board of not less than five nor more than seven members shall be created from the inhabitants of such municipalities, each municipality being entitled to appoint as nearly as possible the proportionate number of representatives on said board as the value of its contribution shall bear to the entire amount of money or property so held by such municipalities for aeronautical purposes. In determining the value of the contribution of any municipality, the value of any funds or property used for the development of said property or the building of facilities on said property shall be taken into consideration.

(m) The said board shall have all powers given by this article to boards created by agreements between municipalities, provided, however, that any funds appropriated by a municipality and turned over to the board for aeronautical purposes shall only be used for these purposes designated by the municipality furnishing such funds.

(n) The actions of such board shall be determined by a majority vote of the members thereof, and a majority of the members shall constitute a quorum for any meeting of the board, and such boards so created shall have full control of all revenues received by reason of the airport or other aeronautical facilities, and shall have power to expend all sums so received for such aeronautical purposes as the board deems proper, and pay over any surplus to the municipalities in proportion to their respective interests.

(o) In the event the aeronautical facilities or any part thereof shall cease to be used for aeronautical purposes, such of the facilities as are jointly owned by two or more municipalities shall be sold, and each municipality shall receive its pro rata proportion of the sums realized from the sale of facilities jointly owned.

(p) In the event aeronautical facilities are now owned or hereafter acquired by two or more municipalities, and are operated under a board as hereinabove provided, and one or more of such municipalities deem it advisable to expand or enlarge the facilities or invest more money in such facilities, all of the municipalities then having representation on the board shall be entitled, if they so desire, to contribute their pro rata part of such additional investment and maintain their pro rata representation on said board, provided, however, that if one or more of the municipalities involved shall fail to contribute its or their proportionate part of such additional investment, the representation of such municipality on such board shall be readjusted, to the end that the representation of each municipality on said board shall represent as nearly as possible its pro rata contribution to the entire investment.

Provided further that where one municipality at the time of the passage of this article shall have invested more than one-half of the total investment in a jointly owned airport, then, and in that event the minority owner or owners shall be allowed five years from the date of the passage of this article in which to pay over to the majority owner a sum sufficient to equalize the amount of ownership of the present minority owner or owners with the total ownership of the majority owner. Provided further that this article shall not be construed to amend or impair in any respect contracts or agreements in effect at the time of the adoption of this article. (1945, c. 490, s. 9.)

§ 63-57. Powers specifically granted to counties.—(a) The purposes of this article are specifically declared to be county purposes as well as generally public, governmental and municipal.

(b) The powers herein granted to all municipalities are specifically declared to be granted to counties in this State, any other statute to the contrary notwithstanding. (1945, c. 490, s. 10.)

Operation of Airport Is Proprietary Function.—In operating and maintaining an airport a county engages in a proprietary or corporate function, in the ex-

ercise of which it is subject to tort liability. *Rhodes v. Asheville*, 230 N. C. 134, 52 S. E. (2d) 371 (1949).

§ 63-58. Municipal jurisdiction exclusive.—Every airport and other air navigation facility controlled and operated by any municipality, or jointly controlled and operated pursuant to the provisions of this article, shall, subject to federal and State laws, rules, and regulations, be under the exclusive jurisdiction and control of the municipality or municipalities controlling and operating it, and no other municipality in which such airport or air navigation facility is located shall have any police jurisdiction of the same. (1945, c. 490, s. 11.)

Cited in *Rhodes v. Asheville*, 230 N. C. 134, 52 S. E. (2d) 371 (1949).

Chapter 64.**Aliens.**

Sec.

64-1. Rights as to real property.

Sec.

64-2. Contracts validated.

§ 64-1. **Rights as to real property.**—It is lawful for aliens to take both by purchase and descent, or other operation of law, any lands, tenements or hereditaments, and to hold and convey the same as fully as citizens of this State can or may do, any law or usage to the contrary notwithstanding. (1870-1, c. 255; Code, s. 7; Rev., s. 182; C. S., s. 192; 1935, c. 243; 1939, c. 19.)

Cross Reference.—As to rules of descent, see § 29-1.

vertently repealed by the 1935 act. See 13 N. C. Law Rev. 355. The 1939 act

Editor's Note.—This section was inad-

restored the section.

§ 64-2. **Contracts validated.**—All contracts to purchase or sell real estate by or with aliens, heretofore made, shall be deemed and taken as valid to all intents and purposes. (1870-1, c. 255, s. 2; Code, s. 8; Rev., s. 183; C. S., s. 193.)

Chapter 65.

Cemeteries.

Article 1.

Care of Rural Cemeteries.

Sec.

- 65-1. County commissioners to provide list of public and abandoned cemeteries.
- 65-2. Appropriations by county commissioners.
- 65-3. County commissioners to have control of abandoned cemeteries; trustees.

Article 2.

Care of Confederate Cemetery.

- 65-4. State Highway and Public Works Commission to furnish labor.

Article 3.

Cemeteries for Inmates of County Homes.

- 65-5. County commissioners may establish new cemeteries.
- 65-6. Removal and reinterment of bodies.

Article 4.

Trust Funds for the Care of Cemeteries.

- 65-7. Money deposited with clerk of superior court.
- 65-8. Separate record of accounts to be kept.
- 65-9. Funds to be kept perpetually.
- 65-10. Investment of funds.
- 65-11. Clerk's bond and fees; substitution of bank or trust company as trustee.
- 65-12. Funds exempt from taxation.

Article 5.

Removal of Graves.

- 65-13. Removal to enlarge or erect churches, etc., or to establish hydro-electric reservoirs, or to perform governmental functions.
- 65-14. Conveyance by church; removal of graves.
- 65-14.1. Churches may remove graves under their custody to regular cemeteries.
- 65-15. Removal after abandonment of cemetery.

Article 6.

Cemetery Associations.

- 65-16. Land holdings.

Sec.

- 65-17. Change of name of association or corporation.

Article 7.

Cemeteries Operated for Private Gain.

- 65-18. Cemeteries to which article applies.
- 65-19. Words and phrases defined.
- 65-20. Reports by cemeteries to Burial Association Commissioner.
- 65-21. Information as to perpetual care fund to be reported.
- 65-22. Requirements for advertising of perpetual care fund.
- 65-23. Trustee for perpetual care fund; irrevocable trust agreement; investments.
- 65-24. Amount set aside in perpetual care fund; use of income.
- 65-25. Sale of lots under "certificate plan;" certificate indemnity fund.
- 65-26. License and provision for perpetual care requisite for establishment of cemetery.
- 65-27. Deposits in perpetual care fund when fund amounts to \$100,000.00.
- 65-28. Amount of deposits for perpetual care fund in certain instances.
- 65-29. Agreements as to retention of perpetual care fund where cemetery property sold to municipality.
- 65-30. Burial Association Commissioner to administer article; examinations.
- 65-31. Violation of article a misdemeanor.
- 65-32. Licenses for persons selling grave space; revocation.
- 65-33. Certain powers delegated to cemetery manager.
- 65-34. Prosecution of violations; revocation and restoration of license; article part of contracts.
- 65-35. Effect of certain other laws.
- 65-36. Funds for expenses of supervision.

Article 8.

Municipal Cemeteries.

- 65-37. Authority to take possession of and continue the use of certain lands as cemetery.
- 65-38. Racial restrictions as to use of cemeteries for burial of dead.
- 65-39. Subdivision into burial plots; sale of lots and use of proceeds.
- 65-40. Appropriations for improvement and maintenance; application of existing laws.

ARTICLE 1.

Care of Rural Cemeteries.

§ 65-1. **County commissioners to provide list of public and abandoned cemeteries.**—It shall be the duty of the boards of county commissioners of the various counties in the State to prepare and keep on record in the office of the register of deeds a list of all public cemeteries in the counties outside the limits of incorporated towns and cities, and not established and maintained for the use of an incorporated town or city, together with the names and addresses of the persons in possession and control of the same. To such list shall be added a list of the public cemeteries in the rural districts of such counties which have been abandoned, and it shall be the duty of the boards of county commissioners to furnish to the division of publications in the office of the Secretary of State copies of the lists of such public and abandoned cemeteries, to the end that it may furnish to the boards, for the use of the persons in control of such cemeteries, suitable literature, suggesting methods of taking care of such places. (1917, c. 101, s. 1; C. S., s. 5019; 1939, c. 316.)

§ 65-2. **Appropriations by county commissioners.**—To encourage the persons in possession and control of the public cemeteries referred to in § 65-1 to take proper care of and to beautify such cemeteries, to mark distinctly their boundary line with evergreen hedges or rows of suitable trees, and otherwise to lay out the grounds in an orderly manner, the board of county commissioners of any county, upon being notified that two-thirds of the expense necessary for so marking and beautifying any cemetery has been raised by the local governing body of the institution which owns the cemetery, and is actually in hand, is hereby required to appropriate from the general fund of the county one-third of the expense necessary to pay for such work, the amount appropriated by the board of commissioners in no case to exceed fifteen dollars for each cemetery. (1917, c. 101, s. 2; C. S., s. 5020.)

§ 65-3. **County commissioners to have control of abandoned cemeteries; trustees.**—The county commissioners of the various counties are required to take possession and control of all abandoned public cemeteries in their respective counties, to see that the boundaries and lines are clearly laid out, defined, and marked, and to take proper steps to preserve them from encroachment, and they are hereby authorized to appropriate from the general fund of the county whatever sums may be necessary from time to time for the above purposes.

The board of county commissioners of the various counties may appoint a board of trustees not to exceed five in number and to serve at the will of the board, and may impose upon such trustees the duties required of the board of commissioners by this article; and such trustees may accept gifts and donations for the purpose of upkeep and beautification of such cemeteries. (1917, c. 101, s. 3; C. S., s. 5021; 1947, c. 236.)

Editor's Note.—The 1947 amendment added the second paragraph.

ARTICLE 2.

Care of Confederate Cemetery.

§ 65-4. **State Highway and Public Works Commission to furnish labor.**—The State Highway and Public Works Commission is hereby authorized and directed to furnish at such time, or times, as may be convenient, such prisoner's labor as may be available, to properly care for the Confederate Cemetery situated in the city of Raleigh, such services to be rendered by the State's prisoners without compensation. (1927, c. 224, s. 1; 1933, c. 172.)

ARTICLE 3.

Cemeteries for Inmates of County Homes.

§ 65-5. **County commissioners may establish new cemeteries.**—The boards of county commissioners of the various counties in the State are authorized and empowered to locate and establish new graveyards or cemeteries upon the lands of their respective counties for the burial of the inmates of the county homes. (1917, c. 151, s. 1; C. S., s. 5022.)

§ 65-6. **Removal and reinterment of bodies.**—Whenever the county commissioners have established new graveyards or cemeteries, they are authorized and empowered to remove to such graveyards or cemeteries all bodies of deceased inmates of the county homes. (1917, c. 151, s. 2; C. S., s. 5023.)

ARTICLE 4.

Trust Funds for the Care of Cemeteries.

§ 65-7. **Money deposited with clerk of superior court.**—For the maintenance and preservation of graves, burial plats, graveyards and cemeteries which may be neglected, any person, firm, or corporation may, by will or otherwise place in the hands of the clerk of the superior court of any county in the State where such grave or lot is located any sum of money not less than one hundred dollars nor more than two thousand dollars, the income from which is to be used for keeping in good condition any grave, burial plat, graveyard, or cemetery in the county in which the money is placed, with specific instructions as to the use of the fund. (1917, c. 155, s. 1; C. S., s. 5024.)

§ 65-8. **Separate record of accounts to be kept.**—It shall be the duty of the clerk of the superior court to keep a separate record for keeping account of the money deposited as above provided, to keep a perpetual account of the same therein, and to record therein the specific instructions about the use of the income on such money. He shall see that the income is spent according to such specific instructions, and shall make report of the same from year to year in the same manner as if it were guardian funds. (1917, c. 155, s. 1; C. S., s. 5025.)

§ 65-9. **Funds to be kept perpetually.**—All money placed in the office of the superior court clerk in accordance with this article shall be held perpetually, and no one shall have authority to withdraw or change the direction of the income on same. (1917, c. 155, s. 2; C. S., s. 5026.)

§ 65-10. **Investment of funds.**—Such money shall be invested in the same manner as is provided by law for the investment of other trust funds by the clerk of the superior court. (1917, c. 155, s. 3; C. S., s. 5027; 1943, c. 97, s. 1.)

Editor's Note.—The 1943 amendment re-wrote this section.

§ 65-11. **Clerk's bond and fees; substitution of bank or trust company as trustee.**—The official bond of the clerk of the superior court shall be liable for all such sums as shall be paid over to him on account of the provisions of this article. The clerk shall receive for his services and responsibilities a commission of ten per cent on the net income each year of such money; and the fees or commissions so received by him under this article shall not be taken into consideration as a part of his salary.

In lieu of the provisions of the first paragraph of this section, the clerk of the superior court may, with the consent and approval of the sheriff and register of deeds, appoint any bank or trust company authorized to do business in this State as trustee for the funds authorized to be paid into his office by virtue of this article;

provided, that no bank or trust company shall be appointed as such trustee unless such bank or trust company is authorized and licensed to act as fiduciary under the laws of this State.

Before any clerk shall turn over such funds to the trustee so appointed, he shall require that the trustee so named qualify before him as such trustee in the same way and manner and to the same extent as guardians are by law required to so qualify. After such trustee has qualified as herein provided, all such funds coming into its hands may be invested by it only in the securities set out in § 2-55 and the income therefrom invested for the purposes and in the manner heretofore set out in this article. All trustees appointed under the provisions of this article shall render and file in the office of the clerk of the superior court all reports that are now required by law of guardians. (1917, c. 155, ss. 3, 4; C. S., s. 5028; 1939, c. 18; 1943, c. 97, s. 2.)

Editor's Note.—The 1939 amendment added the second and third paragraphs. And the 1943 amendment rewrote the first sentence of the first paragraph.

§ 65-12. Funds exempt from taxation.—All money referred to in the preceding sections of this article shall be exempt from all State, county, township, town, and city taxes. (1917, c. 155, s. 4; C. S., s. 5029.)

ARTICLE 5.

Removal of Graves.

§ 65-13. Removal to enlarge or erect churches, etc., or to establish hydro-electric reservoirs, or to perform governmental functions.—In those cases where any church authorities desire to enlarge a church building and/or erect a new church and/or parish house and/or parsonage and where it becomes necessary or expedient to remove certain graves in order to secure the necessary room for such enlargement, it shall be lawful for such church authorities after thirty days' notice to the relatives of deceased, if any are known, and if none are known, then after notice posted at the church door for a like time, to remove such graves to a suitable plat in the church cemetery, or in another cemetery, due care being taken to protect tombstones and replace them properly, so as to leave the graves in as good condition as before removal. When any lands are owned by any hydro-electric power or lighting company for use as a reservoir, on which lands there are graves, it shall be lawful for said company, after thirty (30) days' notice to the surviving husband or wife, or next of kin of the deceased, or the person in control of such graves, if any are known, and if not known, then after publishing a notice for four (4) weeks in a newspaper, published in the county and in a daily State paper, to open any such graves, and to take therefrom any dead body, or part thereof buried therein, and anything interred therewith, and to remove and reinter the same in some other cemetery or suitable place in the same county to be selected by the next of kin, or the welfare officer of the county or the clerk of the superior court in the order named. Due care shall be taken to do said work in a proper and decent manner, and, if necessary, to furnish suitable coffins or boxes for reintering said remains. Due care shall also be taken to remove, protect and replace all tombstones or other markers; so as to leave the new grave in as good condition as the former one. All of said work shall be done under the supervision and direction of the welfare officer of the county, if one, or his representatives; but if no welfare officer, then under the supervision and direction of the clerk of the court, or his representatives. All the expense connected with said work, including the actual expense of one of "next of kin" in attending to same, shall be borne by the company doing, or causing same to be done.

If any municipality or other political subdivision of the State shall find it necessary, in order to perform its governmental functions and duties as prescribed by law, to remove graves from property owned by or in the custody and control of

such municipality or other political subdivision of the State, or from property owned by individuals or corporations, whether known or unknown, such graves may be moved by such municipality or other political subdivision of the State after thirty days' notice to the relatives of the deceased persons, if any are known, and if none are known, then after publication of a notice of such intended removal once a week for four weeks in some newspaper having a general circulation in the county in which such property lies; and such graves when removed shall be removed to a suitable place in another cemetery, due care being taken to protect the tombstones and to place them properly so as to leave the graves in as good condition as before removal. All expense of the removal and acquisition of another burial site shall be borne by the municipality or other political subdivision of the State moving said graves. (1919, c. 245; C. S., s. 5030; 1927, c. 23, s. 1; 1937, c. 3; 1947, c. 168.)

Cross References.—As to condemnation of burial grounds, see §§ 40-10, 56-6; as to removal of or interference with monuments and tombstones, see § 14-148; as to interference with graveyards, see §§ 14-144, 14-149; as to disturbance of graves, see § 14-150; as to burial grounds on watersheds, see § 130-118.

Editor's Note.—The 1937 amendment inserted the words "and/or erect a new church and/or parish house and/or parsonage" in the first sentence. And the 1947

amendment added the second paragraph.

The building of a new vestry room of a church to be used with the one as presently located in relation to the use of the choir, etc., comes within the purview of the statute permitting the removal of the bodies buried in the churchyard by the proper authorities of the church, when necessary or expedient to do so, in carrying out the arrangement. *Mayo v. Bragaw*, 191 N. C. 427, 132 S. E. 1 (1926).

§ 65-14. Conveyance by church; removal of graves.—Where any church has conveyed, or is about to convey real estate on which there are graves, and where it becomes necessary and expedient to remove said graves, it shall be lawful for such church authorities after thirty days' notice to the relatives of deceased, if any are known, and if none are known, then after notice posted at the church door for a like time, to remove such graves to a suitable plot in some other cemetery, due care being taken to protect tombstones and replace them properly, so as to leave the graves in as good condition as before removal. (Ex. Sess. 1920, c. 46; C. S., s. 5030(a).)

§ 65-14.1. Churches may remove graves under their custody to regular cemeteries.—Where any church has assumed the care and custody of any grave or graves not located in a regular cemetery or burying ground, said church is authorized to remove said grave or graves and reinter the remains in some cemetery or other suitable place in the same county to be selected by the next of kin of the deceased resident in that county or the welfare officer of the county or the clerk of the superior court of the county in the order named. Due care shall be taken to do said work of removal in a proper, decent and seemly manner, and if necessary, to furnish suitable coffins or boxes for reintering said remains and due care shall be taken to remove, protect and replace all tombstones or other markers so as to leave the grave in as good condition as it was before removal. The work of removal shall be done under the supervision of the superintendent of welfare of the county, if one, and if not, under the supervision of the clerk of the superior court of the county. All the expenses of removal are to be borne by the church causing the grave to be removed. The church shall give the grave or graves at the location to which they are removed the same care, custody and attention which it was obligated to give said grave or graves at the original location. (1947, c. 576.)

§ 65-15. Removal after abandonment of cemetery.—When any person, firm, or corporation, owns any land on which is situated any cemetery or burying ground, and where it becomes necessary and expedient in the opinion of the

governing body of the county or town in which any such graves are situated to remove said graves, it shall be lawful for such person, firm or corporation, after thirty days' notice to the relatives of the deceased persons buried therein, if any are known, and if none are known, then after thirty days' notice printed in some newspaper published in said county where said property lies, and if no newspaper is published in said county, then by posting notice at the courthouse door of said county, to remove said graves to a suitable plot in some other cemetery, due care being taken to protect tombstones and replace them properly so as to leave the graves in as good condition as before removal: Provided, that all of said work shall be done under the supervision of the county health officer and the board of county commissioners: Provided, further, that the conveyance of the land without reservation of the burying ground shall itself be evidence of the abandonment of the same sufficient for the purposes of this section. (1927, c. 175, s. 1.)

ARTICLE 6.

Cemetery Associations.

§ 65-16. **Land holdings.**—All cemetery associations or corporations created by any local, private or special act or resolution before January tenth, one thousand nine hundred and seventeen are authorized and fully empowered to hold amounts of land in excess of the limitation provided in the local, private or special act or resolution incorporating or chartering such cemetery association or corporation. (1923, c. 76, s. 1; C. S., s. 5030(b).)

§ 65-17. **Change of name of association or corporation.**—Any corporation or association chartered or incorporated by any special act of the legislature, as set forth in § 65-16, is authorized and fully empowered to change the name of such association or corporation by a majority vote of its directors, and upon such change in name it shall be the duty of the officers of the board of directors of such corporation or association to file with the clerk of the superior court a copy of resolution changing the name, which resolution must show the act of the legislature creating or incorporating the same and the reasons for the change thereof. (1923, c. 76, s. 2; C. S., s. 5030(c).)

ARTICLE 7.

Cemeteries Operated for Private Gain.

§ 65-18. **Cemeteries to which article applies.**—This article shall apply only to public cemeteries which are privately owned and operated for private gain or profit or which may hereafter be established for such purpose, and which may advertise or offer perpetual care of grave space in connection therewith. (1943, c. 644, s. 1.)

Local Modification.—Buncombe: 1943, c. 644, s. 20; Durham: 1947, c. 471.

§ 65-19. **Words and phrases defined.**—When consistent with the context of this article and not obviously used in a different sense, the term "cemetery," "public cemetery," or "owner or owners" of such cemetery, as used in this article, includes only such corporations, associations, partnerships, or individuals, as are engaged in the operation for private gain or profit of a public cemetery for the interment of the dead of the human race or the sale of grave space or interment rights therein, and who advertise or offer perpetual care of grave space in connection therewith. The words "Burial Commissioner," "Burial Association Commissioner," or "Commissioner" used herein shall be deemed to refer to the Burial Association Commissioner of North Carolina, and the words "sale" or "conveyance," as used herein, unless obviously used in some other sense, shall be deemed

to refer to and authorize any form of contract by means of which cemetery transfers or agrees to transfer to purchaser title to or exclusive right of interment in a grave space or family burial plot. (1943, c. 644, s. 2.)

§ 65-20. Reports by cemeteries to Burial Association Commissioner.—Every such public cemetery shall, on or before July first, one thousand nine hundred and forty-three, and on or before February first, one thousand nine hundred and forty-four, and on February first of each year thereafter, file or cause to be filed with the Burial Association Commissioner of North Carolina, in his office in Raleigh, on forms to be supplied by said Commissioner, a report giving the name of the cemetery, name of all owners thereof, name of managing or directing head, including name of sales manager or agency handling sales, if any, and stating whether or not such cemetery offers, directly or indirectly, or advertises perpetual care of burial lots or spaces sold to the public, together with copy of all forms of agreements offered to prospective purchasers, and shall, with said first report, file a plat of such cemetery, showing, as of date of ratification of this article, number and location of all lots actually surveyed and permanently staked, together with such other information as may be required under § 65-25, and as may be required by the Burial Association Commissioner of North Carolina. (1943, c. 644, s. 3.)

§ 65-21. Information as to perpetual care fund to be reported.—If such cemetery shall report that it advertises or claims to provide the perpetual care of lots or grave spaces included in its property, such report shall state the amount of its perpetual care fund as of date of above required report, manner of computing same, how and by whom controlled, description of securities in which fund is invested, and copies of all agreements entered into by the cemetery relating thereto. (1943, c. 644, s. 4.)

§ 65-22. Requirements for advertising of perpetual care fund.—No such cemetery shall hereafter cause or permit advertising of perpetual care fund in connection with the sale or offer for sale of its property unless the amount deposited in said fund from all sales made subsequent to the passage of this article shall be equal to not less than four dollars per grave space, sold, said sum to be deposited in perpetual care fund as provided in § 65-23. (1943, c. 644, s. 5.)

§ 65-23. Trustee for perpetual care fund; irrevocable trust agreement; investments.—The perpetual care fund for any cemetery licensed hereunder, as hereinafter authorized, shall immediately be turned over to a reliable trustee, to be approved by the North Carolina Burial Association Commissioner, under an irrevocable trust agreement for safekeeping and for investment only in such securities as may now or hereafter be approved for the investment by a domestic insurance company of its legal reserve. The trustee may, by permission of said Burial Association Commissioner, be changed from time to time, but the trust shall be irrevocable, and the form and substance of the agreement relating thereto shall be approved by the Burial Association Commissioner. (1943, c. 644, s. 6.)

§ 65-24. Amount set aside in perpetual care fund; use of income.—Such cemetery shall set aside in its perpetual care fund not less than four dollars per grave space hereafter sold. The income only derived from the investment of such fund may be used to defray expense of development, upkeep and maintenance of such cemetery. (1943, c. 644, s. 7.)

§ 65-25. Sale of lots under "certificate plan;" certificate indemnity fund.—If such cemetery shall offer for sale and sell its said lots or grave spaces under plan or agreement evidenced by certificate (hereinafter referred to as "certificate plan"), which may involve the transfer of family burial plot or grave spaces, or exclusive right of interment therein, to families, individuals, or their represent-

atives, conditioned upon the continuance or cessation of human life or upon limited pay plan or plans where death of certificate holder prior to payment of all sums due to be paid thereunder may terminate his or her liability for further payment, such cemetery shall set aside and reserve unencumbered and shall keep unencumbered lots or grave spaces suitable for burial in sufficient number to enable the cemetery to comply with the terms of each certificate issued, and shall set aside and deposit with the trustee of its perpetual care fund an additional one dollar per grave space sold, same to be known as "certificate indemnity fund" and continue the making of such deposit until from such sales the total deposits to credit of said fund shall amount to five thousand dollars, same to be held and invested separate and apart from the perpetual care fund of such cemetery, as a fund to indemnify lot and grave space purchasers against loss by reason of the cemetery's failure to reserve, unencumbered, the identical grave space(s) selected by purchaser, if selection has been made, and if not, a sufficient number of grave spaces suitable for burial to enable the cemetery to comply with the terms of its certificate, such fund to be calculated, become due, be deposited and invested, and the cemetery to become liable therefor, only in like manner as for such cemetery's perpetual care fund, and shall be maintained and kept separate so long as there is outstanding any liability of cemetery to reserve grave space under a certificate issued on the above plan, but income therefrom shall be paid to cemetery for such use as income from its perpetual care fund may be used. When such liability no longer exists, said fund shall become a part of the perpetual care fund of such cemetery. Any certificate holder sustaining any loss due to failure of the cemetery to comply with all of the provisions of this section shall have a right of action therefor against said cemetery and upon obtaining a final judgment, such certificate holder shall be entitled to an order directing said trustee to pay the amount of said judgment. Every cemetery licensed under this article shall set aside for and deposit in its perpetual care fund not less than four dollars per grave space agreed by cemetery to be reserved under certificate, or sold by cemetery under any other form of contract: Provided, purchaser is not in default in the payment of any premium or installment becoming due under such certificate or contract, such amount to become due to and be deposited in said fund as such payments are received by the cemetery: Provided, the total amount which said cemetery shall be required to pay into said fund annually shall be only such sum as may be equal to total amount of perpetual care deposit to become due under certificate or contract, divided by the number of years accorded purchaser thereunder to qualify to receive conveyance agreed by cemetery to be made under such certificate or contract, or, if sale has been made under certificate providing for payment of premiums for life, division shall be by life expectancy of certificate holder, computed under American Men Table of Mortality: Provided, further, if purchaser shall pay off or otherwise discharge his or her obligations, as evidenced by certificate or contract, in advance of due date, the deposit of perpetual care shall be ratably increased. Perpetual care earned or deposited under contracts which are in default at time report to Burial Association Commissioner is required to be made hereunder, shall be deducted and shall not be considered in arriving at above total. The income only resulting from the investment of such fund may be used in the sole discretion of the cemetery for the purpose of defraying expense of developing and maintaining the cemetery. Detailed report of amount due to be deposited in such fund, showing the amount actually deposited therein, listed securities in which same is invested, and giving such other details as shall be required by the Burial Association Commissioner, shall be made to said Commissioner annually on the first day of February in each and every year, and more frequently if said Commissioner, in his discretion, so requires. Upon compliance with the terms of this article, including the provisions contained in this section, such cemetery shall be licensed by Burial Association Commissioner and may issue its contracts of sale of grave space or interment rights therein on the certificate plan and on any other plan not prohibited by law. A cemetery complying

with all provisions of this article, excepting only those provisions authorizing the cemetery to operate under the certificate plan, shall be entitled to be licensed hereunder, but any cemetery failing to qualify to so operate shall not be entitled to issue or enter into a contract under such plan. (1943, c. 644, s. 8.)

§ 65-26. License and provision for perpetual care requisite for establishment of cemetery.—No corporation, association, partnership, or individual, shall, after the ratification of this article, be permitted to establish a public cemetery for private gain or profit without obtaining a license therefor, as provided in this article, and without providing for the perpetual care of such cemetery in accordance with the terms of this article, including the setting aside of an initial perpetual care fund of not less than five thousand dollars, same to be in addition to the four dollars per grave space required by this article, to be deposited in such fund. Said perpetual care fund and all additions thereto shall be held and invested as required under § 65-23. (1943, c. 644, s. 9.)

§ 65-27. Deposits in perpetual care fund when fund amounts to \$100,000.00.—When the amount deposited in the perpetual care fund of such cemetery shall amount to one hundred thousand dollars, anything in this article to the contrary notwithstanding, the amount to be deposited in said fund thereafter shall be equal to not less than two dollars per grave space, instead of four dollars, said sum to be deposited in the perpetual care fund as provided in § 65-23. (1943, c. 644, s. 10.)

§ 65-28. Amount of deposits for perpetual care fund in certain instances.—Where such cemetery shall sell its lots for not exceeding thirteen dollars or less than eight dollars per grave space, as to such grave space so sold the amount to be deposited in the perpetual care fund shall be three dollars per grave space; if such lots shall be sold for not exceeding eight dollars per grave space, the amount deposited in the perpetual care fund shall be two dollars per grave space. (1943, c. 644, s. 11.)

§ 65-29. Agreements as to retention of perpetual care fund where cemetery property sold to municipality.—In event of the voluntary purchase by any city or town of a cemetery providing perpetual care of lots under this article, it shall be lawful for the cemetery to provide in its agreement with purchasers that in event of the voluntary purchase by such municipality of such cemetery property, such cemetery may retain for its own any amount accumulated in such perpetual care fund on sale of lots made subsequent to the ratification of this article: Provided, such municipality purchasing and accepting a conveyance of said cemetery property shall, as part consideration for making by such cemetery of said conveyance, assume in writing all obligations of such cemetery in connection with the maintenance thereof. (1943, c. 644, s. 12.)

§ 65-30. Burial Association Commissioner to administer article; examinations.—This article, shall be administered by the Burial Association Commissioner of North Carolina, who shall make periodic examination of affairs of such cemeteries to ascertain whether they are in fact complying with the terms hereof. Examinations shall be made not less frequently than once a year and more frequently if by him deemed necessary. Such examination shall extend back into the business of the cemeteries as far as the Burial Association Commissioner shall deem it necessary in order to show a true picture of the cemetery's financial condition. (1943, c. 644, s. 13; 1945, c. 351, s. 1.)

Editor's Note.—The 1945 amendment added the last sentence.

§ 65-31. Violation of article a misdemeanor.—Any such cemetery owner or manager who fails to comply with any of the provisions of this article

shall be guilty of a misdemeanor and upon conviction therefor shall be fined two hundred dollars, or imprisoned for not exceeding thirty days. (1943, c. 644, s. 14.)

§ 65-32. Licenses for persons selling grave space; revocation.—All persons offering to sell grave space under any plan herein authorized shall be licensed by said Commissioner without payment of any license fee, and such license, for good cause shown, may, in the discretion of the Commissioner, be revoked. (1943, c. 644, s. 15.)

§ 65-33. Certain powers delegated to cemetery manager.—The superintendent, manager, and assistant superintendent of such cemetery shall have all the powers of a deputy sheriff of the county in which such cemetery is located to enforce the law, maintain order, abate nuisances, and prevent vandalism in such cemetery. (1943, c. 644, s. 16.)

§ 65-34. Prosecution of violations; revocation and restoration of license; article part of contracts.—It shall be the duty of the Burial Commissioner to prosecute or cause to be prosecuted all violations of this article, and upon the conviction of the owner or manager of a public cemetery of such violation, and upon failure of such owner or manager to correct such violation within thirty days thereafter, then, in addition to such other penalties as may result from such conviction, the Burial Commissioner may, in his discretion, revoke the license of such cemetery. Said Commissioner may, in his discretion, upon application by such cemetery, thereafter restore to it its license if such cemetery corrects the violation of this article, on account of which its owner or manager was convicted, as well as any other violations thereof known to the Commissioner. This article shall be written into and become a part, where applicable, of all contracts and certificates issued hereunder. (1943, c. 644, s. 17.)

§ 65-35. Effect of certain other laws.—This article shall not be subject to any other laws respecting insurance companies of any class, nor shall same be subject to the laws affecting the sale of securities or laws affecting mutual burial or assessment insurance associations, excepting only as this article, or amendments hereof, shall expressly provide. (1943, c. 644, s. 18.)

§ 65-36. Funds for expenses of supervision.—In order to meet the expenses of the supervision of the cemeteries herein provided for, the Burial Association Commissioner shall assess each cemetery operating under the terms of this article, an equal amount sufficient to collect an aggregate of one thousand dollars (\$1,000.00.), which said amount shall be deposited and commingled with all other funds coming into the hands of the Burial Association Commissioner and he may use said sum of money derived from this section in the discharge of the duties delegated to him by the laws of North Carolina. The assessments provided for in this section shall be due and payable on the first day of July, one thousand nine hundred and forty-five, and on the first day of July of each and every year thereafter. If any cemetery shall fail or refuse to pay the said assessment to the Burial Association Commissioner within thirty (30) days after the making of said assessment, then and in that event the said Burial Association Commissioner is hereby directed and empowered to cancel the license of such cemetery. (1945, c. 351, s. 2.)

Editor's Note.—The 1945 amendment repealed the former section, which exempted certain counties and cemeteries from the application of the article, and

inserted in lieu thereof the present section. The former section was codified from Session Laws 1943, c. 644, s. 19.

ARTICLE 8.

Municipal Cemeteries.

§ 65-37. **Authority to take possession of and continue the use of certain lands as cemetery.**—In any case where property not under the control or in the possession of any church or religious organization in any town or municipality has been heretofore set aside or used for cemetery purposes, and the trustees or owners named in the deed or deeds for said property have died, or are unknown, or the deeds of conveyance have been lost or misplaced and no record of title thereto has been found, and said property has been occupied and used for burial purposes for a time sufficient to identify its use as cemetery property, the municipality in which any such cemetery property is located is hereby authorized and empowered in its discretion to appropriate and take possession of all such land within its corporate limits which has heretofore been used for cemetery purposes and such adjoining land not held or owned by known claimants of title, and to cause the same to be surveyed and lines established and to designate and appropriate the said property as a cemetery, or burial ground. (1947, c. 821, s. 1.)

§ 65-38. **Racial restrictions as to use of cemeteries for burial of dead.**—In the event said property has been heretofore used exclusively for the burial of members of the negro race, then said cemetery or burial ground so established shall remain and be established as a burial ground for the negro race. In the event said property has been heretofore used exclusively for the burial of members of the white race, then said cemetery or burial ground so established shall remain and be established as a burial ground for the white race. (1947, c. 821, s. 2.)

§ 65-39. **Subdivision into burial plots; sale of lots and use of proceeds.**—Said town or municipality shall have power and authority in such cases to cause the same to be subdivided and to lay off and allot for family burial plots any property heretofore appropriated or used for burial purposes for or by different families without any charge therefor, and to cause the remainder of said property to be subdivided and laid off into lots; and shall have the power and authority to sell to any person or persons for burial purposes, any of said lots so subdivided and surveyed, except those heretofore appropriated as referred to in this section of this article, and use the proceeds of such sale for the improvement and upkeep of said cemetery property. (1947, c. 821, s. 3.)

§ 65-40. **Appropriations for improvement and maintenance; application of existing laws.**—In the event any town or municipality appropriates or takes possession of land used for cemetery purposes as set forth and described herein, it is further authorized and empowered to appropriate and use such funds as may be necessary and proper for the improvement and maintenance of said cemetery; and all statutes and ordinances heretofore enacted and passed relative to cemeteries in said town or municipality, are hereby made applicable to said cemetery property. (1947, c. 821, s. 4.)

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ARTICLE 1.

Regulation and Inspection.

§ 66-1. **County commissioners to appoint inspectors.**—The board of county commissioners may appoint for their county or any township thereof inspectors for any article of commerce the inspection of which is not otherwise provided for by law, who shall hold office for the term of five years after their employment. (Rev., ss. 4637, 4669; C. S., s. 5068.)

§ 66-2. **Vacancies in office of inspectors; assistants; principal liable.**—Whenever there shall be a vacancy in the office of inspector while the county commissioners are not in session, any three justices may appoint some other fit person until the next succeeding meeting of the board; or if any inspector shall be rendered incapable of performing his duty by sickness or other accident, he may, with the consent of three justices, appoint some other person as assistant during his sickness or other disability, which consent shall be certified under their hands and lodged with the clerk of the board of commissioners, and such assistant shall take the same oaths as inspectors; and the inspector shall be liable to the same fines and penalties for the assistant's misbehavior as for his own. (1784, c. 206, s. 3; 1793, c. 386; 1799, c. 539, s. 2; 1811, c. 807, s. 6, c. 812; R. C., c. 60, s. 9; Code, s. 2989; Rev., s. 4638; C. S., s. 5069.)

§ 66-3. **Bond of inspector; fees.**—The said inspector shall enter into bond in the sum of five hundred dollars, payable to the State of North Carolina, conditioned for the faithful performance of the duties of his office, which bond the board shall take; and he shall be entitled to such fees as may be prescribed by the board. (1848, c. 43, s. 3; R. C., c. 60, s. 76; Code, s. 3053; Rev., s. 4671; C. S., s. 5071.)

§ 66-4. **Falsely acting as inspector.**—If any person, who is not a legal or sworn inspector of lumber or other articles, presume to act as such, he shall forfeit and pay one hundred dollars, and be guilty of a misdemeanor. (1824, c. 1254, s. 3; R. C., c. 60, s. 69; Code, s. 3046; Rev., s. 3580; C. S., s. 5072.)

§ 66-5. **Penalty for sale without inspection.**—If any person shall sell any article of forage or provision, of which inspection is required in accordance with this article, without the same having been inspected as required, he shall, for every offense, forfeit and pay one hundred dollars. (1850, c. 74, s. 2; R. C., c. 60, s. 77; Code, s. 3054; Rev., s. 4672; C. S., s. 5073.)

§ 66-6. **Penalty on master receiving without inspection.**—No master or commander of any vessel shall take on board any cask or barrel or other commodity, liable to inspection as aforesaid, without its being inspected and branded as required, under the penalty of two hundred dollars for each offense. (1784, c. 206, s. 6; R. C., c. 60, s. 59; Code, ss. 3036, 3037; Rev., ss. 4657, 4658; C. S., s. 5074.)

Local Modification. — Town of New Bern: C. S., § 5074.

§ 66-7. **Who to pay inspectors' fees; penalty for extortion.** — The fees of inspectors shall be paid by the purchaser or exporter of the articles inspected, and if any inspector shall receive any greater fees than are by law allowed, he shall forfeit and pay ten dollars for every offense to any person suing for the same. (1824, c. 1254, ss. 1, 2; R. C., c. 60, s. 79; Code, s. 3055; Rev., s. 4673; C. S., s. 5075.)

§ 66-8. **Firewood in towns.**—All firewood sold in incorporated towns shall be sold by the cord and not otherwise; and each cord shall contain eight feet in length, four feet in height and four feet in breadth; and shall be corded by the seller, under the penalty of two dollars for each offense, to the use of the informer. (1784, c. 211; R. C., c. 60, s. 72; 1880, c. 401; Code, s. 3049; Rev., s. 4667; C. S., s. 5081.)

§ 66-9. **Gas and electric light bills to show reading of meter.** — It shall be the duty of all gas companies and electric light companies selling gas and electricity to the public to show, among other things, on all statements or bills rendered to consumers, the reading of the meter at the end of the preceding month, and the reading of the meter at the end of the current month, and the amount of electricity, in kilowatt hours, and of gas, in feet, consumed for the current month.

Any gas or electric light company failing to render bills or statements, as provided for in this section, shall be subject to a penalty of ten dollars for each violation of this section or failure to render such statements, recoverable before a justice of the peace by any person suing for the same; but this section shall not apply to bills and accounts rendered customers on flat rate contracts. (1915, c. 259; C. S., s. 5082.)

§ 66-10. **Failure of junk dealers to keep record of purchases misdemeanor.**—Every person, firm, or corporation buying brass or copper, or any other metal, or any rubber, or leather and rubber belts and belting, as junk, shall keep a register and shall keep therein a true and accurate record of each purchase, showing the description of the article purchased, the name from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon said metal, rubber, or leather and rubber belts and belting. The said register and the metal and rubber, and leather and rubber belts and belting purchased shall be at all times open to the inspection of the public. A failure to comply with these requirements or the making of a false entry concerning such metals, rubber, or leather, or rubber belts, or belting shall constitute a misdemeanor. (1917, c. 46; C. S., s. 5090.)

Local Modification.—Anson, Buncombe, Caldwell, Davidson, Randolph, Robeson: C. S., § 5090; Stanly: 1939, c. 154.

§ 66-11. **Dealing in certain metals regulated; purchasing from minors; violations of section misdemeanor.**—Every person, firm, or corporation buying railroad brasses or any composition metal specially used in the operation of trains, or brasses, composition metals, or copper of the kind or quality used by manufacturing or power plants, shall keep a register and shall insert therein a true and accurate record of each purchase, showing the name of the person from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon such metal. The register shall be at all times open to the inspection of the public. Any person or dealer buying or selling metals without complying with this section shall be guilty of a misdemeanor; and any person making a false entry in such register shall be guilty of a misdemeanor. Every person, firm, or corporation who shall buy or receive any such metals from persons under twenty-one years old, or who shall buy or receive any such metals after the same have been broken up and the marks or brands obliterated, shall be guilty of a misdemeanor; and every person buying, receiving or selling, or offering for sale metals broken into small pieces, or so broken as to obliterate the marks or brands, shall be prima facie presumed to have received such metals knowing the same to have been stolen. (1907, c. 464; 1909, c. 855, s. 1; C. S., s. 5091.)

ARTICLE 2.

Manufacture and Sale of Matches.

§ 66-12. **Requirements for matches permitted to be sold.**—No person, association, or corporation shall manufacture, store, offer for sale, sell or otherwise dispose of or distribute white phosphorous, single-dipped, strike-anywhere matches of the type popularly known as "parlor matches;" nor manufacture, store, sell, offer for sale, or otherwise dispose of, or distribute, white phosphorous, double-dipped, strike-anywhere matches or any other type of double-dipped matches, unless the bulb or first dip of such match is composed of a so-called safety or inert composition, nonignitable on an abrasive surface; nor manufacture, store, sell, or offer for sale, or otherwise dispose of or distribute matches which when packed in a carton of five hundred approximate capacity and placed in an oven maintained at a constant temperature of two hundred degrees F., will ignite in eight hours; nor manufacture, store, offer for sale, sell or otherwise dispose of, or distribute, blazer, or so-called wind matches, whether of the so-called safety or strike-anywhere type. (1915, c. 109, s. 12, I; C. S., s. 5113.)

§ 66-13. **Packages to be marked.**—No person, association, or corporation shall offer for sale, sell or otherwise dispose of, or distribute, any matches, unless the package or container in which such matches are packed bears, plainly marked on the outside thereof, the name of the manufacturer and the brand or trademark under which the matches are sold, disposed of, or distributed. (1915, c. 109, s. 12, II; C. S., s. 5114.)

§ 66-14. **Storage and packing regulated.**—No more than one case of each brand of matches of any type or manufacture shall be opened at any one time in the retail store where matches are sold or otherwise disposed of; nor shall loose boxes or paper-wrapped packages of matches be kept on shelves or stored in such retail stores at a height exceeding five feet from the floor; all matches when stored in warehouses must be kept only in properly secured cases, and not piled to a height exceeding ten feet from the floor; nor be stored within a horizontal distance of ten feet from any boiler, furnace, stove, or other like heating apparatus; nor within a horizontal distance of twenty-five feet from any explosive material kept or stored on the same floor. All matches shall be packed in boxes or suitable packages, containing not more than seven hundred matches in any one box or package: Provided, however, that when more than three hundred matches are packed in any one box or package the said matches shall be ar-

ranged in two nearly equal portions, the heads of the matches in the two portions shall be placed in opposite directions, and all boxes containing three hundred and fifty or more matches shall have placed over the matches a center-holding or protecting strip, made of chip board, not less than one and one-quarter inches wide; said strip shall be flanged down to hold the matches in position when the box is nested into the shuck or withdrawn from it. (1915, c. 109, s. 12, II; C. S., s. 5115.)

§ 66-15. **Shipping containers regulated.**—All match boxes or packages shall be packed in strong shipping containers or cases; maximum number of match boxes or packages contained in any one shipping container or case shall not exceed the following number:

| Number of Boxes | Nominal Number of Matches per Box |
|----------------------------|--------------------------------------|
| ½ gross | 700 |
| 1 gross | 500 |
| 2 gross | 400 |
| 3 gross | 300 |
| 5 gross | 200 |
| 12 gross | 100 |
| 20 gross over 50 and under | 100 |
| 25 gross under | 50 |

No shipping container or case constructed of fiber board, corrugated fiber board, or wood, nailed or wirebound, shall exceed a weight, including its contents, of seventy-five pounds; and no lock-cornered wooden case containing matches shall have a weight, including its contents, exceeding eighty-five pounds; nor shall any other article or commodity be packed with matches in any such container or case; and all such containers and cases in which matches are packed shall have plainly marked on the outside of the container or case the words "Strike-Anywhere Matches" or "Strike-on-the-Box Matches." (1915, c. 109, s. 12, III; C. S., s. 5116.)

§ 66-16. **Violation of article a misdemeanor.**—Any person, association, or corporation violating any of the provisions of this article shall be fined for the first offense not less than five dollars nor more than twenty-five dollars, and for each subsequent violation not less than twenty-five dollars. (1915, c. 109, s. 12, IV; C. S., s. 5117.)

ARTICLE 3.

Candy and Similar Products.

§ 66-17. **Sale, etc., of candy or other food not complying with health and pure food laws.**—It shall be unlawful for any person, firm or corporation, or agent of any person, firm or corporation, to consign, sell, possess or use any candy or other product within this State that does not comply with all federal and State health and pure food laws in force and effect in North Carolina. (1939, c. 323, s. 1.)

Editor's Note.—For comment on this article, see 17 N. C. Law Rev. 384.

§ 66-18. **Manufacturer to pay tax upon products consigned to person, etc., other than licensed wholesale or retail merchant.**—Any manufacturer of candy or similar products, or the agent of such manufacturer, who consigns any such products to any person, firm or corporation other than a licensed wholesale or retail merchant in the State of North Carolina shall be liable for and pay to the State of North Carolina a tax of three per cent (3%) upon the gross retail sales price of merchandise so consigned and/or sold: Provided such manufacturers shall be entitled to a refund or credit for taxes paid

on such consigned goods as are returned by the consignee to said manufacturers. (1939, c. 323, s. 2.)

§ 66-19. Regulations as to possession and sale.—It shall be unlawful for any person, firm or corporation other than a licensed wholesale or retail merchant in the State of North Carolina to consign, possess or use any article upon which the tax provided for in § 66-18 preceding is payable, or for any consignee to sell such product, unless the manufacturer thereof is registered with the Commissioner of Revenue of the State of North Carolina for payment of said tax. (1939, c. 323, s. 3.)

§ 66-20. Commissioner of Revenue may require reports.—The Commissioner of Revenue shall have authority to require a report, at such times as he may require, from every person, firm or corporation manufacturing candy or similar products, or from the agent of any such manufacturer, of the names and addresses of all consignors, other than licensed merchants, to whom consignment of such merchandise is made. (1939, c. 323, s. 4.)

Editor's Note.—The word "consignors" volume of the General Statutes, was probably intended to read "consignees." appears in the original act and in the original

§ 66-21. Violators deprived of legal redress.—The consignor shall not have the right to sue in any court of law in this State for the collection of monies resulting from the sale of merchandise sold in violation of this article. (1939, c. 323, s. 5.)

§ 66-22. Violations made misdemeanor.—Any person convicted for the violation of this article shall be guilty of a misdemeanor and subject to a fine of not exceeding one hundred dollars (\$100.00) or imprisonment for not exceeding thirty days or both fine and imprisonment in the discretion of the court. (1939, c. 323, s. 6.)

ARTICLE 4.

Electrical Materials, Devices, Appliances and Equipment.

§ 66-23. Sale of electrical goods regulated.—Every person, firm or corporation before selling, offering for sale or exposing for sale, at retail to the general public or disposing of by gift as premiums or in any similar manner any electrical material, devices, appliances or equipment shall first determine if such electrical materials, devices, appliances and equipment comply with the provision of this article. (1933, c. 555, s. 1.)

§ 66-24. Identification marks required.—All electrical materials, devices, appliances and equipment offered for sale, exposed for sale at retail to the general public, or disposed of by gift as premiums or in any similar manner shall have the maker's name, trademark, or other identification symbol placed thereon, together with such other markings giving voltage, current, wattage, or other appropriate ratings as may be necessary to determine the character of the material, device, appliance or equipment and the use for which it is intended; and it shall be unlawful for any person, firm or corporation to remove, alter, change or deface the maker's name, trademark or other identification symbol. (1933, c. 555, s. 2.)

§ 66-25. Acceptable listings as to safety of goods.—The electrical inspector shall accept, without further examination or test, the listings of Underwriters' Laboratories, Inc., as evidence of safety of such materials, etc., so long as the listing continues in effect to his knowledge and, so long as information and experience have not demonstrated, in his judgment, that any specific listed materials, etc., are not safe.

The electrical inspector may accept as evidence of safety of such materials, etc., where not of types for which such Underwriters' Laboratories listings are in effect, such evidence by way of records of tests and examinations by bodies he deems properly qualified, as he deems necessary to assure him of the safety of such materials, etc. But such acceptance cannot be made to apply to other than the stock of materials, etc., for which such evidence has been specifically secured. One body whose evidence of safety shall be accepted by the electrical inspector for specific stocks is the Insurance Commission of the State of North Carolina, if the stock in question has been submitted to the examinations and tests required by that Commission, and that Commission has certified that in its judgment the stock conforms to the State law, to the requirements of this article, and to any additional requirements deemed necessary for safety in the judgment of that Commission.

The electrical inspector may decline to accept any evidence of safety other than that provided by Underwriters' Laboratories listings, for specific materials, etc., of types for which such listings are available.

The electrical inspector, in accepting listings of Underwriters' Laboratories, shall keep in file as far as practicable, copies of all Underwriters' Laboratories listings in effect, and copies of the recorded standards, requirements, tests and examinations of Underwriters' Laboratories for such materials, etc., or shall when necessary refer to the files of such information maintained by the Insurance Commission of North Carolina. The words "electrical inspector" when used in this article shall be construed to refer to any duly licensed and employed electrical inspector of the State or any governmental agency thereof. (1933, c. 555, s. 3.)

§ 66-26. Legal responsibility of proper installations unaffected.—This article shall not be construed to relieve from or to lessen the responsibility or liability of any party owning, operating, controlling or installing any electrical materials, devices, appliances or equipment for damages to persons or property caused by any defect therein, nor shall the electrical inspector be held as assuming any such liability by reason of the approval of any material, device, appliance or equipment authorized herein. (1933, c. 555, s. 4.)

§ 66-27. Violation made misdemeanor.—Any person, firm or corporation who shall violate any of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than fifty (\$50.00) dollars or imprisonment for not more than thirty days. (1933, c. 555, s. 5.)

ARTICLE 5.

Sale of Phonograph Records or Electrical Transcriptions.

§ 66-28. Prohibition of rights to further restrict or to collect royalties on commercial use.—When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within this State, all asserted common-law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.

Nothing in this section shall be deemed to deny the rights granted any person by the United States Copyright Laws. The sole intentment of this enactment is to abolish any common-law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions of the collection of subsequent fees and royalties on phonograph records

and electrical transcriptions by performers who were paid for the initial performance at the recording thereof. (1939, c. 113.)

ARTICLE 6.

Sale of Nursery Stock.

§ 66-29. **Agreements for spraying, pruning, etc.**—Every person, firm or corporation, who shall sell, barter or exchange any nursery stock in the State of North Carolina, who shall promise or agree, either in the written contract of sale, orally or otherwise, that such person, firm or corporation, selling, exchanging or bartering such nursery stock, will spray, prune or otherwise look after or service such nursery stock for any period of time after the said sale is made, shall before engaging in such business in the State of North Carolina post with the Commissioner of Agriculture a good and sufficient bond in the sum of one thousand dollars (\$1,000.00) payable to the State of North Carolina, and conditioned that such person, firm or corporation, shall well and truly comply with the contract of sale containing such promise and agreements either written or oral.

This regulation shall apply to any agent or employee of any person, firm or corporation engaging in such business in the State of North Carolina, but one bond given by the principal shall be sufficient for all agents representing such principal. (1939, c. 189.)

ARTICLE 7.

Tagging Secondhand Watches.

§ 66-30. **Definitions.**—The following terms as used in this article are hereby defined as follows:

(a) "Person" means a person, firm, partnership or corporation, but shall not include a receiver, trustee in bankruptcy, trustee under a mortgage, deed of trust or contract securing any indebtedness, and executor or administrator while acting as such, or any person acting under an order of court or as a licensed pawnbroker.

(b) "Consumer" means an individual, firm, partnership, association or corporation, who buys for their own use or for the use of another, but not for resale.

(c) "Secondhand watch" means a watch as a whole, or any part thereof, which has previously been sold to a consumer, or a watch whose case or movement, serial numbers or other distinguishing numbers or identification marks have been erased, defaced, removed, altered or covered, or a watch any part of which has been replaced by parts from another make or model watch. (1941, c. 244, s. 1.)

§ 66-31. **Tags required; "sell" defined.**—Any person, or agent or employee thereof, who sells a secondhand watch, as herein defined, shall affix and keep affixed to the same a tag with the words "secondhand" legibly written or printed thereon in the English language. For the purpose of this section, "sell" includes an offer to sell or exchange, expose for sale or exchange, possess with intent to sell or exchange and to sell or exchange. (1941, c. 244, s. 2.)

§ 66-32. **Invoices delivered to purchasers; duplicate invoices open to inspection.**—Any person, or agent or employee thereof who sells a secondhand watch, shall deliver to the purchaser a written invoice or bill of sale, setting forth the name and address of the seller, the name and address of the purchaser, the date of the sale, and a full description of the secondhand watch so sold, with the serial numbers, if any, or other distinguishing numbers or identification marks on its case and movements. A duplicate of such invoice or bill of sale shall be kept on file by the vendor for at least one year from the date of such sale, and such duplicate shall be open to inspection during all business hours by any peace

officer or by any person authorized by any such peace officer to make an investigation regarding same. (1941, c. 244, s. 3.)

§ **66-33. Advertisements.**—Any person advertising in any manner second-hand watches for sale shall state in such advertising that the watches so advertised are secondhand watches. (1941, c. 244, s. 4.)

§ **66-34. Violation of article made misdemeanor.**—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty (\$50.00) dollars, or by imprisonment for not more than thirty (30) days, or both. (1941, c. 244, s. 5.)

ARTICLE 8.

Public Warehouses.

§ **66-35. Who may become public warehousemen.**—Any person or any corporation organized under the laws of this State whose charter authorizes it to engage in the business of a warehouseman, may become a public warehouseman and authorized to keep and maintain public warehouses for the storage of cotton, goods, wares, and other merchandise as hereinafter prescribed upon giving the bond hereinafter required. (1901, c. 678; Rev., s. 3029; 1919, c. 212; C. S., s. 5118.)

Cited in *Champion Shoe Machinery Co. v. Sellers*, 197 N. C. 30, 147 S. E. 674 (1929).

§ **66-36. Bond required.**—Every person or every corporation organized under § 66-35, to become a public warehouseman, except such as shall have a capital stock of not less than five thousand dollars, shall give bond in a reliable bonding or surety company, or an individual bond with sufficient sureties, payable to the State of North Carolina, in an amount not less than ten thousand dollars, to be approved, filed with and recorded by the clerk of the superior court of the county in which the warehouse is located, for the faithful performance of the duties of a public warehouseman; but if such person or corporation has a capital stock of not less than five thousand dollars, then it shall not be required to give the bond mentioned in this section. (1901, c. 678, s. 2; 1905, c. 540; Rev., s. 3030; 1908, c. 56; 1919, c. 212; C. S., s. 5119.)

§ **66-37. Person injured may sue on bond.**—Whenever such warehouseman fails to perform any duty or violates any of the provisions of this article, any person injured by such failure or violation may bring an action in his name and to his own use in any court of competent jurisdiction on the bond of said warehouseman. (1901, c. 678, s. 3; Rev., s. 3031; C. S., s. 5120.)

Warehousemen are liable under the general law for their negligence causing damage to articles stored with them. *Motley Co. v. Warehouse Co.*, 122 N. C. 347, 30 S. E. 3 (1898); *Motley v. Southern Finishing, etc., Co.*, 124 N. C. 232, 32 S. E. 555 (1899).

Care Required of Bailee.—Where it was known to bailor at time of storage that the bailee knew nothing about tobacco, and had no experience in handling it, the bailee will not be held liable for injury resulting from want of skill and experience; but will be bound to use such ordinary care as a prudent man would exercise to guard against moisture in the structure of the warehouse

and the location of the tobacco. *Motley v. Southern Finishing Co.*, 126 N. C. 339, 35 S. E. 601 (1900).

Provision against Liability.—A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract, attempts to confer exclusive privileges and is therefore unconstitutional and void. *Motley Co. v. Warehouse Co.*, 122 N. C. 347, 30 S. E. 3 (1898).

The measure of damages for property damaged while in the care of a storage or warehouse company is the difference between the market value of the property

in its damaged condition and what it would have sold for, if undamaged, on the day of its return to the owner. *Motley Co. v. Warehouse Co.*, 122 N. C. 347, 30 S. E. 3 (1898).

Carrier's Liability as Warehouseman.—See *Poythress v. Durham & Southern R. Co.*, 148 N. C. 391, 62 S. E. 515 (1908); *Bank v. Southern R. Co.*, 153 N. C. 346, 69 S. E. 261 (1910).

§ 66-38. When insurance required; storage receipts.—Every such warehouseman shall, when requested thereto in writing by a party placing property with it on storage, cause such property to be insured; every such warehouseman shall give to each person depositing property with it for storage a receipt therefor. (1901, c. 678, s. 4; 1905, c. 540, s. 2; Rev., s. 3032; C. S., s. 5121.)

Cross Reference.—As to warehouse receipts, see § 27-1 et seq.

§ 66-39. Books of account kept; open to inspection.—Every such warehouseman shall keep a book in which shall be entered an account of all its transactions relating to warehousing, storing, and insuring cotton, goods, wares, and merchandise, and to the issuing of receipts therefor, which books shall be open to the inspection of any person actually interested in the property to which such entry relates. (1901, c. 678, s. 7; Rev., s. 3035; C. S., s. 5122.)

§ 66-40. Unlawful disposition of property stored.—If any person unlawfully sells, pledges, lends, or in any other way disposes of or permits or is a party to the unlawful selling, pledging, lending, or other disposition of any goods, wares, merchandise, or anything deposited in a public warehouse, without the authority of the party who deposited the same, he shall be punished by a fine not to exceed two thousand dollars and by imprisonment in the State's prison for not more than three years; but no officer, manager, or agent of such public warehouse shall be liable to the penalties provided in this section unless, with the intent to injure or defraud any person, he so sells, pledges, lends, or in any other way disposes of the same, or is a party to the selling, pledging, lending, or other disposition of any goods, wares, merchandise, article, or thing so deposited. (1901, c. 678, s. 11; Rev., s. 3831; C. S., s. 5123.)

Cross Reference.—As to warehouse receipts, see § 27-1 et seq.

ARTICLE 9.

Collection of Accounts.

§ 66-41. Permit from Insurance Commissioner.—Any person, firm or corporation within the State of North Carolina engaging in the collection of accounts for a percentage consideration of the account collected, or upon any other basis than regular employment, shall, before engaging in such business within the State of North Carolina, apply to and receive from the Insurance Commissioner, a permit to engage in such business, which permit shall at all times be prominently displayed in the main office of the person, firm, or corporation to whom or to which the permit is issued, and the number of said permit shall be printed in bold type upon all letterheads, stationery and forms used by the person, firm or corporation holding said permit. (1931, c. 217, s. 1.)

§ 66-42. Application to Commissioner for permit.—The person, firm, or corporation desiring to secure a permit as provided in § 66-41, shall make application to the Insurance Commissioner upon such form as the Commissioner may provide, and shall submit with such application any and all information which the Commissioner may require to assist him in determining the financial condition, business integrity, method of operation and protection to the public offered by the person, firm or corporation filing the application. All information submitted shall be sworn to by the responsible officer, member of the firm, or in-

dividual, as in each case necessary, and the Commissioner shall have the right to require any and all additional information which, in his judgment, might assist him in determining whether or not the applicant is entitled to the permit sought. (1931, c. 217, s. 2.)

§ 66-43. Hearing granted applicant if application declined; appeal.—If, for any reason, upon the application made and upon the consideration of the data submitted with the application or items, the Commissioner shall be of the opinion that a permit should not be issued to the applicant, he shall decline the same, giving notice of his action to the applicant. Following notice, the applicant shall have ten days within which to submit additional information in support of his application, and if, upon further hearing upon the application and additional information, the Commissioner shall again decline to issue the permit, the applicant shall have the right to appeal to the superior court and his appeal shall stand for hearing in the superior court of the county of Wake, and the evidence, data and information submitted to the Commissioner shall constitute the record in the superior court, and the same shall be heard by the judge of the superior court to determine whether or not the Commissioner had evidence sufficient to justify his action. (1931, c. 217, s. 3.)

§ 66-44. Application fee; issuance of permit; contents and duration.—Upon the filing of the application and information hereinbefore required, the Commissioner may require the applicant to pay a fee of \$50.00, and no permit may be issued until this fee is paid. The Commissioner may issue a permit if he finds it proper, and in that case no part of the \$50.00 shall be returned. If the application is denied, the Commissioner shall retain \$5.00 of the application fee and return the remainder to the applicant. The \$5.00 so retained upon applications not granted, and the full fee of \$50.00 upon applications granted, shall be used in paying the expenses incurred in connection with the consideration of such applications and the issuance of such permits.

Each permit shall state the name of the applicant, his place of business, and the nature and kind of business he is engaged in. The Commissioner shall assign to the permit a serial number for each year beginning with July first, one thousand nine hundred and thirty-one. Each permit shall be for a period of one year, beginning with July first and ending with June thirtieth of the following year. (1931, c. 217, s. 4.)

§ 66-45. Revocation of permit.—If the Commissioner shall have issued any permit to any person, firm, or corporation as herein provided, and shall have information that the holder of the permit is not conducting his business in a business-like way, he shall notify the holder of the permit of a date for a hearing, which notice shall name a time and place for the hearing, and at which hearing any and all evidence as to the conduct of the business may be heard by the Commissioner. If, upon the hearing of the evidence, the Commissioner shall be of the opinion that the applicant is not entitled to the permit, the Commissioner shall cancel said permit, after which time it shall be unlawful for the person, firm or corporation whose permit is canceled to engage in the business covered by the permit. If the permit be canceled upon hearing, either the holder of the permit or the complaining party shall have the right to appeal as hereinbefore provided in case the application is denied, and the record of the hearing before the Commissioner shall be the record in the superior court upon which the judge shall determine whether or not the Commissioner had sufficient evidence upon which to base his action. (1931, c. 217, s. 5.)

Editor's Note.—Though "business-like way," as used in this section, is an exceedingly indefinite standard of conduct, the statute is probably valid, in view of the right of appeal to the courts. 9 N. C. Law Rev. 390.

§ 66-46. **Rules and regulations; schedule of fees.**—The Commissioner shall have the right to make any rules or regulations necessary to enforce the provisions of this article and may approve schedules of fees and methods of collecting the same, or make any other rule or regulation necessary to secure the proper conduct of the business referred to in this article. (1931, c. 217, s. 6.)

§ 66-47. **Violation of article a misdemeanor.**—Any person, firm or corporation who shall engage in the business referred to in this article without first receiving a permit, or who shall fail to secure a renewal of his permit upon the expiration of the license year, or shall engage in the business herein referred to after the permit has been canceled as herein provided, or who shall fail or refuse to furnish the information required of the Commissioner, or who shall fail to observe the rules and regulations made by the Commissioner pursuant to this article, shall, upon conviction, be guilty of a misdemeanor punishable in the discretion of the court. (1931, c. 217, s. 7.)

§ 66-48. **Disposition of fees.**—All fees collected hereunder shall be credited to the account of the Insurance Commissioner for the specific purpose of providing the personnel, equipment and supplies necessary to enforce this article, but the Director of the Budget shall have the right to budget the revenues received in accordance with the requirements of the Commissioner for the purposes herein required, and at the end of the fiscal year, if any sum whatever shall remain to the credit of the Commissioner, derived from the sources herein referred to, the same shall revert to the general treasury of the State to be appropriated as other funds. (1931, c. 217, s. 8.)

§ 66-49. **Attorneys at law and local county agencies excepted.**—Nothing in this article shall be construed to apply to legally licensed attorneys at law engaged in the practice of the profession of law unless, however, such attorneys shall engage in the business herein referred to under a trade name, or as a corporation, nor shall this article apply or be construed to apply to any person, firm or corporation whose business of collecting accounts is limited to the collection of such accounts against debtors having residence in the county of the residence of such person or firm, or the principal office of such corporations so engaged in such business. (1931, c. 217, s. 9.)

ARTICLE 10.

Fair Trade.

§ 66-50. **Title of article.**—This article may be known and cited as the "Fair Trade Act." (1937, c. 350, s. 10.)

Editor's Note.—For a discussion of the act from which this article was codified, see 15 N. C. Law Rev. 367. For constitutionality of article, see note to § 66-52.

§ 66-51. **Definitions.**—The following terms, as used in this article, are hereby defined as follows:

- (a) "Commodity" means any subject of commerce.
- (b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor or publisher.
- (c) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (d) "Retailer" means any person selling a commodity to consumers for use.
- (e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization. "Person" shall not include the State of North Carolina or any of its political subdivisions. (1937, c. 350, s. 1.)

§ 66-52. **Authorized contracts relating to sale or resale of commodities bearing trademark, brand or name.**—No contract relating to the

sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others, shall be deemed in violation of any law of the State of North Carolina by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (1937, c. 350, s. 2.)

Article Is Constitutional. — The Fair Trade Act, permitting the manufacturer or distributor of trademarked goods to establish the minimum retail sale price of such goods by contract with wholesalers and retailers, and providing that sale by retailers not parties to the contracts at prices less than those stipulated in the contracts should be deemed unfair competition, is not void as creating or tending to create monopolies in contravention of Art. I, § 31, of the State Constitution, since the restrictions imposed by the act are limited and apply solely to trademarked goods in their vertical distribution from manufacturer or distributor through the wholesalers and retailers to the consumer, which goods are sold by the retailer in competition with goods of the same general class of other manufacturers or, in the case of patented goods, in competition with comparable products of other manufacturers, and therefore the act does not create or tend to create a monopoly by horizontal agreements between persons in the same business in competition with each other. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308 (1939).

The Fair Trade Act, permitting the establishment of minimum retail prices on trademarked goods by agreement, does not deprive a retailer not a party to a contract with the manufacturer or distributor of any property right in preventing such retailer from selling the trademarked article at a price less than that stipulated by contract, since such retailer acquires title with knowledge and subject to the stipulations relative to the minimum retail price permitted by the law in protecting the property right of the manufacturer or distributor in his trademark and good will, which property right subsists while the goods bear his trademark, even after he has parted with title of the commodity itself. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308 (1939).

The Fair Trade Act is not a special act regulating trade in contravention of Constitution, Art. II, § 29. Nor is it unconstitutional as a delegation of legislative authority. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308 (1939).

§ 66-53. Certain evasions of resale price restrictions prohibited.— For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this article (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale;

or

(c) The sale or offering for sale of such commodity in combination with any other commodity shall be deemed a violation of such resale prices restriction, for which the remedies prescribed by § 66-56 shall be available. (1937, c. 350, s. 3.)

§ 66-54. Contracts with persons other than the owner of the brand, etc., not authorized.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this article, by any person other than the owner of the trademark, brand or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trademark, brand or name. (1937, c. 350, s. 4.)

§ 66-55. Resales not precluded by contract.—No contract containing any of the provisions enumerated in § 66-52 shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and when plain notice of the fact is given to the public: Provided, the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the trademark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(c) When the goods are altered, secondhand, damaged or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(d) By any officer acting under an order of court;

(e) When any commodity is sold to a religious, charitable or educational organization or institution, provided such commodity is for the use of such organization or institution and not for resale. (1937, c. 350, s. 5.)

§ 66-56. Violation of contract declared unfair competition.—Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this article, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (1937, c. 350, s. 6.)

Cross Reference.—See note under § 66-52.

Retailer Deemed to Contract in Contemplation of Article.—The fact that a manufacturer or distributor of trademarked commodities permits the sale of such commodities to a noncontracting retailer does not preclude the manufacturer or distributor from maintaining a suit against such retailer under this article, since the manufacturer or distributor has the option to obtain a contract or rely upon the statute, and since the sale to the noncontracting retailer does not confer upon him the right to violate the statute with reference to which he is deemed to have contracted in making the purchase. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308 (1939).

Permanent Injunction Authorized.—This

section authorizes a suit by a manufacturer or distributor protected by the act against a noncontracting retailer to permanently enjoin such retailer from selling trademarked commodities of the manufacturer or distributor in violation of the act upon allegations of accrued and prospective irreparable damages. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308 (1939).

Reasonable Profit Is No Defense.—The fact that a retailer makes a reasonable profit upon trademarked articles is no defense in a suit against such retailer for selling such articles at a price below that allowed by this article, since the standard of the statute is one of retail price and not of reasonable profit. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308 (1939).

§ 66-57. **Exemptions.**—This article shall not apply to any contract or agreement between or among producers or distributors or, except as provided in subdivision (c) of § 66-52, between or among wholesalers, or between or among retailers, as to sale or resale prices. This article shall not apply to any prices offered in connection with or contracts or purchases made by the State of North Carolina or any of its agencies, or any of the political subdivisions of the said State. (1937, c. 350, s. 7.)

ARTICLE 11.

Government in Business.

§ 66-58. **Sale of merchandise by governmental units.**—It shall be unlawful for any unit or agency of the State government or any individual employee or employees of any such unit or agency in his, or her, or their capacity as employee or employees of said unit or agency to purchase for or sell to any person, firm or corporation any article of merchandise in competition with citizens of the State: Provided, however, that as regards educational institutions, the provisions of this section shall not apply to articles produced incident to the operation of an instructional department, or incident to educational research, or to articles of merchandise incident to classroom work, meals, books and/or other articles of merchandise not exceeding fifteen cents in value when sold to members of the educational staff, or staff auxiliary to education, or sold to duly enrolled students, or to members of charitable institutions, or on occasion to immediate members of the families of members of the educational staff or of duly enrolled students: Provided further, that the provisions of this section shall not apply to the sale of meals, or merchandise aforesaid, to persons attending meetings or conventions at State institutions as invited guests of such institutions, or to the products of experiment stations at any State institution: Provided further, that the provisions of this section shall not apply to the sale of learned journals or books, or to the business operation of endowment funds established for the purpose of producing income for educational purposes: Provided further, that the provisions of this section shall not apply to counties and municipalities, to the State Board of Health, to the Division of Purchase and Contract, to the State Highway and Public Works Commission, to State Hospitals for the Insane, to the State Commission for the Blind, to the North Carolina School for the Blind at Raleigh, to the North Carolina School for the Deaf at Morganton, to Appalachian State Teachers College at Boone, to Western Carolina Teachers College at Cullowhee, or to any State correctional institutions or agencies, or to farm, dairy, livestock, or poultry products of any State institution or agency; provided that nothing in this section shall apply to Highlands School in Macon County; provided further, that this section shall not be construed to apply to any high school or public school: Provided further, that this section shall not apply to child-caring institutions or orphanages receiving State aid.

Any person knowingly or willfully violating the provisions of this section shall be subject to a fine of ten dollars for each such violation. (1939, c. 122.)

ARTICLE 12.

Coupons for Products of Photography.

§ 66-59. **Title of article.**—The title of this article shall be "An Act to Prevent the Perpetration of Certain Fraudulent Practices by Photographers within the State of North Carolina." (1943, c. 25, s. 1.)

§ 66-60. **Definitions.**—The term "photographer" as used herein shall mean any individual, firm, partnership, association, corporation, or other group or combination acting as a unit.

The term "coupon" as used herein shall mean any coupon, certificate, receipt or similar device, by whatever name called.

The term "solicitor" as used herein shall mean any agent, salesman, employee, solicitor, canvasser, or any other person acting for or on behalf of a photographer. (1943, c. 25, s. 2.)

§ 66-61. Coupons redeemable in products of photography prohibited unless bond given.—No photographer or solicitor shall sell or issue any coupon, whether for a consideration or otherwise, purporting to be exchangeable, redeemable, or payable, in whole or in part, for any product of photography, including photographs, coloring, tinting, frames, mounts, folders, copying or the reproduction of photographs, and all other products of photography, unless the principal for which said business is conducted shall first file with the clerk of the superior court in each and every county in which said business is to be conducted a good and sufficient bond in the principal sum of two thousand dollars (\$2,000.00), the condition of such bond being that the principal shall well and truly discharge all contracts, representations and other obligations made by said principal and all contracts, representations and other obligations made by any solicitor of such principal. (1943, c. 25, s. 3.)

§ 66-62. Method of withdrawing bond.—The coupons, as above defined, issued in any county shall be serially numbered, and before any bond, herein required to be filed, can be withdrawn, the principal on said bond shall file a sworn statement with the clerk of the superior court, in a form approved by said clerk, showing the lowest and highest serial number of the coupon, the total number issued, and the total number that has been redeemed. On the unredeemed coupons, the said principal shall show the name and address of the person to whom the said coupon was issued; that each of said persons have been notified, in writing, at the address shown, at least thirty (30) days prior thereto, to redeem said coupons, or otherwise that said coupon would become void on a day certain stated in said notice. (1943, c. 25, s. 4.)

§ 66-63. Remedies for loss sustained through nonperformance of obligation in connection with sale of coupons.—Any person sustaining any loss or damage by reason of any photographer or solicitor failing to fully perform and discharge any contract, representation or other obligation in connection with the sale of any coupon purporting to be exchangeable, redeemable or payable, in whole or in part, for any product of photography, whether such contract, promise or representation be made by the photographer or solicitor, may recover in any court of competent jurisdiction against the principal and his, her or its surety, the sum of twenty-five dollars (\$25.00), in addition to any actual loss or damage sustained, and any amount so recovered shall be a specific lien on the bond filed as herein required. (1943, c. 25, s. 5.)

§ 66-64. Violation a misdemeanor.—Any person violating the provisions of this article, including the make of any false statement in the affidavit required under § 66-62, shall be guilty of a misdemeanor and, upon conviction, be fined or imprisoned, or both, in the discretion of the court. (1943, c. 25, s. 6.)

Editor's Note.—The word "make" in line which this section was codified, was ob-two, which also appears in the act from viously intended to read "making."

ARTICLE 13.

Miscellaneous Provisions.

§ 66-65. Indemnity bonds required of agents, etc., to state maximum liability and period of liability.—Wherever any person, firm, or corporation, engaged in the business of merchandising any articles whatsoever, shall require of its agents, solicitors, salesmen, representatives, consignees, or peddlers, or other persons selling or handling its merchandise, as a condition precedent to selling or handling any of the merchandise of said person, firm, or corporation,

that such agents, solicitors, salesmen, representatives, consignees, or peddlers should furnish and provide a bond or guaranty or indemnity contract guaranteeing the full and faithful accounting of moneys collected from such merchandise. such bond or indemnity contract shall state specifically therein the maximum amount of money or other liability which the principal and the sureties or guarantors thereof undertake thereby to pay in event of default of said bond or indemnity or guaranty contract; and said bond or indemnity or guaranty contract shall also state specifically the period of time during which liability may be incurred on account of any default in said bond or indemnity or guaranty contract.

Any bond or indemnity or guaranty contract which does not comply with the provisions of this section shall be null and void and no action may be maintained against the surety or guarantor to recover any sum due thereon in any court of this State. (1943, c. 604, ss. 1, 2.)

For comment on this section, see 21 N. C. Law Rev. 362.

§ 66-66. Manufacture or sale of anti-freeze solutions compounded with inorganic salts or petroleum distillates prohibited.—The manufacture or sale of anti-freeze solutions which are designated, intended, advertised, or recommended by the manufacturer or seller for use in the cooling systems of motor vehicles or gasoline combustion engines, and which are compounded with calcium chloride, magnesium chloride, sodium chloride, or other inorganic salts or with petroleum distillates is hereby prohibited.

Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1943, c. 625, ss. 1, 2.)

§ 66-67. Disposition by laundries and dry cleaning establishments of certain unclaimed clothing.—If any person shall fail to claim any garment, clothing or other article having a value of not more than seventy-five dollars (\$75.00) delivered for laundering, cleaning or pressing to any laundry or dry cleaning establishment as defined in the General Statutes of North Carolina, § 105-85, or any dry cleaning establishment as defined in General Statutes of North Carolina, § 105-74, for a period of four months after the completion of the laundering or cleaning of such articles, the laundry or dry cleaning establishment shall have the right to dispose of such clothing, garment or article by whatever means it may choose, without liability or responsibility to the owner. Provided, however, that before such laundry or dry cleaning establishment may claim the benefit of this section it shall, at the time of receiving such clothes, garments or articles, have a notice setting forth the provisions of this section prominently displayed in a conspicuous place in the office, branch office or retail outlet where said clothes, garments or articles are received, if the same be received at an office, and in addition shall, at the time of receiving such clothes, garments or other articles, deliver to the owner thereof a ticket or receipt on the back of which shall be set forth the provisions of this section. (1947, c. 975.)

Chapter 67.

Dogs.

Article 1.

Owner's Liability.

Sec.

- 67-1. Liability for injury to livestock or fowls.
- 67-2. Permitting bitch at large.
- 67-3. Sheep-killing dogs to be killed.
- 67-4. Failing to kill mad dog.

Article 2.

License Taxes on Dogs.

- 67-5. Amount of tax.
- 67-6. License tags; optional with county commissioners.
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- 67-14. Mad dogs, dogs killing sheep, etc., may be killed.
- 67-15. Dogs, when listed, personal property; larceny of dog a misdemeanor.

Sec.

- 67-16. Failure to discharge duties imposed under this article.
- 67-17. [Deleted.]
- 67-18. Application of article.

Article 3.

Special License Tax on Dogs.

- 67-19. Nothing in this article abrogated by article 2; special tax an additional tax.
- 67-20. Special dog tax submitted to voters on petition.
- 67-21. Conduct of elections.
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- 67-28. Application of article to counties having dog tax.

Article 4.

"Seeing-Eye" Guide Dogs.

- 67-29. Accompanying blind persons in public conveyances, etc.

ARTICLE 1.

Owner's Liability.

✓ § 67-1. **Liability for injury to livestock or fowls.**—If any dog, not being at the time on the premises of the owner or person having charge thereof, shall kill or injure any livestock or fowls, the owner or person having such dog in charge shall be liable for damages sustained by the injury, killing, or maiming of any livestock, and costs of suit. (1911, c. 3, s. 1; C. S., s. 1669.)

Cross References.—As to dogfighting, see § 14-362. As to admittance of dogs to bedrooms by innkeeper or guest, see § 72-7; but see also § 67-29, relating to "seeing-eye" dogs.

Editor's Note.—As to owner's liability for personal injury by dog, see Perry v. Phipps, 32 N. C. 259 (1849); Harris v. Fisher, 115 N. C. 318, 20 S. E. 461 (1894). As to property in dogs and liability for

wrongfully killing or injuring them, see Dodson v. Mock, 20 N. C. 282 (1838); Mowery v. Salisbury, 82 N. C. 175 (1880); State v. Smith, 156 N. C. 628, 72 S. E. 321 (1911); Beasley v. Byrum, 163 N. C. 3, 79 S. E. 270 (1913). As to right to kill dog attempting to destroy animals used for food, see Parrott v. Hartsfield, 20 N. C. 242 (1838); State v. Smith, 156 N. C. 628, 72 S. E. 321 (1911).

§ 67-2. **Permitting bitch at large.**—If any person owning or having any bitch shall knowingly permit her to run at large during the erotic stage of copulation he shall be guilty of a misdemeanor and fined not exceeding fifty dollars

or imprisoned not exceeding thirty days. (1862-3, c. 41, s. 2; Code, s. 2501; Rev., s. 3303; C. S., s. 1670.)

§ 67-3. Sheep-killing dogs to be killed.—If any person owning or having any dog that kills sheep or other domestic animal, upon satisfactory evidence of the same being made before any justice of the peace of the county, and the owner duly notified thereof, shall refuse to kill it, and shall permit such dog to go at liberty, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days, and the dog may be killed by anyone if found going at large. (1862-3, c. 41, s. 1; 1874-5, c. 108, s. 2; Code, s. 2500; Rev., s. 3304; C. S., s. 1671.)

Cross References.—As to what dogs may be killed, see § 67-14, and see note to § 67-1. As to liability for killing listed dogs, see § 67-27.

Cited in Parrott v. Hartsfield, 20 N. C. 242 (1838); Daniels v. Homer, 139 N. C. 219, 51 S. E. 922 (1905).

§ 67-4. Failing to kill mad dog.—If the owner of any dog shall know, or have good reason to believe, that his dog, or any dog belonging to any person under his control, has been bitten by a mad dog, and shall neglect or refuse immediately to kill the same, he shall forfeit and pay the sum of fifty dollars to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by anyone, in his property or person, by the bite of any such dog, and shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days. (R. C., c. 67; Code, s. 2499; Rev., s. 3305; C. S., s. 1672.)

Cross References.—As to killing mad dogs, see §§ 67-14, 67-27. As to rabies, vaccination, etc., generally, see § 106-364 et seq.

Actual Knowledge Unnecessary.—In an action under this section it is not necessary to prove that the biting dog was in fact mad. The words "good reason to believe" apply both to the condition of the biting dog and to the fact that the dog was bitten by a mad dog. Wallace v. Douglas, 32 N. C. 79 (1849).

Dog Can Be Destroyed.—If owner refuses to destroy a dog, which is mad or is bitten by a mad dog, he subjects himself to the possibility of a fine and imprisonment and the dog can be destroyed by order of the justice issuing the warrant under this section. Beasley v. Byrum, 163 N. C. 3, 79 S. E. 270 (1913).

As to contributory negligence of person bitten by a mad dog, see Holton v. Moore, 165 N. C. 549, 81 S. E. 779 (1914).

ARTICLE 2.

License Taxes on Dogs.

§ 67-5. Amount of tax.—Any person owning or keeping about him any open female dog of the age of six months or older shall pay annually a license or privilege tax of two dollars. Any person owning or keeping any male dog, or female dog other than an open female dog of the age of six months or older, shall pay annually on each dog so owned or kept a license or privilege tax of one dollar. (1919, c. 116, ss. 1, 2; C. S., s. 1673.)

Local Modification.—Cherokee: 1933, c. 90; Clay: 1933, c. 301; Graham: 1931, c. 35; Jackson: 1947, c. 105; Macon: 1933, c. 301; Swain: 1933, c. 149.

Cross Reference.—As to credit of vaccination fee on dog tax, see § 106-372.

Constitutional Exercise of Police Power.—A statute imposing a specified tax upon all persons owning or keeping a dog within

a certain county is for the privilege of keeping the dog therein and comes under the police regulations of the county. It is therefore constitutional and valid and will not be restrained. Newall v. Green, 169 N. C. 462, 86 S. E. 291 (1915); McAlister v. Yancey County, 212 N. C. 208, 193 S. E. 141 (1937).

§ 67-6. License tags; optional with county commissioners.—To every person paying the license or privilege tax prescribed in § 67-5 there shall be issued by the sheriff a metal tag bearing county name, a serial number, and expiration date, which shall be attached by owner to a collar to always be worn

by any dog when not on premises of the owner or when engaged in hunting. The Superintendent of Public Instruction shall at all times keep on hand a supply of tags to be furnished the sheriffs of the several counties. Provided, that the county commissioners of each county shall, by order duly made in regular session, make an order determining whether the collar and tag shall be applied to that county. (1919, c. 116, s. 2½; C. S., s. 1674; Ex. Sess. 1920, c. 37.)

Editor's Note.—Prior to the 1920 amendment the metal tags were kept by the Commissioner of Agriculture.

§ 67-7. Dogs to be listed; penalty for failure to list.—It shall be the duty of every owner or keeper of a dog to list the same for taxes at the same time and place that other personal property is listed, and the various tax listers in the State shall have proper abstracts furnished them for listing dogs for taxation, and any person failing or refusing to list such dog or dogs shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The owner of the home or lessee of such owner shall be responsible for listing of any dog belonging to any member of his family. (1919, c. 116, s. 3; C. S., s. 1675.)

Local Modification.—Mitchell: Pub. Loc. 1925, c. 265. (See § 67-18.)

§ 67-8. When tax is due.—The license or privilege tax herein imposed shall be due and payable on the first day of October of each and every year. (1919, c. 116, s. 3; C. S., s. 1676; 1943, c. 119.)

Editor's Note.—The 1943 amendment eliminated a provision as to penalty for failure to pay tax.

§ 67-9. Receipt for tax a license.—Upon the payment to the sheriff or tax collector of the license or privilege tax aforesaid, such sheriff or tax collector shall give the owner or keeper of such dog or dogs a receipt for the same which shall constitute a license under the provisions of this article. (1919, c. 116, s. 3; C. S., s. 1677.)

§ 67-10. Tax listers to make inquiry, compile reports; compensation.—The tax listers for each township, town, and city in this State shall annually, at the time of listing property as required by law, make diligent inquiry as to the number of dogs owned, harbored, or kept by any person subject to taxation. The list takers shall, on or before the first day of July in each year, make a complete report to the sheriff or tax collector on a blank form furnished them by the proper authority, setting forth the name of every owner of any dog or dogs, how many of each and the sex owned or kept by such person. The county commissioners may pay the tax listers for such services such amounts as may be just out of the money arising under this article. (1919, c. 116, ss. 4, 6; C. S., s. 1678.)

§ 67-11. Purchasers to ascertain listing.—Any person coming in possession of any dog or dogs after listing time shall immediately ascertain whether such dog or dogs have been listed for taxes or not, and if not so listed, it is hereby made the duty of such owner or keeper of such dog or dogs to go to the sheriff or tax collector of his county and list such dog or dogs for taxes, and it is made the duty of the owner or keeper of such dog or dogs to pay the privilege or license tax as is herein provided for in other cases. (1919, c. 116, s. 4; C. S., s. 1679.)

§ 67-12. Permitting dogs to run at large at night; penalty; liability for damage.—No person shall allow his dog over six months old to run at large in the nighttime unaccompanied by the owner or by some member of the owner's

family, or some other person by the owner's permission. Any person intentionally, knowingly, and willfully violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, and shall also be liable in damages to any person injured or suffering loss to his property or chattels. (1919, c. 116, s. 5; C. S., s. 1680.)

Local Modification.—Buncombe, Halifax, New Hanover, Wake: 1925, c. 314; Watauga: Pub. Loc. 1927, c. 503. (See § 67-18.)

Cross Reference.—As to permitting dogs to run at large on Capitol Square, see § 14-396.

Valid Exercise of Police Power.—A city ordinance which prohibits the owner from allowing dogs to run at large without muzzles is a valid exercise of the police power. *State v. Clifton*, 152 N. C. 800, 67 S. E. 751 (1910).

§ 67-13. Proceeds of tax to school fund; proviso, payment of damages; reimbursement by owner.—The money arising under the provisions of this article shall be applied to the school funds of the county in which said tax is collected: Provided, it shall be the duty of the county commissioners, upon complaint made to them of injury to person or injury to or destruction of property by any dog, upon satisfactory proof of such injury or destruction, to appoint three freeholders to ascertain the amount of damages done, including necessary treatment, if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damage as aforesaid, the said county commissioners shall order the same paid out of any moneys arising from the tax on dogs as provided for in this article. And in cases where the owner of such dog or dogs is known or can be ascertained, he shall reimburse the county to the amount paid out for such injury or destruction. To enforce collection of this amount the county commissioners are hereby authorized and empowered to sue for the same. Provided, further, that all that portion of this section after the word "collected," in line three, shall not apply to Alamance, Anson, Beaufort, Bladen, Caldwell, Chatham, Cleveland, Columbus, Currituck, Davie, Duplin, Durham, Gaston, Gates, Graham, Harnett, Hertford, Lincoln, McDowell, Moore, Nash, New Hanover, Perquimans, Robeson, Rowan, Rutherford, Scotland, Stokes, Transylvania, Union, Wayne and Yadkin counties. (1919, c. 77, s. 7; c. 116, s. 7; C. S., s. 1681; Pub. Loc. 1925, c. 54; Pub. Loc. 1927, cc. 18, 219, 504; 1929, cc. 31, 79; 1933, cc. 28, 387, 477, 526; 1935, c. 402; 1937, cc. 63, 75, 118, 282, 370; 1939, cc. 101, 153; 1941, cc. 8, 46, 132, 287; 1943, cc. 211, 371, 372; 1945, cc. 75, 107, 136, 465; 1947, c. 853, s. 1.)

Local Modification. — Avery, Forsyth, McDowell, Orange, Randolph, Watauga: 1931, c. 283; Avery, Mitchell: 1933, c. 273; Bertie: 1943, c. 189; Buncombe: 1937, c. 119; Burke: 1945, c. 245; Cabarrus: 1939, c. 225; Caldwell: 1937, c. 23; Caswell: 1935, c. 188; 1941, c. 19; Chowan: 1925, c. 15; 1949, c. 219; Cumberland: 1935, c. 361; Dare: 1939, c. 155; Davidson: 1925, c. 79; Duplin: 1937, c. 47; Greene: 1937, c. 92; Guilford, Forsyth: 1933, c. 547; Guilford: 1945, c. 138; Jones: 1939, c. 151; Lee: 1949, c. 349; Madison: 1935, c. 412; Mitchell: 1937, c. 73; Mecklenburg, Stanly: 1935, c. 30; Onslow: 1933, c. 200; 1939, c. 85; 1949, c. 137; Pender: 1937, c. 76; Pitt: 1933, c. 561; Rockingham: 1925, c. 25; Sampson: 1949, c. 349; Surry: 1933, c. 310; Tyrrell: 1949, c. 219; Union: Pub. Loc. 1927, c. 501; Vance: Pub. Loc. 1925, c. 103; Wake: 1945, c. 561; Warren: 1943, c. 545; 1947, c. 443;

Wayne: 1939, c. 39; Wilson: 1931, c. 37; Yancey: Pub. Loc. 1925, c. 57, s. 2.

Session Laws 1947, c. 853, s. 2 repealed Public Laws 1935, c. 50 relating to Alamance County.

Cross Reference.—As to prohibiting use of dog taxes for other than school purposes, see § 115-382.

Editor's Note.—The 1945 amendments inserted "Nash," "Robeson," "Gaston" and "Cleveland," respectively, in the list of counties in the proviso. And the 1947 amendment inserted "Alamance."

This section is a police regulation not estopping the defendant in the county's action from establishing any defense available to him under the pleadings, nor does it change the method of procedure as to the burden of proof, or otherwise, except that it limits recovery of the injured person, electing to proceed under this statute,

to a sum not exceeding the amount thereunder ascertained. *Board v. George*, 182 N. C. 414, 109 S. E. 77 (1921).

This section is constitutional, and does not deprive the defendant of a jury trial. *Board v. George*, 182 N. C. 414, 109 S. E. 77 (1921).

Mandamus Will Lie.—Where a person having a legal right to recover under this section, makes satisfactory proof to the county commissioners of injury inflicted by a dog, it is the legal duty of the commissioners to appoint freeholders to ascertain the amount of damage done, and mandamus will lie to compel them to perform this duty. *White v. Holding*, 217 N. C. 329, 7 S. E. (2d) 825 (1940).

Testimony of Nonexpert Witness.—Admission of judgment of a nonexpert witness upon the personal observation of the carcass of the sheep, as to the length of time it had been killed, is not erroneous as the expression of a theoretical or scientific opinion. *Board v. George*, 182 N. C. 414, 109 S. E. 77 (1921).

Right to Trial by Jury.—The ascertainment of damages by three disinterested

freeholders, and the payment thereof by county commissioners from the dog taxes, with the right of the county to sue to recover the amount so paid from the owner of the dog if known or discovered, as provided by this section, reserves to such owner the right to a trial by jury in the action of the commissioners, and does not permit recovery in excess of the sum awarded for the damages caused as ascertained under the provisions of the statute. *Board v. George*, 182 N. C. 414, 109 S. E. 77 (1921).

Cost of Assessment.—In an action by the county, under this section, the reasonable cost of the services of the persons chosen to make the assessment, which is paid by the county, is a part of the money paid on account of the injury or destruction caused by the dog, and defendant's exception thereto will not be sustained. Semble, the question of the reasonableness of this amount is a question for the jury, when aptly and properly raised and presented. *Board v. George*, 182 N. C. 414, 109 S. E. 77 (1921).

§ 67-14. Mad dogs, dogs killing sheep, etc., may be killed.—Any person may kill any mad dog, and also any dog if he is killing sheep, cattle, hogs, goats, or poultry. (1919, c. 116, s. 8; C. S., s. 1682.)

Cross References.—As to liability of owner who fails to kill sheep-killing dog, see § 67-3. As to liability of owner who

fails to kill mad dog, see § 67-4. As to protection of listed dogs, see § 67-27.

§ 67-15. Dogs, when listed, personal property; larceny of dog a misdemeanor.—All dogs, when listed for taxes, become personal property and shall be governed by the laws governing other personal property: Provided, the larceny of any dog upon which aforesaid tax has been paid shall be a misdemeanor. (1919, c. 116, s. 9; C. S., s. 1683.)

Cross Reference.—As to larceny of listed dog, see §§ 14-84, 67-27.

Not Larceny.—In the absence of a stat-

ute, stealing a dog is not larceny in this State. *State v. Holder*, 81 N. C. 527 (1879).

§ 67-16. Failure to discharge duties imposed under this article.—Any person failing to discharge any duty imposed upon him under this article shall be guilty of a misdemeanor, and upon conviction shall pay a fine not exceeding fifty dollars or be imprisoned not more than thirty days. (1919, c. 116, s. 10; C. S., s. 1684.)

§ 67-17: Deleted.

Editor's Note.—This section has been deleted as it appeared to be local legislation of the type contemplated by § 67-18 and repealed by that section. It was held

to have been so repealed in *McAlister v. Yancey County*, 210 N. C. 208, 193 S. E. 141 (1936).

§ 67-18. Application of article.—This article, §§ 67-5 to 67-18, inclusive, is hereby made applicable to every county in the State of North Carolina, notwithstanding any provisions in local, special or private acts exempting any county or any township or municipality from the provisions of the same enacted at any General Assembly commencing at the General Assembly of nineteen

hundred and nineteen and going through the General Assembly of nineteen hundred and twenty-nine. (1929, c. 318.)

Applied in *McAlister v. Yancey County*,
212 N. C. 208, 193 S. E. 141 (1937).

ARTICLE 3.

Special License Tax on Dogs.

§ 67-19. Nothing in this article abrogated by article 2; special tax an additional tax.—Nothing contained in article 2 of this chapter shall have the effect of abrogating any of the provisions of this article, and the special license tax on dogs provided for under this article shall be in addition to the license tax on dogs provided for under article 2 of this chapter: Provided that article 2 shall not be construed as repealing any existing ordinance of any city or town or any ordinance of any city or town hereafter enacted, regulating the keeping or use of dogs in cities and towns. (1919, c. 116, s. 11; C. S., s. 1685; Ex. Sess. 1920, c. 53.)

Editor's Note.—The 1920 amendment added the proviso.

§ 67-20. Special dog tax submitted to voters on petition.—Upon the written application of one-third of the qualified voters of any county in this State made to the board of commissioners of such county, asking that an election be held in said county to adopt the provisions of this article for levying and collecting a special dog tax in said county, it shall be the duty of said board of commissioners from time to time to submit the question of "special dog tax" or "no special dog tax" to the qualified voters of said county; and if at any such election a majority of the votes cast shall be in favor of said special dog tax, then the provisions of this article shall be in full force and effect over the whole of said county, and the special dog tax hereinafter provided for shall be levied and collected in said county; but if a majority of the votes cast at such election shall be against said special dog tax, then the provisions of this article shall not apply to any part of said county. (1917, c. 206, s. 1; C. S., s. 1686.)

§ 67-21. Conduct of elections.—Every election held under the provisions of this article shall be held and conducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the General Assembly: Provided, that no such election shall be held in any county oftener than once in two years. (1917, c. 206, s. 3; C. S., s. 1687.)

§ 67-22. Commissioners to provide for registration; ballots and machinery.—The board of commissioners of any county in this State in which an election is to be held under the provisions of this article may provide for a new registration of voters in said county if they deem necessary, or they may provide for the use of the registration of voters in effect at the general election for county officers in said county next preceding the holding of the election hereunder, and they shall appoint such officers as may be necessary to properly hold such election and shall designate the time and places for holding such elections, and make all rules, regulations, and do all other things necessary to carry into effect the provisions of this article. (1917, c. 206, s. 4; C. S., s. 1688.)

§ 67-23. Canvass of votes and returns.—At the close of said election the officers holding same shall canvass the vote and certify the returns to the said board of commissioners of said county, and the said board of commissioners shall canvass the said returns and declare the results of said election in the manner now provided by law for holding special tax school elections. (1917, c. 206, s. 4; C. S., s. 1689.)

§ 67-24. Contents and record of petition; notice of election.—The qualified voters of any county who shall make written application to the board of commissioners of said county asking that an election be held under the provisions of this article shall designate and insert in said application the amount of special dog tax to be levied and collected in said county, which tax shall not exceed the sum of five dollars nor be less than the sum of one dollar for each dog, whether male or female, and the board of commissioners shall have said written application, specifying the amount of said special dog tax to be voted for in said county, recorded in the records of their proceedings, and shall cause to be published in some newspaper published or circulated in said county, and posted at the courthouse door and five other public places in said county, a notice of the time and places for holding said election and specifying the amount of tax to be voted for in said county. (1917, c. 206, s. 5; C. S., s. 1690.)

§ 67-25. License tax.—Any person or persons, firm or corporation, owning or keeping any dog or dogs, whether male or female, in any county which shall adopt the provisions of this article for the levy and collection of said special dog tax shall pay annually a license or privilege tax on each dog, whether male or female, such sum or sums as may be designated and inserted in the written application of the qualified voters of said county asking for said election and as recorded in the proceedings of the board of county commissioners of said county, which shall not exceed the sum of five dollars nor be less than the sum of one dollar for each dog: Provided, the tax voted for and levied on female dogs may be greater than the tax on male dogs, but in no event shall said special tax exceed the sum of five dollars, nor be less than the sum of one dollar for any dog, whether male or female. (1917, c. 206, s. 6; C. S., s. 1691.)

Local Tax Valid.—The legislature may levied under this authority is constitutional empower the authorities of a town to and valid. *Mowery v. Salisbury*, 82 N. C. regulate the manner in which dogs may 175 (1880). be kept in the said town. Hence, a tax

§ 67-26. Collection and application of tax.—The special dog tax voted for under the provisions of this article shall be due and collectible at the same time and in the same manner as provided by law for the collection of taxes on other personal property in said county, and shall be collected by the collector of other taxes in said county in the same manner and under the same penalties provided by law for collection of taxes on other personal property in said county, and shall be applied to the road fund, or school fund, of said county, as may be directed by the board of commissioners of said county. (1917, c. 206, s. 8; C. S., s. 1692.)

Cross Reference.—As to application of proceeds of general dog tax, see § 67-13.

§ 67-27. Listed dogs protected; exceptions.—Any person who shall steal any dog which has been listed for taxation as herein provided shall be guilty of a misdemeanor and fined or imprisoned, in the discretion of the court; and any person who shall kill any dog the property of another, after the same has been listed as herein provided, shall be liable to the owner in damages for the value of such dog. Nothing in this article shall prevent the killing of a mad dog, sheep-killing dog, or egg-sucking dog on sight, when off the premises of its owner, and the owner shall not recover any damages for the loss of such dog. (1917, c. 206, s. 9; C. S., s. 1693.)

Cross References.—As to listed dogs as personal property, see § 67-15. As to larceny of taxed dogs, see § 14-84.

§ 67-28. Application of article to counties having dog tax.—Any county in this State which now has a local law taxing dogs may, by election in

the manner herein provided for, accept the provisions of this article, and if adopted by a majority of the qualified voters of said county at such election, the local law taxing dogs in such county shall thereby be repealed and annulled, and the provisions of this article shall be in full force and effect in such county. (1917, c. 206, s. 10; C. S., s. 1694.)

ARTICLE 4.

"Seeing-Eye" Guide Dogs.

§ 67-29. **Accompanying blind persons in public conveyances, etc.**
—Any blind person accompanied by a dog described as a "seeing-eye dog," or any dog educated by a recognized training agency or school, which is used as a leader or guide, is entitled with his dog to the full and equal accommodations, advantages, facilities and privileges of all public conveyances, and all places of public accommodation, subject only to the conditions and limitations applicable to all persons not so accompanied. (1943, c. 111.)

Chapter 68.

Fences and Stock Law.

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ARTICLE 1.

Lawful Fences.

§ 68-1. **Fences to be five feet high.**—Every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high, unless otherwise provided in this chapter, unless there shall be some navigable stream or deep watercourse that shall be sufficient, instead of such fence, and unless his lands shall be situated within the limits of a county, township or district wherein the stock law may be in force. (1777, c. 121, s. 2; 1791, c. 354, s. 1; R. C., c. 48, s. 1; Code, s. 2799; Rev., s. 1660; C. S., s. 1827.)

Local Modification.—Bertie, Buncombe, Carteret, Hyde, Madison, McDowell, New Hanover, Northampton, Pamlico: C. S. § 1829.

Cross Reference.—As to fence four and

one-half feet high being lawful in certain counties, see § 68-2.

Requirements Mandatory.—Proof that plaintiff's fence is a "good ordinary one" such as the neighbors have, does not dis-

pense with the obligation imposed by this section. *Runyan v. Patterson*, 87 N. C. 343 (1882).

Effect of Failure to Comply with Section.—If the statutory requirement is not complied with one cannot recover damages caused by animals of another, although the animal may be vicious and the fences are “good ordinary ones” such as the plaintiff’s neighbors have. *Runyan v. Patterson*, 87 N. C. 343 (1882).

A pasture field is not “ground under

cultivation,” within the meaning of this section, irrespective of whether it is woods pasture or cleared pasture. *State v. Perry*, 64 N. C. 305 (1870).

The word “planter” as used in this section does not include hirelings, laborers or employees who have no discretion as to the plans for fencing. *State v. Taylor*, 69 N. C. 543 (1873).

Cited in *State v. Anderson*, 123 N. C. 705, 31 S. E. 219 (1898).

§ 68-2. Local: Four and a half feet in certain counties.—A fence four and one-half feet high is a lawful fence in the counties of Alleghany, Bladen, Brunswick, Burke, Caldwell, Cherokee, Craven, Cumberland, Currituck, Davidson, Davie, Duplin, Harnett, Henderson, Jackson, Lenoir, Perquimans, Randolph, Richmond, Robeson, Rutherford, Sampson, Tyrrell, Wake, Washington, Wilkes and Yancey. This section does not apply to stock-law fences. (1889, c. 175; 1891, c. 36; 1905, c. 333; Rev., s. 1661; 1909, cc. 55, 94; P. L. 1911, c. 15; C. S., s. 1828.)

Local Modification.—Tyrrell: C. S. § 1828.

Cited in *McCoy v. Tillman*, 224 N. C. 201, 29 S. E. (2d) 683 (1944).

§ 68-3. Watercourse made lawful fence by county commissioners.—Any five electors, residents of the same county, may apply to the board of commissioners of the county, at any regular meeting of the same, by written petition praying that any watercourse, or any part of any watercourse, in the county, may be made a lawful fence. Notice of such petition shall be posted forty days at the courthouse door, by the clerk of the board, before such petition shall be acted upon. Upon the hearing of such petition, the board of county commissioners is authorized to declare any watercourse, or any part of any watercourse to which the petition applies, a lawful fence. And the several acts of the General Assembly, declaring certain watercourses, in part or in whole, lawful fences, are so far repealed as to enable the board of commissioners of any county to declare any of such acts, or parts thereof, to be null and void in said county. Any order made under this section shall be of record and signed by the chairman, and may be rescinded by the board of commissioners at any regular meeting. (1872-3, c. 98; Code, ss. 2808, 2809, 2810; Rev., s. 1663; C. S., s. 1830.)

§ 68-4. Injury to wire fence forbidden.—If any person shall willfully destroy, cut or injure any part of a wire fence or a fence composed partly of wire and partly of wood situated on the land of another, he shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not exceeding thirty days or fined not exceeding fifty dollars. (1889, c. 516; Rev., s. 3413; C. S., s. 1831.)

Purpose of Section.—This section is not in conflict with § 14-144, as that section was meant to protect the inclosure while this one was meant to protect the fences

irrespective of whether or not they inclosed any field. *State v. Biggers*, 108 N. C. 760, 12 S. E. 1024 (1891).

§ 68-5. Local: Building unguarded barbed-wire fences along public highways.—If any person shall erect or maintain a barbed-wire fence along any public road or highway, and within ten yards thereof, without putting a railing, smooth wire, board or plank on the top of such fence not less than three inches in width, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. This section shall apply to the counties of Brunswick, Catawba, Cumberland, Durham, Forsyth, Greene, Iredell, Macon, Mitchell, Richmond, Rowan, Rutherford, Stanly, Stokes, Swain, Wilkes and Yadkin: Provided, that in Rutherford County only a railing or plank shall

be used at the top of such fence. (1895, c. 65; 1899, cc. 43, 225; 1905, c. 220; Rev., s. 3769; 1909, cc. 318, 604, 629, 810; C. S., s. 4422.)

ARTICLE 2.

Division Fences.

§ 68-6. Division fences maintainable jointly.—Where two or more persons have lands adjoining, which are either cultivated or used as a pasture for stock, the respective owners of each piece of land shall make and maintain one-half of the fence upon the dividing line. (1868-9, c. 275, s. 1; Code, s. 2800; Rev., s. 1664; C. S., s. 1832.)

Quoted in *McCoy v. Tillman*, 224 N. C. 201, 29 S. E. (2d) 683 (1944).

§ 68-7. Remedy against delinquent owner.—If any person who is liable to build or keep up a part of any division fence fails at any time to do so, the owner of the adjoining land, after notice, may build or repair the whole, and recover of the delinquent one-half of the cost before any court having jurisdiction. (1868-9, c. 275, s. 7; Code, s. 2807; Rev., s. 1670; C. S., s. 1833.)

Only Civil Liability.—A violation of this section does not subject the wrongdoer to indictment. His liability is civil only. *State v. Watson*, 86 N. C. 626 (1882).

Quoted in *McCoy v. Tillman*, 224 N. C. 201, 29 S. E. (2d) 683 (1944).

§ 68-8. Fence erected because of changed use of land.—If the owner of a tract of land, who chooses neither to cultivate it, to use it as a pasture, nor to permit his stock to run on it, afterwards uses it in either of these ways and does not so enclose his stock that they cannot enter on the lands of an adjoining owner, he shall refund to such owner one-half the value of any fence erected by the latter on the dividing line. (1868-9, c. 275, s. 2; Code, s. 2801; Rev., s. 1665; C. S., s. 1834.)

§ 68-9. When owner may remove his part of division fence.—If any owner of land liable to contribute for the keeping up of a division fence determines neither to cultivate his land nor permit his stock to run thereon, he may give the adjoining owner three months' notice of his determination; and in that case, at any time after the expiration of such notice and between the first day of January and the first day of March, but at no other time, he may remove the half of the fence kept up by himself, and shall be no longer liable to keep up the same. (1868-9, c. 275, s. 8; 1883, c. 111; Code, s. 2802; 1903, c. 20; Rev., s. 1671; C. S., s. 1835.)

Only Civil Liability.—A violation of this section will not subject one to indictment. *State v. Watson*, 86 N. C. 626 (1882).

In counties where the "stock law" is ap-

plicable, this section will not be applied and a division fence may be dispensed with at any time without notice. *State v. Edmonds*, 121 N. C. 679, 28 S. E. 545 (1897).

§ 68-10. Proceeding to value division fence.—The value of such fence shall be ascertained as follows: Either owner may summon the other to appear before any justice of the peace of the township in which the dividing line is situate; or if it be situate in more than one township, then before any justice of the peace of any township in which any part of it is situate. In his summons he shall name a certain day, not less than five days after the summons, for the appearance of the defendant; he shall also state the purpose of the summons to be the adjustment of all matters in controversy respecting the dividing fence between the parties. The justice shall hear the complaint and defense. If the facts be found such as entitle either party to demand contribution of the other, the justice shall call on the complainant to name an indifferent person, qualified to act as a juror of the township, and if the complainant refuses the justice shall name one for

him. The justice shall then call on the defendant to name an indifferent person, qualified to act as a juror of the township, and if the defendant refuses the justice shall name one for him. The justice shall then name a third indifferent person. These three persons, or any two of them, shall view the premises and decide all matters in controversy between the parties, relating to a fence on the dividing line. They shall make a written report to the justice, who shall give judgment thereon, and for the costs, which shall be paid by the owners of the several pieces of land equally. The jurors shall each receive one dollar per day. The fees of the justice and constable shall be as in other cases. Either party may appeal as provided in other cases of justices' judgments. (1868-9, c. 275, s. 3; Code, s. 2803; Rev., s. 1666; C. S., s. 1836.)

§ 68-11. Contents of jurors' report.—The report of the jurors shall also state the kind of fence which ought to be kept up, and assign to each owner, in such manner as that it may be identified, the part which he shall keep up. (1868-9, c. 275, s. 4; Code, s. 2804; Rev., s. 1667; C. S., s. 1837.)

§ 68-12. Register to record report.—The justice shall return the report, together with a transcript of the proceedings, to the register of deeds of his county for registration. The justice shall collect from the parties the fees of the register, and pay the same to him. (1868-9, c. 275, s. 5; Code, s. 2805; Rev., s. 1668; C. S., s. 1838.)

§ 68-13. Final judgment on report; effect.—The final judgment upon the report of the jurors shall be binding on the owners of the respective lands and their assigns, so long as such ownership shall continue, or until the same shall be set aside, modified or reversed. (1868-9, c. 275, s. 6; Code, s. 2806; Rev., s. 1669; C. S., s. 1839.)

§ 68-14. Removal of common fence misdemeanor.—If any person owning, occupying, cultivating or being in possession of any lands under a common fence protecting the lands, crops or property of others, shall remove such fence or any part thereof during the time in which any crops are growing or being actually cultivated thereon, or property is protected by such fence, and before such crops are harvested, without the consent and permission of such person or persons whose crop or property is protected by such common fence, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that the provisions of this section shall not apply when ninety days' notice of such removal shall have been given to all persons owning, cultivating or in possession of lands surrounded by such common fence, or having property protected thereby, and when thereafter such fence shall be removed between the first day of January and the first day of March following such notice of intended removal. (Code, s. 2820; 1903, c. 20; Rev., s. 3412; C. S., s. 1840.)

Editor's Note.—When a fence is altogether on the land of a person, although used as a common fence, he has the right to move it and he is not subject to criminal prosecution, but a civil right might arise under § 68-9. *State v. Watson*, 86 N. C. 626 (1882). Neither will an indictment lie for removing a fence when a party removing

the fence has possession of the land on both sides of the fence although title may be in the prosecutor, and the defendant is only a tenant by curtesy. *State v. Williams*, 44 N. C. 197 (1853).

Cited in *State v. Dunn*, 95 N. C. 697 (1886).

ARTICLE 3.

Stock Law.

§ 68-15. Term "stock" defined.—The word "stock" in this chapter shall

be construed to mean horses, mules, colts, cows, calves, sheep, goats, jennets, and all neat cattle, swine and geese. (Code, s. 2822; Rev., s. 1681; C. S., s. 1841.)

Local Modification.—Currituck: 1937, c. 389; Dare: 1935, c. 263; 1937, c. 213; Onslow: 1933, c. 151; 1937, c. 356; Robeson: 1917, c. 662.

A dog is not "stock" within the meaning of the section, but nevertheless subject to larceny. *Meekins v. Simpson*, 176 N. C. 130, 96 S. E. 894 (1918).

§ 68-16. **County elections.**—Upon the written application of one-fifth of the qualified voters of any county made to the board of commissioners thereof, it shall be the duty of the commissioners from time to time to submit the question of "stock law" or "no stock law" to the qualified voters of said county. And if at any such election a majority of the votes cast is in favor of "stock law," then the provisions of this chapter relating to the stock law shall be in force over the whole of said county. (Code, s. 2812; Rev., s. 1672; C. S., s. 1842.)

Cross Reference.—As to "majority of qualified voters," see N. C. Const., Art. VII, § 7.

In a county where only a part of the townships have stock laws, an election covering the whole county is held valid, and it does not interfere with the principles of local self-government. *Smalley v. Board*, 122 N. C. 607, 29 S. E. 904 (1898);

Perry v. Board, 130 N. C. 558, 41 S. E. 787 (1902).

Mandamus to Compel Election.—When a petition duly signed by the required number of voters is filed with the commissioners, and they refuse to call an election, mandamus may be brought to compel them to grant the petition. *Perry v. Board*, 130 N. C. 558, 41 S. E. 787 (1902).

§ 68-17. **Township elections.**—Upon the written application of one-fifth of the qualified voters in any township, made to the board of commissioners of the county wherein the township is situated, it shall be the duty of the commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of the township; and if at any such township election a majority of the votes cast is in favor of "stock law," then the stock law shall be in force in said township. (Code, s. 2813; Rev., s. 1673; C. S., s. 1843.)

Voting in County Election.—The fact that a township has "stock laws" does not bar the voters in that township from vot-

ing in a county election. *Smalley v. Board*, 122 N. C. 607, 29 S. E. 904 (1898).

§ 68-18. **District elections.**—Upon the written application of one-fifth of the qualified voters of any district or territory, whether the boundaries of said district follow township lines or not, made to the board of county commissioners at any time, and setting forth well-defined boundaries of the district, it shall be the duty of the commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of the district, and if at any such election a majority of the votes cast is in favor of "stock law," then the stock law shall be in force over the whole of said district. (Code, s. 2814; Rev., s. 1674; C. S., s. 1844.)

"Well-Defined Boundaries."—The words "well-defined boundaries" are not too indefinite to admit of proof to locate the boundaries where the beginning is "at a certain tract of land," and the difficulty as to the uncertainty of the point of beginning is removed where there is a call for the boundaries of lands of successive proprietors, thence to a certain point. *Newsom v. Earnheart*, 86 N. C. 391 (1882).

Right to Unite Districts.—The commissioners have no power when several districts adjoin each other to unite them into one territory, provide for the construction of one boundary fence, and assess a uniform tax on all the real property in the several districts so united to meet the expense of the fence. *Bradshaw v. Board*, 92 N. C. 278 (1885).

§ 68-19. **Local: How territory released from stock law.**—Upon the written application of a majority of the qualified voters in any district, territory or well-defined boundary, made to the board of county commissioners, at any

time, setting forth that the citizens of said district, territory or boundary are within the stock-law boundary, and are desirous of being released from the laws governing stock-law territory, it shall be the duty of the commissioners to submit the question of "no stock law" or "stock law" to the qualified voters of said district or territory, and if at any such election a majority of the votes cast is against stock law, then the said district or territory shall be released and free from the operation of the stock law: Provided, the expense incurred in changing the fence in such boundary, district or territory so released be paid by the property holders in such boundary, district or territory, and that the commissioners of the county levy the tax to pay the same on the property holders of such boundary, district or territory so released, but they shall not be further liable for keeping up said stock-law fence: Provided, that in any territory where stock law now prevails no election against stock law shall be held in less than two years from the date of the election adopting stock law in said territory: Provided further, that if "no stock law" should carry, it shall not take effect until six months from the date of its ratification: Provided still further, that neither "stock law" nor "no stock law" shall take effect during crop season.

This section applies only to the counties of Cherokee, Clay, Graham, Jackson, Macon, Mitchell, Pender, Randolph, Swain, and to Hogback Township in Transylvania County. (1895, c. 35; 1897, cc. 461, 516; 1903, c. 60; Rev., s. 1675; 1907, c. 874, s. 3; P. L. 1911, cc. 265, 469; P. L. 1915, c. 379; P. L. 1917, c. 662; C. S., s. 1845.)

Local Modification.—Currituck: 1937, c. 389; Dare: 1935, c. 263; 1937, c. 213; Jackson, as to Cashiers Township: 1949, c. 752, s. 3.

When a "no stock law" is duly passed, before the stock can be turned out to run at large the district or county passing such law must be inclosed so that the stock will not range out of "no stock law" territory and on the crops of others not in the "no stock law" territory. *Marsburn v. Jones*, 176 N. C. 516, 97 S. E. 422 (1918).

This section provides that the expense incurred in building such a fence shall be paid by a tax on the property holders of the district or county. This certainly does not authorize a tax solely upon the real estate in the county or district. *Hawes v. Commissioners*, 175 N. C. 268, 95 S. E. 482 (1918). Therefore, to raise this fund an election must be held and authority granted by the majority of the voters. *Marsburn v. Jones*, 176 N. C. 516, 97 S. E. 422 (1918).

§ 68-20. How election conducted.—Every election under this chapter shall be held and conducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the General Assembly: Provided, no such county, township or district election shall be held oftener than once in any one year, although the boundaries of such district may not be the same. (Code, s. 2815; Rev., s. 1676; C. S., s. 1846.)

§ 68-21. Powers and duties of county commissioners.—The board of commissioners of the county may provide for a new registration of voters, designate places for holding elections, and make all regulations, and do all other things necessary to carry into effect the provisions of this chapter relating to the stock law. (Code, s. 2826; Rev., s. 1677; C. S., s. 1847.)

Building and Repairing Fences.—County commissioners are not required by the stock law to personally superintend the fence around the no fence territory; they discharge their duty under the statute when they levy the necessary taxes, appoint the committees, etc., to keep the fence in repair. *State v. Commissioners*, 97 N. C. 388, 1 S. E. 641 (1887).

But an owner of stock, however, who resides outside of such territory, is not liable to have his stock impounded within such territory, unless the county commissioners have kept the fence in good repair. In such case the presumption is that the fence is in good order, and the burden of showing the contrary on the party alleging it. *Coor v. Rogers*, 97 N. C. 143, 1 S. E. 613 (1887).

§ 68-22. Admission of lands adjoining stock-law territory.—Any person, or any number of persons, owning land in a county, district or township

which shall not adopt the stock law, or adjoining any county, township or district where a stock law prevails, may have his or their lands enclosed within any fence built in pursuance of this chapter. All such adjacent lands, when so enclosed, shall be subject to all the provisions of law with respect to livestock running at large within the original district so enclosed, as if it were a part of the township, county or district with which it is hereby authorized to be enclosed. Any number of landowners, whose lands are contiguous, may at any time build a common fence around all their lands, with gates across all public highways; and no livestock shall run at large within any such enclosure, under the pains and penalties prescribed in this chapter. (Code, s. 2821; Rev., s. 1678; C. S., s. 1848.)

Cited in *Edwards v. Supervisors*, 127 N. C. 62, 37 S. E. 73 (1900).

§ 68-23. Allowing stock at large in stock-law territory forbidden.—If any person shall allow his livestock to run at large within the limits of any county, township or district in which a stock law prevails or shall prevail pursuant to law, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Code, s. 2811; 1889, c. 504; Rev., s. 3319; C. S., s. 1849.)

Editor's Note.—For act declaring Nash County to be stock-law territory, see Session Laws 1943, c. 451.

Duty to Restrain Stock.—This section imposes upon all persons the statutory duty of restraining their stock from running at large. *McCoy v. Tillman*, 224 N. C. 201, 29 S. E. (2d) 683 (1944).

This section implies knowledge, consent or willingness on the part of the owner that the animals be at large, or negligence

equivalent thereto, and the mere fact that animals are at large does not raise the presumption that the owner permits them to run at large, nor does the doctrine of res ipsa loquitur apply upon the establishment of the facts that animals are found at large. *Gardner v. Black*, 217 N. C. 573, 9 S. E. (2d) 10 (1940).

Cited in *State v. Brigman*, 94 N. C. 888 (1886).

§ 68-24. Impounding stock at large in territory.—Any person may take up any livestock running at large within any township or district wherein the stock law shall be in force and impound the same; and such impounder may demand fifty cents for each animal so taken up, and twenty-five cents for each animal for every day such stock is kept impounded, and may retain the same, with the right to use it under proper care, until all legal charges for impounding said stock and for damages caused by the same are paid, the damages to be ascertained by two disinterested freeholders, to be selected by the owner and the impounder, the freeholders to select an umpire, if they cannot agree, and their decision to be final. (Code, s. 2816; Rev., s. 1679; C. S., s. 1850.)

Local Modification.—Camden, Currituck, Gates, Pasquotank, Perquimans: Pub. Loc. 1927, c. 327.

Cross Reference.—As to larceny of stock and malicious injury thereto, see § 14-85.

Constitutionality.—This and the following sections are constitutional. *Hogan v. Brown*, 125 N. C. 251, 34 S. E. 411 (1899). And resident owners may be required to pay a higher penalty than nonresident owners. *Broadfoot v. Fayetteville*, 121 N. C. 418, 28 S. E. 515 (1897).

Not Applicable to Stock under Control.—This section does not authorize the taking up and impounding of livestock unless running at large, and does not apply to

cows securely tied to trees under the immediate control of the owner with the permission of the lessee of the land, and it is forcible trespass to take them away over the protest of the owner, to prevent which the owner may use all necessary force, unless the taking is by appropriate legal proceedings. *Kirkpatrick v. Crutchfield*, 178 N. C. 348, 100 S. E. 602 (1919). See *State v. Hunter*, 118 N. C. 1196, 24 S. E. 708 (1896).

When and by Whom Stock May Be Impounded.—All persons are under the statutory duty of restraining their livestock from running at large, and when out of the pasture such stock are at large and subject to be taken up and impounded by any per-

son, even though they are at large as a result of the negligence of the person who so impounds them, where the owner has knowledge of their being at large and neglects to restrain them. *McCoy v. Tillman*, 224 N. C. 201, 29 S. E. (2d) 683 (1944).

Strays from No-Fence Territory.—In *State v. Mathis*, 149 N. C. 546, 63 S. E. 99 (1908), the court said: "While it is usual for the counties or townships which adopt a 'stock law' to build a common fence, it is not necessary that they do so." In *State v. Garner*, 158 N. C. 630, 74 S. E. 458 (1912), the court held that the owner of

cattle who permits them to run at large in fence territory, but they stray across the line into a no-fence territory, is liable, though he does not turn them out for that purpose. *Owen v. Williamston*, 171 N. C. 57, 59, 87 S. E. 959 (1916).

Liability for Killing Strayers.—Under this section one has the power to take up a stray, and the law requires that he do so in preference to killing or injuring it. If he wantonly kills such stray, he is guilty of a misdemeanor. *State v. Brigman*, 94 N. C. 888 (1886). See § 14-366.

Applied in *Beasley v. Edwards*, 211 N. C. 393, 190 S. E. 221 (1937).

§ 68-25. Owner notified; sale of stock; application of proceeds.—If the owner of such stock be known to the impounder he shall immediately inform the owner where his stock is impounded, and if the owner shall for two days after such notice willfully refuse or neglect to redeem his stock, then the impounder, after ten days' written notice posted at three or more public places within the township where the stock is impounded, and describing the stock and stating place, day and hour of sale, or if the owner be unknown, after twenty days' notice in the same manner, and also at the courthouse door, shall sell the stock at public auction, and apply the proceeds in accordance with the provisions of this article, and the balance he shall turn over to the owner if known, and if the owner be not known, to the county commissioners for the use of the school fund of the district wherein said stock was taken up and impounded, subject in their hands for six months to the call of the legally entitled owner. (Code, s. 2817; Rev., s. 1680; C. S., s. 1851.)

Cross Reference.—As to constitutional-ity, see note to § 68-24.

When Owner May Not Complain.—Where a party lawfully impounds a sow, sells same under provisions of a recorder's judgment, and pays himself his lawful fees for impounding the sow and his damages

caused by the sow, and pays to the owner the amount due him out of the purchase price, the owner may not complain. *Beasley v. Edwards*, 211 N. C. 393, 190 S. E. 221 (1937).

Cited in *McCoy v. Tillman*, 224 N. C. 201, 29 S. E. (2d) 683 (1944).

§ 68-26. Impounding unlawfully misdemeanor.—If any person shall willfully and unlawfully toll, drive, or in any way move any other person's horse, mule, ass, neat cattle, sheep, hog, goat, or dog, from the range or elsewhere, into any stock-law district, or into the limits of any city or town having the right to impound or destroy the same, with intent to secure the poundage or other penalty, or with intent to injure the owner of such animal, or to require him to pay any poundage or penalty on account of such animal, or for hire or reward, he shall be guilty of a misdemeanor. If any person shall unlawfully and willfully remove any animal above named from any lawful inclosure, with intent to injure the owner, he shall be guilty of a misdemeanor. (1895, c. 141, s. 1; Rev., s. 3309; C. S., s. 1852.)

§ 68-27. Illegally releasing or receiving impounded stock misdemeanor.—If any person unlawfully receives or releases any impounded stock, or unlawfully attempts to do so, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Code, s. 2819; 1889, c. 504; Rev., s. 3310; C. S., s. 1853.)

§ 68-28. Impounded stock to be fed and watered.—If any person shall impound, or cause to be impounded in any pound or other place, any animal, and shall fail to supply to the same during such confinement a sufficient quantity

of good and wholesome food and water, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1881, c. 368, s. 3; Code, s. 2484; 1891, c. 65; Rev., s. 3311; C. S., s. 1854.)

Stated in *McCoy v. Tillman*, 224 N. C. 201, 29 S. E. (2d) 683 (1944).

§ 68-29. Right to feed impounded stock; owner liable.—In case any animal is at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person from time to time, and as often as it shall be necessary, to enter into and upon any such pound or other place in which any animal shall be so confined, and to supply it with necessary food and water so long as it shall remain so confined. Such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such animal. (1881, c. 368, s. 4; Code, s. 2485; Rev., s. 1682; C. S., s. 1855.)

The difference between an impounding fee and a charge for food, is recognized by the law. Section 68-24 prescribed the impounding fees for taking up stock running at large, and this section prescribes for payment of feeding such stock when taken up. The former fees go to the officer or the

town or county, and the latter is a humane provision without which the stock might suffer for want of food and water. *Owen v. Williamston*, 171 N. C. 57, 87 S. E. 959 (1916).

Cited in *McCoy v. Tillman*, 224 N. C. 201, 29 S. E. (2d) 683 (1944).

§ 68-30. Injuring lands in stock-law territory by riding or driving.—If any person, by riding or driving upon the lands of another without permission, or while driving livestock along any roadway, public or private, shall willfully, deliberately or recklessly do or permit to be done any actual injury to said land, or to the crops or other property growing or being thereon, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. But no such offender shall be proceeded against unless the party injured, or some one in his behalf, shall cause a warrant to be issued or an indictment to be found against the party offending, within fifteen days after the commission of the offense. (Code, s. 2828; 1889, c. 118; Rev., s. 3321; C. S., s. 1856.)

§ 68-31. Owner in stock-law territory allowing stock outside.—If any person having stock within the limits of a stock-law territory shall allow the same to run at large beyond the boundaries of said territory, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that a person owning or renting land outside of the stock-law territory may turn his stock upon the said land outside of the stock-law district. (Code, s. 2827; 1885, c. 371; 1889, c. 266; Rev., s. 3322; C. S., s. 1857.)

§ 68-32. Stock-law territory to be fenced around.—The stock-law authorized by this chapter shall not be enforced until a fence has been erected around any territory proposed to be enclosed, with gates on all the public roads passing into and going out of said territory: Provided, all streams which are or may be declared to be lawful fences shall be sufficient boundaries, in lieu of fences: Provided further, no fence shall be erected along the boundary lines of any county, township, or district where a stock law prevails. (Code, s. 2823; Rev., s. 1683; C. S., s. 1858.)

§ 68-33. Commissioners may declare natural barrier sufficient fence.—In any county in the State in which or in any portion of which the stock law is now in force or may hereafter be adopted, the county commissioners of said county in their discretion may declare any watercourse, mountain, mountain

range or parts of same, and also other natural and sufficient obstructions along the line of said stock-law territory to be and constitute a sufficient stock-law fence, and in that event such watercourse, mountain, mountain range or part thereof and obstructions so declared by said commissioners shall be and constitute a lawful fence to all intents and purposes. (1901, c. 542; Rev., s. 1684; C. S., s. 1859.)

When Absence of Built Fence No Defence.—It is competent for the county commissioners to forbid stock from running at large within the county, and declare a mountain range, a creek, or other natural line, a fence as the limit within which the law shall operate, and it is not a valid de-

fence that no fence had been built on the line to prevent the stock from the adjoining county to run at large on his side of the line when one is prosecuted for allowing his stock to run at large. *State v. Mathis*, 149 N. C. 546, 63 S. E. 99 (1908).

§ 68-34. Assessment of landowners for fence.—For the purpose of building stock-law fences, the board of commissioners of the county may levy and collect a special assessment upon all real property, taxable by the county, within the county, township or district which may adopt the stock law, but no such assessment shall be greater than one-fourth of one per centum on the value of said property. (Code, s. 2824; Rev., s. 1685; C. S., s. 1860.)

Cross Reference.—As to tax for “no stock law” fence, see note to § 68-19.

Constitutionality.—This section does not come within the prohibition of the State Constitution providing for uniform tax, as this is not of the nature of a tax, but is an assessment to defray expenses of local improvements, although called a tax by the legislature. *Cain v. Commissioners*, 86 N. C. 8 (1882); *Shuford v. Commissioners*, 86 N. C. 552 (1882).

When Applicable.—The provisions of this section apply both to the cases where the adoption of the stock law is dependent on a popular vote, and where it is made absolute by an act of the General Assembly. *Busbee v. Commissioners*, 93 N. C. 143 (1885).

These local assessments are not under all the restraints put upon the taxing power. They stand upon a different footing and rest upon the equitable and just consideration that lands rendered more valuable by the improvements ought to contribute to the expense of making the improvements, and that these expenses ought not to fall upon the entire body of the taxpayers. The advantage is to the land, and to the persons only as owners of the land. *Busbee v. Commissioners*, 93 N. C. 143

(1885).

District in Two Counties.—If the district organized lies in two counties the assessment shall be as if it was all in one county. *Commissioners v. Commissioners*, 92 N. C. 180 (1885).

Township Withdrawn from Stock Law.—This section does not authorize the imposition of the assessment on the real estate of a township withdrawn from the benefit of the stock law by express legislative enactment for the purpose of raising money to replace the money withdrawn from the general fund to pay the expenses of fences erected by the commissioners. *Harper v. Commissioners*, 133 N. C. 106, 45 S. E. 526 (1903).

Assessment Must Be for Stock-Law Fences Only.—An assessment by a county upon the real estate to build a fence for the purpose of keeping the stock in anti-stock-law territory from trespassing is unauthorized by law. *Hawes v. Commissioners*, 175 N. C. 268, 95 S. E. 482 (1918).

The roadbed and right of way of a railroad are liable to an assessment for local improvements. *Commissioners v. Seaboard Air Line R. Co.*, 133 N. C. 216, 45 S. E. 566 (1903).

§ 68-35. Condemnation of land for fence.—If the owner of any land objects to the building of any fence herein allowed, his land, not exceeding twenty feet in width, shall be condemned for the fenceway in accordance with the procedure specified in the article Condemnation Proceedings under the chapter Eminent Domain. (Code, s. 2825; Rev., s. 1686; C. S., s. 1861.)

§ 68-36. Injury to stock-law fences misdemeanor in stock-law territory.—If any person willfully tears down, or in any manner breaks a fence or gate, or leaves open a gate erected around a stock-law territory, or willfully breaks any enclosure within any township, district or county where a stock law is in force, and wherein any stock is confined, so that the same may escape there-

from, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Code, s. 2820; 1889, c. 504; Rev., s. 3411; C. S., s. 1862.)

Cited in *State v. Dunn*, 95 N. C. 697 (1886).

§ 68-37. Impounder violating stock law misdemeanor.—If any impounder willfully misappropriates money that he may receive from sale of stock impounded, or in any manner willfully violates any provisions of the law in regard thereto, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Code, s. 2820; 1889, c. 504; Rev., s. 3312; C. S., s. 1863.)

Cited in *State v. Dunn*, 95 N. C. 697 (1886).

§ 68-38. Local: Depredations of domestic fowls in certain counties.—In the counties and parts of counties hereinafter enumerated, where the stock law prevails, it shall be unlawful for any person to permit any turkeys, geese, chickens, ducks or other domestic fowls to run at large, after being notified as provided in this section, on the lands of any other person while such lands are under cultivation in any kind of grain or feedstuff, or while being used for gardens or ornamental purposes.

Any person so permitting his fowls to run at large, after having been notified to keep them up, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five dollars or imprisoned not exceeding five days, or if it shall appear to any justice of the peace that after two days' notice any person persists in allowing his fowls to run at large and fails or refuses to keep them upon his own premises, then the said justice of the peace may, in his discretion, order any sheriff, constable or other officer to kill said fowls when so depredating. (C. S., s. 1864.)

Alamance, 1901, c. 645.

Avery, 1935, c. 77.

Beaufort, Pub. Loc. 1927, c. 316.

Bladen, 1901, c. 645.

Buncombe, 1907, c. 508.

Burke, 1907, c. 508.

Cabarrus, 1901, c. 645.

Caldwell, Pub. Loc. 1911, c. 244.

Caswell, 1943, c. 64.

Chatham, 1945, c. 329.

Clay, 1935, c. 51.

Cleveland, 1901, c. 645.

Columbus, 1933, c. 308.

Craven, 1945, c. 329.

Cumberland, 1945, c. 329.

Currituck, 1901, c. 645.

Davidson, Pub. Loc. 1911, c. 244.

Duplin, Ex. Sess. 1908, c. 73; 1933, c. 186.

Edgecombe, 1901, c. 645.

Gaston, Pub. Loc. 1919, c. 31.

Gates, 1935, c. 77.

Graham, 1901, c. 645.

Granville, Pub. Loc. 1911, c. 244.

Guilford, 1901, c. 645.

Harnett, 1931, c. 443.

Henderson, Pub. Loc. 1911, c. 636.

Iredell, 1935, c. 170.

Jackson, Pub. Loc. 1919, c. 31.

Johnston, 1935, c. 78.
 Lee, Pub. Loc. 1913, c. 725.
 Lenoir, Pub. Loc. 1911, c. 244.
 Macon, Pub. Loc. 1919, c. 31.
 Martin, 1935, c. 77.
 Mecklenburg, 1901, c. 645.
 Moore, 1935, c. 77.
 Nash, 1943, c. 451.
 Onslow, Pub. Loc. 1911, c. 244.
 Orange, 1903, c. 115.
 Pasquotank, 1901, c. 645.
 Perquimans, 1949, c. 1221.
 Richmond, Pub. Loc. 1927, c. 72.
 Rockingham, Ex. Sess. 1924, c. 205; 1931, c. 434.
 Rowan, 1909, c. 847.
 Sampson, 1935, c. 196.
 Stokes, 1931, c. 22.
 Surry, 1901, c. 645.
 Swain, Pub. Loc. 1911, c. 244.
 Transylvania, Pub. Loc. 1911, c. 244.
 Tyrrell, Ex. Sess. 1921, c. 41.
 Union, 1935, c. 77.
 Vance, 1909, c. 748.
 Washington, 1947, c. 222.
 Wayne, Pub. Loc. 1911, c. 244.
 Wilson, 1937, c. 122.

Local Modification.—Catawba: 1903, c. 482; Davie: Pub. Loc. 1915, c. 167; Forsyth: Pub. Loc. 1915, c. 39; Greene: 1907, c. 917; Ex. Sess. 1908, c. 78; Lincoln: Pub. Loc. 1915, c. 312; McDowell: Pub. Loc. 1917, c. 328; Pitt: Pub. Loc. 1915, c. 462; Randolph: Pub. Loc. 1913, c. 645; Scotland: Pub. Loc. 1915, c. 714; Wake: Pub. Loc. 1915, c. 378; Yadkin: Pub. Loc. 1915, c. 39; Pub. Loc. 1917, c. 321; Yancey: Pub. Loc. 1913, c. 739.

Editor's Note.—The 1945 amendment added Chatham, Craven and Cumberland to the list of counties appearing in this section. The 1947 amendment added Washington to the list, and the 1949 amendment added Perquimans.

§ 68-39. **Eastern North Carolina, territory placed under stock law.**—From and after January first, one thousand nine hundred and twenty-two, all of that part of eastern North Carolina lying east of that branch of the Atlantic Coast Line Railroad running from Wilmington, North Carolina, northerly to the Virginia line and passing through Goldsboro, Wilson, and Weldon (formerly known as the Wilmington and Weldon Railroad), shall be and is hereby declared to be "stock-law territory," and shall be subject to all of the provisions of §§ 68-15 to 68-38, inclusive: Provided, that that portion of North Carolina which borders the Atlantic Ocean and which is separated from the mainland by a body of water such as an inlet or sound, shall not be considered to fall within the provisions of this law. (1921, c. 50, s. 1; C. S., s. 1864(a).)

Local Modification.—Currituck: 1937, c. 389; Dare: 1935, c. 263; 1937, c. 213; Onslow: 1933, c. 151; 1937, c. 356.

§ 68-40. **Counties divided by railroad.**—Wherever the railroad referred to in § 68-39 shall divide a county so that a part of the county lies east and a part west of the said railroad, then the whole of said county shall be "stock-law territory," and under the provisions of this article from and after January first, one thousand nine hundred and twenty-two. (1921, c. 50, s. 2; C. S., s. 1864(b).)

§ 68-41. **Repeal of local laws or regulations.**—Sections 68-39 and 68-40 shall not be construed to repeal or change local laws or regulations regarding the subject matter covered by those sections except so far as said local laws and regulations actually conflict with the provisions thereof and prevent the proper enforcement of said provisions, and the said local laws, rules, and regulations on the subject matter similar to that covered by said sections shall remain in full force and effect, except as they do and until they do actually interfere with the enforcement of the said provisions. (1921, c. 230; C. S., s. 1864(c).)

Chapter 69.

Fire Protection.

Article 1.

Investigation of Fires and Inspection of Premises.

Sec.

- 69-1. Fires investigated; reports; records.
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ARTICLE 1.

Investigation of Fires and Inspection of Premises.

§ 69-1. **Fires investigated; reports; records.**—The Insurance Commissioner and the chief of the fire department, or chief of police where there is no chief of fire department, in municipalities and towns, and the sheriff of the county where such fire occurs outside of a municipality, are hereby authorized to investigate the cause, origin, and circumstances of every fire occurring in such municipalities or counties in which property has been destroyed or damaged, and shall specially make investigation whether the fire was the result of carelessness or design. A preliminary investigation shall be made by the chief of fire department or chief of police, where there is no chief of fire department in municipalities, and by the sheriff of the county where such fire occurs outside of a municipality, and must be begun within three days, exclusive of Sunday, of the occurrence of the fire, and the Insurance Commissioner shall have the right to supervise and direct the investigation when he deems it expedient or necessary. The officer making the investigation of fires shall forthwith notify the Insurance Commissioner, and must within one week of the occurrence of the fire

furnish to the Commissioner a written statement of all the facts relating to the cause and origin of the fire, the kind, value, and ownership of the property destroyed, and such other information as is called for by the blanks provided by the Commissioner. The Insurance Commissioner shall keep in his office a record of all fires occurring in the State, together with all facts, statistics, and circumstances, including the origin of the fires, which are determined by the investigations provided for by this article. This record shall at all times be open to public inspection. (1899, c. 58; 1901, c. 387; 1903, c. 719; Rev., s. 4818; C. S., s. 6074.)

§ 69-2. Insurance Commissioner to make examination; arrests and prosecution.—It is the duty of the Insurance Commissioner to examine, or cause examination to be made, into the cause, circumstances, and origin of all fires occurring within the State to which his attention has been called in accordance with the provisions of § 69-1, or by interested parties, by which property is accidentally or unlawfully burned, destroyed, or damaged, whenever in his judgment the evidence is sufficient, and to specially examine and decide whether the fire was the result of carelessness or the act of an incendiary. The Commissioner shall, in person, by deputy or otherwise, fully investigate all circumstances surrounding such fire, and, when in his opinion such proceedings are necessary, take or cause to be taken the testimony on oath of all persons supposed to be cognizant of any facts or to have means of knowledge in relation to the matters as to which an examination is herein required to be made, and shall cause the same to be reduced to writing. If he is of the opinion that there is evidence sufficient to charge any person with the crime of arson, or other willful burning, he shall cause such person to be arrested, charged with such offense, and prosecuted, and shall furnish to the solicitor of the district all such evidence, together with the names of witnesses and all the information obtained by him, including a copy of all pertinent and material testimony taken in the case. (1899, c. 58, s. 2; 1901, c. 387, s. 2; 1903, c. 719; Rev., s. 4819; C. S., s. 6075.)

§ 69-3. Powers of Commissioner in investigations.—The Insurance Commissioner, or his deputy appointed to conduct such examination, has the powers of a trial justice for the purpose of summoning and compelling the attendance of witnesses to testify in relation to any matter which is by provisions of this article a subject of inquiry and investigation, and may administer oaths and affirmations to persons appearing as witnesses before them. False swearing in any such matter or proceeding is perjury and shall be punished as such. The Commissioner or his deputy has authority at all times of the day or night, in performance of the duties imposed by the provisions of this article, to enter upon and examine any building or premises where any fire has occurred, and other buildings and premises adjoining or near the same. All investigations held by or under the direction of the Commissioner or his deputy may, in their discretion, be private, and persons other than those required to be present by the provisions of this article may be excluded from the place where the investigation is held, and witnesses may be kept apart from each other and not allowed to communicate with each other until they have been examined. (1899, c. 58, s. 3; 1901, c. 387, s. 3; Rev., s. 4820; C. S., s. 6076.)

§ 69-4. Inspection of premises; dangerous material removed.—The Insurance Commissioner, or the chief of fire department or chief of police where there is no chief of fire department, or local inspector of buildings in municipalities where such officer is elected or appointed, has the right at all reasonable hours, for the purpose of examination, to enter into and upon all buildings and premises in their jurisdiction. It is the duty of the Insurance Commissioner to require in all municipalities of the State that such officers make in their respective municipalities annual inspection of the buildings therein and quarterly inspection of all premises within the fire limits, and report in detail the results of their in-

spection to the Insurance Commissioner upon blanks furnished by him. When any of such officers find in any building or upon any premises combustible material or inflammable conditions dangerous to the safety of such building or premises they shall order the same to be removed or remedied, and this order shall be forthwith complied with by the owner or occupant of such building or premises. The owner or occupant may, within twenty-four hours, appeal to the Insurance Commissioner from the order, and the cause of the complaint shall be at once investigated by his direction, and unless by his authority the order of the officer above named is revoked it remains in force and must be forthwith complied with by the owner or occupant. The Insurance Commissioner, fire chief, or fire committee shall make an immediate investigation as to the presence of combustible material or the existence of inflammable conditions in any building or upon any premises under their jurisdiction upon complaint of any person having an interest in such building or premises or property adjacent thereto. The Commissioner may, in person or by deputy, visit any municipality and make such inspections alone or in company with the local officer. The local inspector shall be paid by the municipality a reasonable salary or proper fees to be fixed by its governing board. (1899, c. 58, s. 4; 1901, c. 387, s. 4; 1903, c. 719; Rev. s. 4821; C. S., s. 6077.)

Cross Reference.—As to regulation of buildings by municipalities, see § 160-115 et seq.

§ 69-5. Deputy investigators.—It shall be the duty of the Insurance Commissioner to appoint two or more persons as deputies, whose particular duty it shall be to investigate forest fires and endeavor to ascertain the persons guilty of setting such fires and cause prosecution to be instituted against those who, as a result of such investigation, are deemed guilty. (1899, c. 58, s. 6; 1901, c. 387, s. 6; 1903, c. 719, s. 2; Rev., s. 4823; 1915, c. 109, s. 2; 1919, c. 186, s. 7; C. S., s. 6078; Ex. Sess. 1924, c. 119.)

Editor's Note.—The provisions of this section were derived from the 1924 amendment. **Cited in** *O'Neal v. Wake County*, 196 N. C. 184, 145 S. E. 28 (1928).

§ 69-6. Reports of Insurance Commissioner.—The Insurance Commissioner shall submit annually, as early as consistent with full and accurate preparation, and not later than the first day of June, a detailed report of his official action under this article, and it shall be embodied in his report to the General Assembly. He shall, in his annual report, make a statement of the fires investigated, the value of property destroyed, the amount of insurance, if any, the origin of the fire, when ascertained, and the location of the property damaged or destroyed, whether in town, city, or country. (1899, c. 58, s. 7; 1901, c. 387, s. 7; Rev., s. 4824; 1915, c. 109, s. 1; C. S., s. 6079.)

§ 69-7. Fire prevention and Fire Prevention Day.—It is the duty of the Insurance Commissioner and Superintendent of Public Instruction, as far as practicable, to provide, except to schools taught in one-story houses, a pamphlet containing printed instructions for properly conducting fire drills in schools, and the superintendent or principal of every public school in this State, except schools taught in one-story houses, shall conduct at least one fire drill every month during the regular school session, such fire drills to include all children and teachers and the use of all ways of egress, and the Insurance Commissioner and Superintendent of Public Instruction shall further provide for the teaching of "Fire Prevention" in the colleges and schools of the State, and to arrange for a textbook adapted to such use. The ninth day of October of every year shall be set aside and designated as "Fire Prevention Day," and the Governor shall issue a proclamation urging the people to a proper observance of the day, and the Insurance Commissioner shall bring the day and its observance to the attention

of the officials of the municipalities of the State, and especially to the firemen, and where possible arrange suitable programs to be followed in its observance. (1915, c. 166, s. 5; C. S., s. 6080; 1925, c. 130; 1947, c. 781.)

Editor's Note.—The 1925 amendment inserted the provisions relating to pamphlet or fire drill instructions and conducting monthly fire drills. And the 1947

amendment substituted "Insurance Commissioner" for "Insurance Commission" near the middle of the section.

ARTICLE 2.

Fire Escapes.

§ 69-8. **Construction of buildings regulated.**—All hotels, lodging houses, school dormitories, hospitals, sanitariums, apartment houses, flats, tenement houses and all buildings other than private dwellings not over three stories in height, in which rooms are to be rented or leased or let or offered for rent, let or leased for living or sleeping purposes, hereafter constructed in this State shall be constructed so that the occupants of all rooms above the first floor shall have unobstructed access to two separate and distinct ways of egress extending from the uppermost floor to the ground, such ways of egress to be so arranged in reference to rooms that in case of fire on one stairway the other stairway can be reached by the occupant without his or her having to pass the stairway involved. Entrance to all such ways of egress aforementioned in this section shall be from corridors or hallways of not less than three feet in width, and in no case shall entrance to such ways of egress be through a room or closet, and where such building is in the opinion of the Insurance Commissioner of sufficient size to require more than two ways of egress the "National Fire Protection Association" standard governing corridors and stair areas shall be adhered to. Every hotel, lodging house, school dormitory, hospital, sanatorium, apartment house, flat, tenement or other building, other than a private dwelling not over three stories in height, in which rooms are rented, leased, let or offered for rent, leased or let, shall forthwith, at the owner's expense, be provided with additional ways of egress as the Insurance Commissioner shall deem practicable in order that the object of this article may be accomplished and that existing dangers may not be perpetuated. (1909, c. 637, s. 1; C. S., s. 6081; 1923, c. 149, s. 4.)

Editor's Note.—The 1923 amendment rewrote this section.

Nonsuit Held Proper.—These actions to recover for personal injuries and for wrongful death resulting from a fire in defendants' building, the third floor of which was rented for sleeping quarters, were founded on this section, upon allegations that defendants failed to have two exits from the sleeping quarters in case of fire. All the evidence tended to show that the

building was constructed prior to 1913, and there was no evidence that the Insurance Commissioner ever deemed practical that the building should be provided with any additional ways of egress in order that the dangers existing should be terminated. It was held that defendants' motion to nonsuit was properly allowed, since plaintiffs failed to bring themselves within the statute relied upon. *Woods v. Hall*, 214 N. C. 16, 197 S. E. 557 (1938).

§ 69-9. **Places of public amusement, how constructed.**—Every theater, opera house, or other like place of public amusement shall have as many doors for egress therefrom as may be necessary and can be made consistently with the proper strength of the building; all such doors shall be hung so as to open outwardly, or both outwardly and inwardly; and the seats therein shall be arranged in rows properly spaced, with aisles of adequate width, so as to afford easy egress therefrom. All scenery shall be made as secure against becoming inflamed as reasonably practical, and also all reasonably practical arrangements shall be made for the constant supply of water and other means for extinguishment of fires, and they shall be kept constantly effective during the presence of an audience. The Insurance Commissioner may require all theaters to be equipped with a front curtain of asbestos or other fireproof material, to be furnished by

owner of the building, and this curtain shall be raised and lowered not less than twice before each performance, in order to guarantee its being in perfect working order. (1909, c. 637, s. 2; C. S., s. 6082.)

§ 69-10. Doors in certain buildings to open outwardly.—In all public schoolhouses and other buildings, and also all theaters, assembly rooms, halls, churches, factories with more than ten employees, and all other buildings or places of public resort where people are accustomed to assemble (excepting schoolhouses and churches of one room on the ground floor) which shall hereafter be erected, together with all those heretofore erected and which are still in use as such buildings or places of resort, the doors for ingress and egress shall be so hung as to open outwardly from the audience rooms, halls, or workshops of such buildings or places, or the doors may be hung on double hinges, so as to open with equal ease outwardly or inwardly. And it is further provided that, in order to safeguard the public from the dangers of fire and contingencies arising and resulting therefrom in places of this kind, and the owner or owners from unnecessary confusion and expense, plans for all such theaters, opera houses, moving picture shows, and other like places of amusement to be hereafter erected shall be submitted to and approved, as to the safety of the building from fire and the occupants in case of fire, by the Insurance Commissioner, before work is begun on the building. This requirement shall apply also where any building standing or part thereof is to be changed to use as a theater, opera house, moving picture show or other like place of amusement. (1909, c. 637, s. 3; C. S., s. 6083; 1923, c. 149, s. 1.)

Editor's Note.—The 1923 amendment reduced the number of employees mentioned near the beginning of the section from twenty to ten, and inserted the re-

quirement that the plans of buildings shall be submitted to and approved by the Insurance Commissioner.

§ 69-11. Fire escapes to be provided.—All factories, manufacturing establishments or workshops of three or more stories in height, in which ten or more people are employed above the first floor thereof, shall be provided with one or (if the proper official shall deem necessary) more outside fire escapes, not less than six feet in length and three feet in width, properly and safely constructed, guarded by iron railings not less than three feet in length and taking in at least one door and one window or two windows at each story and connected with the interior by easily accessible and unobstructed openings; and the fire escapes shall connect by iron stairs not less than twenty-four inches wide, the steps to be not less than six inches tread, placed at not more than an angle of forty-five degrees slant, and protected by a well secured hand-rail on both sides, with a twelve-inch wide drop ladder from the lowest platform reaching to the ground. Each story of all factories, manufacturing establishments or workshops of three or more stories in height shall be amply supplied with means for extinguishing fires. All the main doors, both inside and outside, in factories, except fire doors, shall open outwardly, when the proper official shall so direct, and no outside or inside door of any building wherein operatives are employed shall be locked, bolted, or otherwise fastened during the hours of labor so as to prevent egress. (1909, c. 637, s. 4; C. S., s. 6084; 1923, c. 149, s. 2.)

Editor's Note.—The 1923 amendment reduced the number of the employees men-

tioned near the beginning of this section from thirty to ten.

§ 69-12. Ways of escape provided.—Every building now or hereafter used, in whole or in part, as a public building, public or private institution, schoolhouse, church, theater, public hall, place of assembly or place of public resort, and every building in which twenty or more persons are employed, allowed or accustomed to assemble or accommodated above the second story in a factory, workshop, office building or mercantile or other establishment, when the owner or agent of the owner of the buildings is notified in writing by the Insurance

Commissioner or one of his deputies, shall be provided with proper ways of egress or other means of escape from fire sufficient for the use of all persons accommodated, assembled, employed, lodging or residing in such building or buildings, and such ways of egress and means of escape shall be kept free from obstructions, in good repair, and ready for use. Every room above the second story in any such building in which twenty or more persons are employed shall be provided with more than one way of egress by stairways on the inside or outside of the building. All doors in any building subject to the provisions of this article shall open outwardly, if the Insurance Commissioner or one of his deputies shall so direct in writing. (1909, c. 637, s. 5; C. S., s. 6085; 1923, c. 149, s. 3; 1927, c. 55, s. 1.)

Editor's Note.—The 1923 amendment to assemble or accommodated." And the made the section applicable to buildings 1927 amendment made it apply to office where people are "allowed or accustomed buildings where people are employed.

§ 69-13. Enforcement by Insurance Commissioner.—The Insurance Commissioner is charged with the execution of this article, and he or the chief of the fire department is vested with all privileges, duties, and obligations placed upon them in this chapter, in regard to the inspection of buildings, for the purpose of enforcing the provisions of this article in regard to the buildings and requirements herein. Any owner or occupant of premises failing to comply with the provisions of this article, in accordance with the orders of the authorities above specified, shall be guilty of a misdemeanor and punished by a fine of not less than ten dollars nor more than fifty dollars for each day's neglect. If any owner or lessee of any building referred to in this article shall deem himself aggrieved by any ruling or order of any chief of fire department or local inspector, he may within twenty-four hours appeal to the Insurance Commissioner, and the cause of complaint shall at once be investigated by the direction of the Commissioner, and unless by his authority the order or ruling is revoked it shall remain in full force and effect and be forthwith complied with by the owner or lessee. (1909, c. 637, s. 6; C. S., s. 6086.)

ARTICLE 3.

State Volunteer Fire Department.

§ 69-14. Purpose of article.—The purpose of this article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this article. (1939, c. 364, s. 1.)

§ 69-15. Personnel.—The personnel of the North Carolina State Volunteer Fire Department shall consist of all active members of the organized fire departments, who are members of the North Carolina State Firemen's Association, of municipalities whereof the governing bodies shall subscribe to and endorse this article. (1939, c. 364, s. 2.)

§ 69-16. Organization.—The North Carolina State Fire Marshal shall be chief of the State Volunteer Fire Department; regular municipal fire chiefs shall be assistant chiefs; assistant chiefs shall be deputy chiefs; battalion chiefs, captains; lieutenants and privates shall hold the same positions that they occupy in their municipal companies. When engaged in rendering assistance at the scene of any emergency, the ranking officer of the first department arriving at the scene of the emergency shall have complete charge of all operations until the arrival of a superior officer. All subordinate officers and men shall act under the direction of such ranking officer. Whenever present at the scene of an emergency, the chief shall have full and complete control and authority over operations of all members of the Department. (1939, c. 364, s. 3.)

§ 69-17. Acceptance by municipalities.—Any municipality having an organized fire department and desiring to participate in the establishment of the State Volunteer Fire Department, may do so by a resolution of the governing body accepting and endorsing the provisions of this article: Provided, that acceptance shall not be compulsory. (1939, c. 364, s. 4.)

§ 69-18. Withdrawal.—Any municipality which has accepted the provisions of this article may withdraw its fire departments from membership in the State Volunteer Fire Department by resolution of the governing body thereof. Notice of such withdrawal shall be given to the State Fire Marshal and withdrawal shall not become effective until sixty (60) days after his receipt thereof. (1939, c. 364, s. 5.)

§ 69-19. Dispatching firemen and apparatus from municipalities.—Municipalities endorsing this article shall retain full and complete control and authority in sending or permitting firemen and apparatus to go beyond the limits of the municipality. The governing bodies of such municipalities shall designate and authorize a person, and at least two alternates, who shall have authority to grant or deny permission to firemen and apparatus to leave the municipality in all cases where request is made for assistance beyond its corporate limits, and the municipality shall, through the office of its municipal fire chief, furnish to the office of the State Insurance Commissioner, and to the secretary of the North Carolina State Firemen's Association, a list of the persons so authorized by the municipality. The secretary of the State Firemen's Association shall furnish to all municipalities and counties accepting this article a list of all such persons so designated in all municipalities within the State. (1939, c. 364, s. 6.)

§ 69-20. No authority in State Volunteer Fire Department to render assistance to nonaccepting counties.—The State Volunteer Fire Department shall not have authority to render assistance in any emergency occurring within a county which has not accepted the terms and conditions of this article by resolution of the board of county commissioners: Provided, that nothing in this article shall be construed to prevent any municipality from voluntarily permitting its fire department to render assistance in any emergency, notwithstanding that it may arise in a county which has failed to accept this article. (1939, c. 364, s. 7.)

§ 69-21. Acceptance by counties.—Any county desiring to accept the benefits of this article may do so by resolution of the board of county commissioners. The board may make the necessary appropriation therefor and levy annually taxes for payment of the same as a special purpose, in addition to any tax allowed by any special statute for the purposes enumerated in § 153-9, and in addition to the rate allowed by the Constitution. Any such county may thereupon make agreements and enter into contracts with respect to payment for services rendered by the State Volunteer Fire Department within its boundaries in the following manner:

The county may contract with any municipality which has accepted the terms of this article, whether within or without said county, to pay to such municipality an annual fee as a consideration for the municipality providing equipment and carrying compensation insurance which will enable it to respond to calls from within the county so contracting, and to pay an additional sum per truck for each mile traveled from the station house to the scene of the emergency, and to pay an additional sum per truck per hour or fraction thereof for the use of its water or chemical pumping equipment. Said sums shall be paid to the city within thirty (30) days after such services have been performed: Provided, that nothing in this section shall be construed to prevent the county and municipality from adopting a different schedule of fees in cases where those provided above shall be considered excessive or inadequate: Provided, that if the emergency

shall occur within the limits of another city or town, such city or town and not the county wherein it lies shall be responsible for the payments and shall assume all liabilities as provided in this section. (1939, c. 364, s. 8.)

§ 69-22. **Municipalities not to be left unprotected.**—At no time shall the entire personnel or equipment of any municipal fire department be absent from the municipality in response to a call to another municipality, or other place lying at a distance exceeding two miles from the corporate limits, but there shall remain within the municipal limits such personnel and equipment as in the judgment of the local fire chief might provide sufficient protection during the absence of the remainder. (1939, c. 364, s. 9.)

§ 69-23. **Rights and privileges of firemen; liability of municipality.**—When responding to a call and while working at a fire or other emergency outside the limits of the municipality by which they are regularly employed or in volunteer fire service, all members of the State Volunteer Fire Department shall have the same authority, rights, privileges and immunities which are afforded them while responding to calls within their home municipality. In permitting its fire department or equipment to attend an emergency or answer a call beyond the municipal limits, whether under the terms of this article or otherwise, a municipality shall be deemed in exercise of a governmental function, and shall hold the privileges and immunities attendant upon the exercise of such functions within its corporate limits. (1939, c. 364, s. 10.)

§ 69-24. **Relief in case of injury or death.**—In case of injury or death of any member of the State Volunteer Fire Department arising out of and in the course of the performance of his duties while such member is assisting at any emergency arising beyond the limits of the municipality with which he is connected, or while going to or returning from the scene of such emergency, such fireman shall be entitled to compensation under the terms of the North Carolina Workmen's Compensation Act, and the municipality with which he is connected shall be liable for the compensation provided under that Act. (1939, c. 364, s. 11.)

§ 69-25. **Sums from contingent fund of State made available for administration of article.**—In order to assist in carrying out the purposes of this article the Governor may, from time to time, make provisions for assistance to the North Carolina State Firemen's Association in a sum not to exceed two thousand five hundred dollars (\$2,500.00), in any one year, out of the contingent fund appropriated in the General Appropriation Act. One-half of the amount so provided shall, in each instance, go to the State Firemen's Relief Fund, and one-half to the expenses of the said Association incurred in carrying out the provisions of this article. (1939, c. 364, s. 12.)

ARTICLE 4.

Hotels; Safety Provisions.

§ 69-26. **Administration.**—For the purpose of administering and enforcing the provisions of this article, reference is made to article 9 of chapter 143 of the General Statutes of North Carolina, known as the North Carolina Building Code and all rights, powers, duties and authorities provided in said code shall apply and be in force in the administration and enforcement of this article except as may be specifically provided hereunder; and such rules, regulations, standards, classifications or restrictions necessary in the administration and enforcement hereof and appeals therefrom and thereupon shall be made in accordance with said article 9, chapter 143 of the General Statutes of North Carolina. (1947, c. 1066.)

§ 69-27. **Alarms, bells and gongs.**—In any hotel or other building of like occupancy, there shall be provided a manually operated fire alarm, bell or gong system, approved by the Commissioner of Insurance, suitable to arouse all occupants of such buildings if necessary in case of fire or other emergency and capable of being operated by one operation at the main desk or at the telephone switchboard. Where practicable, the alarm system shall be connected with the city fire alarm system and shall be subject to periodic inspection as directed by the Commissioner of Insurance. (1947, c. 1066.)

§ 69-28. **Watchman service.**—Every proprietor or keeper of any hotel or other building of like occupancy, two stories or more in height or designed to provide twenty or more rooms for sleeping accommodations shall provide or cause to be provided watchman service, utilizing a standard watch clock system in such manner so that each and every floor, corridor and accessible space, exclusive of rooms being occupied, shall be inspected at least once each hour between 10:00 p. m. and 6:00 a. m. Within the corporate limits of municipalities, this watchman service shall be satisfactory to the chief of the fire department and/or the Commissioner of Insurance. In every building subject to the provisions of this section, there shall be kept a record showing compliance therewith, and this record shall be subject to inspection by the Commissioner of Insurance or his deputies or the chief of the fire department. Provided that in lieu of a watchman service such hotel or other building of like occupancy may be provided with an automatic fire detection system approved by the Commissioner of Insurance and the North Carolina Building Code Council. (1947, c. 1066.)

§ 69-29. **Automatic sprinklers.**—(a) In any hotel or other building of like occupancy of B, C, D or E construction as defined in the North Carolina Building Code more than three stories in height, there shall be provided in such building an automatic sprinkler system to be of such design, construction and scope as may meet the approval of the North Carolina Building Code Council, provided, however, that if in the opinion of the Commissioner of Insurance any such building three stories or less in height shall not have ample and adequate protected fire escapes or exits, then he may require the responsible party to provide or cause to be provided in such building an approved automatic sprinkler system of such design, construction and scope as may be approved by the North Carolina Building Code Council.

(b) In any hotel or other building of like occupancy of A or A1 construction, as defined in the North Carolina Building Code, more than four stories in height, there shall be provision that such rooms or areas in such building as are occupied or used for such purposes as linen rooms, storage rooms, carpenter shop, upholstery and furniture repair shop, kitchens, laundries, paint shop, mattress renovation shops, basements and other areas of special fire hazard shall be cut off in a manner approved by the Commissioner of Insurance or his deputy or the chief of fire department of the city in which the building is located, and, in the discretion of said Insurance Commissioner or his deputy, the responsible party may be required to provide in such areas an approved automatic sprinkler system.

(c) In any hotel or other building of like occupancy of any type construction, wherein, under subparagraphs (a) and (b) above, an automatic sprinkler system is required to be installed, if, in the opinion of the Commissioner of Insurance or his deputy, reasonable life safety may be insured, such Commissioner or his deputy may permit the installation of an approved automatic detection system in lieu of an automatic sprinkler system.

(d) A period of three years from the effective date of this article shall be allowed for compliance with the provisions of this section.

(e) The obligation of this article with respect to installation of alarms, bells or gongs and of automatic sprinklers or automatic fire detection systems shall

rest upon the owner of the building as the lessor, or upon the operator thereof as the lessee, as the case may be, in accordance with the terms and provisions of the lease contract; and in the absence of any determining provision in such lease contract, or in the absence of any written lease, the obligation with respect to such installations shall be determined in accordance with the law of the State. (1947, c. 1066.)

§ 69-30. Interior stairways and vertical openings.—(a) In new or existing hotel buildings all interior stairways used as exits, except stairways from a lobby to a mezzanine and open stairways permitted under subsection (b) below, shall be so enclosed as to provide a safe path of escape to the outside of the building without danger from fire or smoke, by means of enclosures and self-closing doors having at least one hour fire resistance rating, or otherwise enclosed in a manner approved by the Commissioner of Insurance or his deputy, and any vertical openings other than stairways through which fire and smoke may spread from story to story, shall be enclosed in a manner approved by the Commissioner of Insurance or his deputy.

(b) In existing hotel buildings of less than four stories in height, the enclosure of floor openings as provided in subsection (a) above may be waived by the Commissioner of Insurance or his deputy if life safety is not endangered thereby. (1947, c. 1066.)

§ 69-31. Fire extinguishers.—Every proprietor or keeper of any hotel or other building of like occupancy shall provide and keep in proper operating condition at least two two and one-half (2½ gal.) gallon extinguishers on each floor utilized for sleeping purposes or at least one two and one-half gallon fire extinguisher for each fifteen (15) rooms utilized for sleeping purposes on each floor, whichever is the greater number. It shall further be the duty of every proprietor or keeper of any hotel or other building of like occupancy to insure that all employees working in said building shall be trained in the use of fire extinguishers and other fire fighting equipment located or installed in said building. (1947, c. 1066.)

§ 69-32. Alterations and decorations.—In all hotels or other buildings of like occupancy, located in a city which has a fire department, after the effective date of this article, no interior structural alteration, temporary or permanent, shall be made or no decorations or scenery shall be placed in the public spaces thereof without the prior approval and permit of the chief of fire department of that city. (1947, c. 1066.)

Editor's Note.—The act inserting this article became effective Sept. 1, 1947.

§ 69-33. Careless or negligent setting of fires.—Any person who in any fashion or manner negligently or carelessly sets fire to any bedding, furniture, draperies, house or household furnishings or other equipment or appurtenances in or to any hotel or other building of like occupancy shall be guilty of a misdemeanor and shall be subject to a fine of not less than \$50.00 nor more than \$500.00 or to imprisonment or to both fine and imprisonment in the discretion of the court. (1947, c. 1066.)

§ 69-34. Penalty for noncompliance.—Any owner, owners, proprietor or keeper of any hotel or other building of like occupancy who fails to comply with any of the foregoing provisions of this article shall be guilty of a misdemeanor and punished by fine of not less than \$10.00 nor more than \$50.00. Each day of noncompliance herewith shall constitute a separate offense. (1947, c. 1066.)

§ 69-35. Unsafe buildings condemned.—The Commissioner of Insurance is empowered to inspect or cause to be inspected any hotel or other build-

ing of like occupancy and any such building which shall be found to be especially dangerous to life, because of its liability to fire or in case of fire by reason of bad condition of walls, overloaded floors, defective construction, insufficient means of egress, decay or other causes shall be held to be unsafe and the Commissioner of Insurance shall affix or cause to be affixed a notice of dangerous character of the structure in a conspicuous place on the exterior wall of such building. (1947, c. 1066.)

§ 69-36. Penalty for allowing unsafe building to remain occupied.

—If any person shall continue to use or occupy or permit the use or occupancy of any hotel or other building of like occupancy which has been condemned as unsafe and dangerous to life by the Commissioner of Insurance or his authorized deputy, after having been notified in writing of the unsafe and dangerous character of said building, and if such use and occupancy shall continue for a period as much as 30 days without remedying the conditions complained of to the satisfaction of the Commissioner of Insurance or the chief of the fire department of the city in which the building is located, such person shall be guilty of a misdemeanor and shall pay a fine of not less than \$10.00 nor more than \$50.00 for each day of such continued use and occupancy after the expiration of such 30 day period following such notice. Provided that such 30 day period may be enlarged (for good cause shown) by the Commissioner of Insurance or by the chief of the fire department of the city in which the building is located to such time as in his discretion he may find proper. (1947, c. 1066.)

§ 69-37. Penalty for removing notice from condemned building.—

If any person, except by authority by the Insurance Commission, shall remove any condemnation notice which has been affixed to any hotel or other building of like occupancy, he shall be guilty of a misdemeanor and shall be fined not less than \$10.00 nor more than \$50.00 for each offense. (1947, c. 1066.)

§ 69-38. Construction of article.—Nothing in this article shall be construed to limit powers granted to and duties imposed upon the chiefs of fire departments and building inspectors by article 11, chapter 160 of the General Statutes of North Carolina, but the powers granted in this article shall be in addition thereto. (1947, c. 1066.)

Chapter 70.

Indian Antiquities.

Sec.

70-1. Private landowners urged to refrain from destruction.

70-2. Possessors of relics urged to commit them to custody of State agencies.

Sec.

70-3. Preservation of relics on public lands.

70-4. Destruction or sale of relic from public lands made misdemeanor.

§ 70-1. **Private landowners urged to refrain from destruction.**—Private owners of lands containing Indian relics, artifacts, mounds or burial grounds are urged to refrain from the excavation or destruction thereof and to forbid such conduct by others, without the co-operation of the director of the State Museum and the secretary of the North Carolina Historical Commission or without the assistance or supervision of some person designated by either as qualified to make scientific archaeological explorations. (1935, c. 198, s. 1.)

§ 70-2. **Possessors of relics urged to commit them to custody of State agencies.**—All persons having in their possession collections of Indian relics, artifacts, and antiquities which are in danger of being lost, destroyed or scattered are urged to commit them to the custody of the North Carolina State Museum, the North Carolina Historical Commission, or some other public agency or institution within the State which is qualified to preserve and exhibit them for their historic, scientific and educational value to the people of the State. (1935, c. 198, s. 2.)

§ 70-3. **Preservation of relics on public lands.**—It shall be the duty of any person in charge of any construction or excavation on any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, to report promptly to and preserve for the director of the State Museum or the secretary of the North Carolina Historical Commission any Indian relic, artifact, mound, or burial ground discovered in the course of such construction or excavation. (1935, c. 198, s. 3.)

§ 70-4. **Destruction or sale of relic from public lands made misdemeanor.**—Any person who shall excavate, disturb, remove, destroy or sell any Indian relic or artifact, or any of the contents of any mound or burial ground, on or from any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, except with the written approval of the director of the State Museum or the secretary of the North Carolina Historical Commission, shall be guilty of a misdemeanor. (1935, c. 198, s. 4.)

Chapter 71.

Indians.

Sec.

71-1. Cherokee Indians of Robeson County; rights and privileges.

71-2. Separate privileges in schools and institutions.

71-3. Chapter not applicable to certain bands of Cherokees.

Sec.

71-4. Rights of eastern band of Cherokee Indians to inherit, acquire, use and dispose of property.

71-5. Eligibility of members of eastern band of Cherokee Indians to hold office in tribal organization.

§ 71-1. Cherokee Indians of Robeson County; rights and privileges.

—The persons residing in Robeson, Richmond, and Sampson counties, who have heretofore been known as “Croatan Indians” or “Indians of Robeson County,” together with their descendants, shall hereafter be known and designated as “Cherokee Indians of Robeson County,” and by that name shall be entitled to all the rights and privileges heretofore or hereafter conferred, by any law or laws of the State of North Carolina, upon the Indians heretofore known as the “Croatan Indians” or “Indians of Robeson County.” In all laws enacted by the General Assembly of North Carolina relating to said Indians subsequent to the enactment of said chapter fifty-one of the Laws of eighteen hundred and eighty-five, the words “Croatan Indians” and “Indians of Robeson County” are stricken out and the words “Cherokee Indians of Robeson County” inserted in lieu thereof. (1885, c. 51, s. 2; Rev., s. 4168; 1911, c. 215; P. L. 1911, c. 263; 1913, c. 123; C. S., s. 6257.)

§ 71-2. **Separate privileges in schools and institutions.**—Such Cherokee Indians of Robeson County and the Indians of Person County, defined in the chapter Education, § 115-66, shall be entitled to the following rights and privileges:

1. Separate schools, with the educational privileges provided in the chapter Education.

2. Suitable accommodations in the State Hospital for the Insane at Raleigh, as provided in the chapter Hospitals for the Insane, in the article entitled Organization and Management.

3. The sheriffs, jailers, or other proper authorities of Robeson and Person counties shall provide in the common jails of said counties, and in the homes for the aged and infirm thereof, separate cells, wards, or apartments for such Indians in all cases where it shall be necessary under the laws of this State to commit any of said Indians to such jails or county homes. (1911, c. 215, s. 6; 1913, c. 123; P. L. 1913, c. 22; C. S., s. 6258.)

Cross References.—As to Pembroke State College, see §§ 116-79 to 116-86. For separate schools in certain counties, see § 115-66. For care of insane, see § 122-5.

§ 71-3. Chapter not applicable to certain bands of Cherokees.

—Neither this chapter nor any other act relating to said “Cherokee Indians of Robeson County” shall be construed so as to impose on said Indians any powers, privileges, rights, or immunities, or any limitations on their power to contract, heretofore enacted with reference to the eastern band of Cherokee Indians residing in Cherokee, Graham, Swain, Jackson, and other adjoining counties in North Carolina, or any other band or tribe of Cherokee Indians other than those now residing, or who have since the Revolutionary War resided, in Robeson county, nor shall said “Cherokee Indians of Robeson County,” as herein designated, be subject to the limitations provided in the chapter Contracts Requiring Writing, in § 22-3, entitled Contracts with Cherokee Indians. (1913, c. 123, s. 5; C. S., s. 6259.)

§ 71-4. Rights of eastern band of Cherokee Indians to inherit, acquire, use and dispose of property.—Subject only to restrictions and conditions now existing or hereafter imposed under federal statutes and regulations, or treaties, contracts, agreements, or conveyances between such Indians and the federal government, the several members of the eastern band of Cherokee Indians residing in Cherokee, Graham, Swain, Jackson and other adjoining counties in North Carolina, and the lineal descendants of any bona fide member of such eastern band of Cherokee Indians, shall inherit, purchase, or otherwise lawfully acquire, hold, use, encumber, convey and alienate by will, deed, or any other lawful means, any property whatsoever as fully and completely in all respects as any other citizen of the State of North Carolina is authorized to inherit, hold, or dispose of such property. (1947, c. 978, s. 1.)

§ 71-5. Eligibility of members of eastern band of Cherokee Indians to hold office in tribal organization.—Any person who is a lineal descendant of any bona fide member of such eastern band of Cherokee Indians who is a member of said band and who is domiciled on the lands of the said eastern band of Cherokee Indians shall be eligible to hold any elective or appointive office or position within the tribal organization, including the position of chief, and may be elected or appointed and shall thereafter serve in such manner and for such time as a majority of the accredited membership of such eastern band of Cherokee Indians may decide at any election held for such purpose or appointment made by the accredited officials of said eastern band of Cherokee Indians. (1947, c. 978, s. 2.)

Chapter 72.

Inns, Hotels and Restaurants.

Article 1.

Innkeepers.

Sec.

- 72-1. Must furnish accommodations.
- 72-2. Liability for loss of baggage.
- 72-3. Safekeeping of valuables.
- 72-4. Loss by fire.
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- 72-7. Admittance of dogs to bedrooms.

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72-8 to 72-29. [Repealed.]

Article 3.

Immoral Practices of Guests of Hotels and Lodginghouses.

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Licensing and Regulation of Tourist Camps and Homes, Cabin Camps, Roadhouses and Public Dance Halls.

- 72-31. License required.
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- 72-33. Application to county commissioners for license.

Sec.

- 72-34. Verification of application; disqualifications for license.
- 72-35. List of employees furnished to sheriff upon request.
- 72-36. Registration of guest.
- 72-37. False registration and use for immoral purposes made misdemeanor.
- 72-38. Operator knowingly permitting violations, guilty of misdemeanor.
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- 72-40. Revocation of operator's license.
- 72-41. Tax imposed declared additional.
- 72-42. Time of payment of license; expiration date.
- 72-43. Operation without license made misdemeanor.
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- 72-45. Application of article to municipalities.

Article 5.

Sanitation of Establishments Providing Food and Lodging.

- 72-46. State Board of Health to regulate sanitary conditions of hotels, cafes, etc.
- 72-47. Inspection; report and grade card.
- 72-48. Violation of article a misdemeanor.

ARTICLE 1.

Innkeepers.

§ 72-1. **Must furnish accommodations.**—Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel. (1903, c. 563; Rev., s. 1909; C. S., s. 2249.)

Cross References.—As to innkeeper's lien on baggage, see §§ 44-30 to 44-32. As to obtaining entertainment at hotels and boarding houses without paying therefor, see § 14-110. As to fire protection, see §§ 69-26 to 69-38.

What Constitutes Inn or Hotel.—A public inn or hotel is a public house of entertainment for all who choose to visit it, and where all transient persons who may choose to come will be received as guests, for compensation; and it does not lose its character as such by reason of its being located at a summer resort or a watering place, or by taking some as boarders by a

special contract or for a definite time. *Holstein v. Phillips*, 146 N. C. 366, 59 S. E. 1037 (1907).

Sleeping Car Not an Inn.—Though a "sleeping car" is a place for the reception of travelers, it is not an "inn." *Garrett v. Southern R. Co.*, 172 N. C. 737, 90 S. E. 903 (1916).

Boarding House.—A boarding house is as well known and as distinguishable from every other house in every city, village, and the country as an inn or tavern. It is a house where the business of keeping boarders generally is carried on, and which is held out by the owner or keeper as a

place where boarders are kept. *State v. McRae*, 170 N. C. 712, 86 S. E. 1039 (1915).

Distinction between Inn and Boarding House.—It is the publicly holding a place out as one where all transient persons who may choose to come will be received as guests for compensation that is the principal distinction between a hotel and a boarding house. *Holstein v. Phillips*, 146 N. C. 366, 59 S. E. 1037 (1907).

What Constitutes Boarding House Keeper.—The keeper of a boarding house is one who reserves the right to select and choose his patrons and takes them in only by special arrangement, and usually for a definite time. *Holstein v. Phillips*, 146 N. C. 366, 59 S. E. 1037 (1907).

Same—Not an Innkeeper.—One who entertains strangers only occasionally, although he receives compensation for it, is not an innkeeper. *State v. Mathews*, 19 N. C. 424 (1837).

Boarder and Guest Distinguished.—In 16 A. and E. Enc. (2 Ed.), it is said: "The essential difference between a boarder and a guest at an inn lies in the character in which the party comes—that is, whether he is a transient person or not, and, accordingly, one who stops at an inn as a transient or a guest, with all the rights, privileges, and liberties incident to that station. On the other hand, one who seeks accommodation with a view to permanency, as to make the place his home for the time being, is not a guest, but a boarder. The length of his stay, however, is not of itself ordinarily decisive, for he will continue to be a guest as long as he remains in the transitory condition of that relation." *Holstein v. Phillips*, 146 N. C. 366, 371, 59 S. E. 1037 (1907).

When Guest Can Be Ejected.—Guests of a hotel, and travelers or other persons entering it with the bona fide intent of becoming guests, cannot be lawfully prevented from going in, or be put out, by force, after entrance, provided they are able to pay the charges and tender the money necessary for that purpose, if requested by the landlord, unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit derived either from his inn or any other business incidental to or connected with its management and constituting a part of the provision for the wants or

pleasure of his patrons. *State v. Steele*, 106 N. C. 766, 11 S. E. 478 (1890).

Same—Breach of Rules.—A guest's right of occupancy of a hotel is dependent upon proper behavior and decent conduct and obedience to reasonable rules and regulations of the proprietors; for a breach of such implied conditions they may be summarily removed. *Hutchins v. Durham*, 118 N. C. 457, 24 S. E. 723 (1896).

Remedy of Ejected Guest.—Guests at a hotel cannot maintain ejectment if evicted, but can only sue for damages if wrongfully turned out. *Hutchins v. Durham*, 118 N. C. 457, 24 S. E. 723 (1896).

One Not a Guest Is a Licensee.—One who is in a hotel for social purposes, at the invitation of one of its guests, is a licensee, at the will of its management, and may be forbidden the premises for improper conduct. *Money v. Travelers Hotel Co.*, 174 N. C. 508, 93 S. E. 964 (1917).

Same—Can Be Expelled.—When persons, unobjectionable on account of character or race, enter a hotel not as guests, but intent on pleasure or profit, to be derived from intercourse with its inmates, they are there not of right, but under an implied license that the landlord may revoke at any time, because barring the limitation imposed by holding out inducements to the public to seek accommodation at his inn, the proprietor occupies it as his dwelling house, from which he may expel all who have not acquired rights growing out of the relation of guests, and must drive out all who, by their bad conduct, create a nuisance and prove an annoyance to his patrons. *State v. Steele*, 106 N. C. 766, 11 S. E. 478 (1890).

Force Allowable in Expelling Licensee.—The board rule laid down by Wharton (1 Cr. L., sec. 625), is that the proprietor of a public house has a right to request a person who visits it, not as a guest or on business with guests, to depart, and if he refuse, the innkeeper has a right to lay his hands gently on him and lead him out, and if resistance be made, to employ sufficient force to put him out. For so doing, he can justify his conduct on a prosecution for assault and battery. *State v. Steele*, 106 N. C. 766, 11 S. E. 478 (1890).

Other Rights of Innkeeper.—An innkeeper has, unquestionably, the right to establish a newsstand or a barbershop in his hotel, and to exclude persons who come for the purpose of vending newspapers or books, or of soliciting employment as barbers, and, in order to render his business more lucrative, he may establish a laundry or a livery stable in con-

nection with his hotel, or an innkeeper may contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses from dealing with the patrons of the public

house. After concluding such contracts, the innkeeper may make, and, after personal notice to violators, enforce a rule excluding from his hotel the agents and representatives of other livery stables who enter to solicit the patronage of his guests. *State v. Steele*, 106 N. C. 766, 11 S. E. 478 (1890).

§ 72-2. Liability for loss of baggage.—Innkeepers shall not be liable for loss, damage or destruction of the baggage or property of their guests except in case such loss, damage, or destruction results from the failure of the innkeeper to exercise ordinary, proper and reasonable care in the custody of such baggage and property; and in case of such loss, damage or destruction resulting from the negligence and want of care of the said innkeeper he shall be liable to the owner of the said baggage and property to an amount not exceeding one hundred dollars. Any guest may, however, at any time before a loss, damage or destruction of his property, notify the innkeeper in writing that his property exceeds in value the said sum of one hundred dollars, and shall upon demand of the innkeeper furnish him a list or schedule of the same, with the value thereof, in which case the innkeeper shall be liable for the loss, damage or destruction of said property because of any negligence on his part for the full value of the same. Proof of the loss of any such baggage, except in case of damage or destruction by fire, shall be prima facie evidence of the negligence of said hotel or innkeeper. (1903, c. 563, s. 2; Rev., s. 1910; C. S., s. 2250.)

Boarder and Guest Distinguished.—See note to § 72-1.

Liability Extends to Guest.—When one is received at a public inn or hotel and entertained as a guest, without any prearrangement as to terms or time, but on the implied invitation held out to the public generally, he is a transient only—a guest and not a boarder—and entitled to recover of the defendant innkeeper as such. *Holstein v. Phillips*, 146 N. C. 366, 59 S. E. 1037 (1907).

Same—Common-Law Liability.—The decisions of this State are to the effect that, in the absence of statutory regulation, the keeper of a public inn, or hotel, which is the modern and more frequently used term, is responsible to his guest for the safety of the latter's goods, chattels, and money, when placed *infra hospitium* and which he has with him for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause except the act of God or the public enemy, or the fault of the guest himself or his agents or servants. *Quinton v. Courtney*, 2 N. C. 40 (1794); *Neal v. Wilcox*, 49 N. C. 146 (1856); *Holstein v. Phillips*, 146 N. C. 366, 59 S.

E. 1037 (1907).

Ordinary Care Now Required.—Even at a public inn or hotel, one who holds the position of a regular boarder or lodger can only hold the proprietor to the exercise of ordinary care on the part of himself and his employees. *Holstein v. Phillips*, 146 N. C. 366, 59 S. E. 1037 (1907).

Failure to comply with § 72-6 renders innkeeper liable as at common law. *Holstein v. Phillips*, 146 N. C. 366, 59 S. E. 1037 (1907).

Liability for Personal Injuries.—The innkeeper is not insurer of his guest's personal safety, but his liability does extend to injuries received by the guest from being placed in an unsafe room. This is a matter peculiarly within the innkeeper's knowledge and entirely beyond the control of the guest. In that particular he is peculiarly within the innkeeper's power and protection. *Patrick v. Springs*, 154 N. C. 270, 70 S. E. 395 (1911).

Same—Negligence of Guest.—The guest must use reasonable care on his part to protect himself, and if he is himself negligent and could have avoided the injury by due care, he cannot recover. *Patrick v. Springs*, 154 N. C. 270, 70 S. E. 395 (1911).

§ 72-3. Safekeeping of valuables.—It is the duty of innkeepers, upon the request of any guest, to receive from said guest and safely keep money, jewelry and valuables to an amount not exceeding five hundred dollars; and no innkeeper shall be required to receive and take care of any money, jewelry or other

valuables to a greater amount than five hundred dollars: Provided, the receipt given by said innkeeper to said guest shall have plainly printed upon it a copy of this section. No innkeeper shall be liable for the loss, damage or destruction of any money or jewels not so deposited. (1903, c. 563, s. 3; Rev., s. 1911; C. S., s. 2251.)

§ 72-4. Loss by fire.—No innkeeper shall be liable for loss, damage or destruction of any baggage or property caused by fire not resulting from the negligence of the innkeeper or by any other force over which the innkeeper had no control. Nothing herein contained shall enlarge the limit of the amount to which the innkeeper shall be liable as provided in preceding sections. (1903, c. 563, s. 4; Rev., s. 1912; C. S., s. 2252.)

Cross Reference.—As to fire protection, see §§ 69-26 to 69-38.

§ 72-5. Negligence of guest.—Any innkeeper against whom claim is made for loss sustained by a guest may show that such loss resulted from the negligence of such guest or of his failure to comply with the reasonable and proper regulations of the inn. (1903, c. 563, s. 7; Rev., s. 1914; C. S., s. 2253.)

Cross References.—As to liability for innkeeper's lien on baggage, see §§ 44-30 to 44-32. As to innkeeper's liability for personal injuries and effect of negligence of guest, see note to § 72-2.

§ 72-6. Copies of this article to be posted.—Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this article and of all regulations relating to the conduct of guests. This chapter shall not apply to innkeepers, or their guests, where the innkeeper fails to keep such notices posted. (1903, c. 563, ss. 5, 6; Rev., s. 1913; C. S., s. 2254.)

Effect of Noncompliance with Section.—Where the provision of this section is not complied with the principle of the common law obtains and the keeper is liable as at common law. *Holstein v. Phillips*, 146 N. C. 366, 59 S. E. 1037 (1907).

§ 72-7. Admittance of dogs to bedrooms.—It shall be unlawful for any innkeeper or guest owning, keeping, or who has in his care a dog or dogs, to permit such a dog or dogs admittance to any bedroom or rooms used for sleeping purposes in any inn or hotel.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall pay a fine not to exceed fifty dollars or be imprisoned not more than thirty days. (1927, c. 67.)

Cross Reference.—As to special provisions for "seeing-eye" dogs, see § 67-29.

ARTICLE 2.

Sanitary Inspection and Conduct.

§§ 72-8 to 72-29: Repealed by Session Laws 1945, c. 829, s. 4.

Cross Reference.—For sanitation of establishments providing food and lodging, see §§ 72-46 to 72-48.

ARTICLE 3.

Immoral Practices of Guests of Hotels and Lodginghouses.

§ 72-30. Registration to be in true name; addresses; peace officers.—No person shall write, or cause to be written, or if in charge of a register

knowingly permit to be written, in any register in any lodginghouse or hotel any other or different name or designation than the true name or names in ordinary use of the person registering or causing himself to be registered therein. Any person occupying any room or rooms in any lodginghouse or hotel shall register or cause himself to be registered where registration is required by such lodginghouse or hotel. Any person registering or causing himself to be registered at any lodginghouse or hotel, shall write, or cause to be written, in the register of such lodginghouse or hotel the correct address of the person registering, or causing himself to be registered. Any person violating any provision of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding two hundred dollars (\$200). This section shall not apply to any peace officer of this State who shall privately give his true name to the clerk or proprietor of such hotel or lodginghouse. (1921, c. 111; C. S., s. 2283(v).)

ARTICLE 4.

Licensing and Regulation of Tourist Camps and Homes, Cabin Camps, Roadhouses and Public Dance Halls.

§ 72-31. License required.—Every person, firm or corporation engaged in the business of operating outside the corporate limits of any city or town in this State a tourist camp, cabin camp, tourist home, roadhouse, public dance hall, or any other similar establishment by whatever name called, where travelers, transient guests, or other persons are or may be lodged for pay or compensation, shall, before engaging in such business, apply for and obtain from the board of county commissioners of the county in which such business is to be carried on a license for the privilege of engaging in such business and shall pay for such license an annual tax in the amount of two dollars (\$2.00). (1939, c. 188, s. 1.)

Editor's Note.—For comment on this article, see 17 N. C. Law Rev. 335.

What Must Be Shown to Convict of Operating a "Roadhouse."—This article is regulatory, involving police power as well as taxing power, and the words, "tourist camp, cabin camp, tourist home, roadhouse, public dance hall, or other similar establishment," in this section are qualified

by the words "where travelers, transient guests, or other persons are or may be lodged for pay," so that to convict a person operating a "roadhouse" and impose the penalties of § 72-43, it must be shown that such person lodged or offered to lodge transient guests. *State v. Campbell*, 223 N. C. 828, 28 S. E. (2d) 499 (1944).

§ 72-32. Exemptions.—This article shall not apply to hotels and inns within the definition of § 72-9, nor to persons who incidental to their principal business or occupation accept from time to time seasonal boarders in their private residences: Provided, however this shall not be construed to exempt from the provisions of this article residences maintained in connection with a store or other establishment operated for the sale of articles of merchandise. (1939, c. 188, s. 2.)

Editor's Note.—Section 72-9, referred to in this section, has been repealed. It defined "hotel" as "any inn or public lodginghouse where transient guests are

lodged for pay." It also defined the term "transient guest" as "one who puts up for less than one week at a time at such hotel."

§ 72-33. Application to county commissioners for license.—Every person, firm or corporation making application for license to engage in the business described in § 72-31 shall make application to the board of county commissioners in the county in which such business is to be engaged in and the application shall contain:

(a) The name and residence of the applicant and the length of the residence within the State of North Carolina.

(b) The address and place for which such license is desired.

(c) The name of the owner of the premises upon which the business licensed is to be carried on.

(d) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction.

(e) That such applicant is of good moral character and has never been convicted of a felony involving moral turpitude, or adjudged guilty of violating either the State or federal prohibition laws within the last two years prior to the filing of the application. (1939, c. 188, s. 3.)

§ 72-34. Verification of application; disqualifications for license. —

The application prescribed in § 72-33 must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant, or otherwise, that such applicant has been convicted of a felony involving moral turpitude or adjudged guilty of violating either State or federal prohibition laws within the last two years prior to the filing of the application, or within two years from the completion of sentence thereon, the license herein provided for shall not be granted, unless it shall appear to the satisfaction of the board of county commissioners that the licensed premises will be operated in a lawful manner; in which case they may, in their discretion, issue such license. Before any such license shall be issued, the governing body of the county shall be satisfied that the statements required by § 72-33 are true. Every establishment named in this article shall be subject to inspection by the State Board of Health and the county health authorities in the county in which such business is carried on. (1939, c. 188, s. 4.)

§ 72-35. List of employees furnished to sheriff upon request. —

At any time upon request of the sheriff of the county in which such business is carried on, the operator of every establishment named in this article shall furnish said sheriff with a list of all employees who are employed by him in connection with said business; and, in every instance when such an operator goes out of business or there is a change of ownership or management thereof, such operator shall immediately file with the clerk of the board of county commissioners of the county in which such business is carried on a notice to this effect, giving the name and address of the purchaser or the new owner or manager thereof. (1939, c. 188, s. 5.)

§ 72-36. Registration of guest.—Any person or persons occupying any room or rooms in a tourist camp, cabin camp, tourist home, roadhouse, or any other similar establishment by whatever name called, shall register or cause himself to be registered before occupying the same, and if traveling by motor vehicle shall register at the same time the automobile license tag of such motor vehicle and the name of the manufacturer of such motor vehicle; and no person shall write or cause to be written, or, if in charge of a register, knowingly permit to be written in any register in any of the establishments herein named, any other or different name or designation than the true name or names in ordinary use of the person registering or causing himself to be registered therein, or the true name of the manufacturer of such motor vehicle or the correct license plate and number thereof. Every person to whom a license is issued under the provisions of this article shall provide a permanent register for the purposes set forth herein. (1939, c. 188, s. 6.)

Cited in *State v. Campbell*, 223 N. C. 828,
28 S. E. (2d) 499 (1944).

§ 72-37. False registration and use for immoral purposes made misdemeanor.—Any man or woman found occupying the same room in any es-

establishment within the meaning of this article for any immoral purpose, or any man or woman falsely registering as or otherwise representing themselves to be husband and wife in any such establishment shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 7.)

Cited in State v. Campbell, 223 N. C. 828, 28 S. E. (2d) 499 (1944).

§ 72-38. Operator knowingly permitting violations, guilty of misdemeanor.—Any person being the operator or keeper of any establishment within the meaning of this article who shall knowingly permit any man or woman to occupy any room in any establishment within the meaning of this article for any immoral purposes, or who shall knowingly permit any man or woman to falsely register as husband and wife in such an establishment, shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 8.)

Tourist Camp as Nuisance.—Under § 19-2 the operation of a tourist camp in a disorderly manner may be enjoined or it may be abated as a nuisance against public morals. *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).

§ 72-39. Inducing female to enter tourist camps, etc., for immoral purpose made misdemeanor.—Any person who shall knowingly persuade, induce or entice, or cause to be persuaded, induced or enticed, any woman or girl to enter any establishment within the meaning of this article for the purpose of prostitution or debauchery, or for any other immoral purpose, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 9.)

§ 72-40. Revocation of operator's license.—In addition to the penalty herein prescribed for a violation of this article, the court, before whom such person is tried and where a conviction is had, shall have the power to revoke the license to operate the establishment or establishments licensed under this article, and whenever any person, firm or corporation has been so convicted, the court, if it shall appear that said premises were being operated in violation of the law with the knowledge, consent or approval of the owner thereof, shall have the authority to prohibit the issuance of any similar license for said premises to any person for a term of six months after the revocation of said license. (1939, c. 188, s. 10.)

§ 72-41. Tax imposed declared additional.—The tax imposed by this article shall be in addition to all other licenses and taxes levied by law upon the business taxed hereunder. (1939, c. 188, s. 11.)

§ 72-42. Time of payment of license; expiration date.—Licenses issued under this article shall be due and payable in advance annually on or before the first day of June of each year, or at the date of engaging in such business, and shall expire on the thirty-first day of May of each year, and shall be for the full amount of the tax prescribed, regardless of the date such business is begun. Upon the expiration of the license herein required, it shall be unlawful for any person, firm or corporation to continue such business until a new license is applied for and obtained for the privilege of engaging in such business, as in this article required. (1939, c. 188, s. 12.)

§ 72-43. Operation without license made misdemeanor.—It shall be unlawful for any person, firm or corporation to engage in such business without first obtaining a license therefor. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 13.)

Cross Reference.—See note to § 72-31.

§ 72-44. **Violations of article made misdemeanor.**—Unless another penalty is in this article or by the laws of this State provided, any person violating any of the provisions of this article shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 14.)

§ 72-45. **Application of article to municipalities.**—The governing body of any city or town shall have the authority to make any or all of the provisions of this article applicable to any business as defined herein which may be located in the limits of any such city or town. (1939, c. 188, s. 15.)

Local Modification.—Bladen, Caswell, Graham, Hyde, Moore: 1939, c. 188, s. 18; Guilford: 1939, c. 188, s. 16.

ARTICLE 5.

Sanitation of Establishments Providing Food and Lodging.

§ 72-46. **State Board of Health to regulate sanitary conditions of hotels, cafes, etc.**—For the better protection of the public health, the State Board of Health is hereby authorized, empowered, and directed to prepare and enforce rules and regulations governing the sanitation of hotels, cafes, restaurants, tourist homes, tourist camps, summer camps, lunch and drink stands, sandwich manufacturing establishments, and all other establishments where food is prepared, handled, and served to the public at wholesale or retail for pay, or where transient guests are served food or provided with lodging for pay. The State Board of Health is also authorized, empowered, and directed to prepare a system of grading all such places, and no such establishment shall operate which receives a grade less than C. (1941, c. 309, s. 1.)

§ 72-47. **Inspections; report and grade card.**—The officers, sanitarians or agents of the State Board of Health are hereby empowered and authorized to enter any hotel, cafe, restaurant, tourist home, tourist camp, summer camp, lunch and drink stand, sandwich manufacturing establishment, and all other establishments where food is prepared, handled or served to the public at wholesale or retail for pay, or where transient guests are served food or provided lodging for pay, for the purpose of making inspections, and it is hereby made the duty of every person responsible for the management or control of such hotel, cafe, restaurant, tourist home, tourist camp, summer camp, lunch and drink stand, sandwich manufacturing establishment, or other establishment to afford free access to every part of such establishment, and to render all aid and assistance necessary to enable the sanitarians or agents of the State Board of Health to make a full, thorough, and complete examination thereof, but the privacy of no person shall be violated without his or her consent. It shall be the duty of the sanitarian or agent of the State Board of Health to leave with the management, or person in charge at the time of the inspection, a copy of his inspection report and a grade card showing the grade of such place, and it shall be the duty of the management, or person in charge, to post said card in a conspicuous place where it may be readily observed by the public. Such grade card shall not be removed by anyone, except an authorized sanitarian or agent of the State Board of Health, or upon his instruction. (1941, c. 309, s. 2.)

§ 72-48. **Violation of article a misdemeanor.**—Any owner, manager, agent, or person in charge of a hotel, cafe, restaurant, tourist home, tourist camp, summer camp, lunch and drink stand, sandwich manufacturing establishment, or any other establishment where food is prepared, handled, or served to the public at wholesale or retail for pay, or where transient guests are served food or provided with lodging for pay, or any other person who shall willfully obstruct, hinder, or interfere with a sanitarian, agent, or officer of the State Board of

Health in the proper discharge of his duty, or who shall be found guilty of violating any of the other provisions of this article, or any of the rules and regulations that may be provided under this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten (\$10.00) dollars, nor more than fifty (\$50.00) dollars, or imprisoned for not more than thirty days, and each day that he shall fail to comply with this article, or operate a place with a rating of less than a grade of C shall be a separate offense. (1941, c. 309, s. 3.)

Chapter 73.

Mills.

Article 1.

Public Mills.

Sec.

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Article 4.

Recovery of Damages for Erection of Mill.

73-25. Action in superior court; procedure.

73-26. When dams, etc., abated as nuisances.

73-27. Judgment for annual sum as damages.

73-28. Final judgment; costs and execution.

ARTICLE 1.

Public Mills.

§ 73-1. **Public mills defined.**—Every grist or grain mill, however powered or operated, which grinds for toll is a public mill. (1777, c. 122, s. 1; R. C., c. 71, s. 1; Code, s. 1846; Rev., s. 2119; C. S., s. 2531; 1947, c. 781.)

Editor's Note.—The 1947 amendment re-wrote this section. (1875); *Branch v. Wilmington*, etc., R. Co., 77 N. C. 347 (1877).

Cited in *Hyatt v. Myers*, 73 N. C. 232

§ 73-2. **Miller to grind according to turn; tolls regulated.**—All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the Indian corn and wheat, and one-fourteenth part for chopping grain of any kind; and every miller and keeper of a mill making default therein shall, for each offense, forfeit and pay five dollars to the party injured: Provided, that the owner may grind his own grain at any time. (1777, c. 122, s. 10; 1793, c. 402; R. C., c. 71, s. 6; Code, s. 1847; 1905, c. 694; Rev., s. 2120; 1907, c. 367; C. S., s. 2532.)

Local Modification.—Bertie, Hertford, ampton: 1929, c. 129; Lenoir: 1929, c. 139; Hyde: 1933, c. 150; Chowan: 1937, c. 4; Pamlico, Robeson: 1929, c. 311; Pender: Cleveland: 1933, c. 158; Franklin, North- 1933, c. 298; Sampson: 1937, c. 164.

§ 73-3. Measures to be kept; tolls by weight or measure.—All millers shall keep in their mills the following measures, namely, a half bushel and peck of full measure, and also proper toll dishes for each measure; but the toll allowed by law may be taken by weight or measure at the option of the miller and customer. (1777, c. 122, s. 11; R. C., c. 71, s. 7; Code, s. 1848; 1885, c. 202; Rev., s. 2121; C. S., s. 2533.)

§ 73-4. Keeping false toll dishes misdemeanor.—If any owner, by himself or servant, keeping any mill, shall keep any false toll dishes, he shall be guilty of a misdemeanor. (1777, c. 122, s. 11; R. C., c. 71, s. 7; Code, s. 1848; Rev., s. 3679; C. S., s. 2534.)

Words "False Toll Dish" Defined.—The words "false toll dish," as used in the statute, mean a toll dish measuring more than one-eighth of a half bushel. *State v. Perry*, 50 N. C. 252 (1858).

The measure kept need not be averred in the indictment. *State v. Perry*, 50 N. C. 252 (1858).

Sufficiency of Evidence.—An indictment for keeping false toll dishes was suf-

ficiently supported by proving that measures of one-seventh and one-sixth of a half bushel were kept. *State v. Perry*, 50 N. C. 252 (1858).

But an indictment for keeping a false toll dish is not sustained by proof that the mill owner took one-sixth part of each half bushel with a half gallon toll dish. *State v. Nixon*, 50 N. C. 257 (1858).

ARTICLE 2.

Condemnation for Mill by Owner of One Bank of Stream.

§ 73-5. Special proceedings; parties; summons.—Any person wishing to build a water mill, who has land on only one side of a stream, shall issue a summons returnable to the superior court of the county in which the land sought to be condemned, or some part of it, lies, against the persons in possession and the owners of the land on the opposite side of the stream, and against such others as have an interest in the controversy, and the procedure shall be as is provided in other special proceedings, except so far as the same may be modified by this chapter. (1868-9, c. 158, s. 1; Code, s. 1849; Rev., s. 2122; C. S., s. 2535.)

Cross Reference.—For full treatment of eminent domain proceedings, see § 40-1 et seq.

Corporation That Erects Mills.—The legislature, in providing for the condemnation of land for the purpose of erecting mills thereon, classifies a corporation that erects mills generally as one of those private corporations which enjoy a prerogative franchise because of some powers or duties, which they are to perform for the public, and to that extent such a corporation is quasi public. *Bass v. Roanoke Nav., etc., Co.*, 111 N. C. 439, 16 S. E. 402 (1892).

Withdrawal of Verbal Consent to Maintaining Dam.—The plaintiff built a mill, and, with the verbal consent of the defend-

ant, constructed a dam across a stream upon land of the latter. After the mill had been in operation for several years, the defendant withdrew his consent to the further use of the land for this purpose, and notified the plaintiff to level the dam, which he failed to do. Thereupon the defendant caused the obstruction to be removed. In an action by the plaintiff for damages, it was held that the plaintiff should have taken a conveyance of the easement, or pursued the remedy pointed out for the condemnation of land for mill purposes. *Kivett v. McKeithan*, 90 N. C. 106 (1884).

Cited in *Benbow v. Robbins*, 71 N. C. 338 (1874); *Gwaltney v. Scottish Carolina Timber, etc., Co.*, 111 N. C. 547, 16 S. E. 692 (1892).

§ 73-6. Commissioners to be appointed.—If no just cause is shown against the building of such mill, the court shall appoint three freeholders, one of whom shall be chosen by the plaintiff, another by the defendants, and the third by the court, or if the plaintiff or defendants refuse or fail, or unreasonably delay to name a commissioner, the court shall name one in lieu of such delinquent party. These commissioners may be changed from time to time by permission

of the court for just cause shown. (1868-9, c. 158, s. 2; Code, s. 1850; Rev., s. 2123; C. S., s. 2536.)

Right of Appeal.—Defendants have a view, lay off and value land for a millsite. right to appeal from an interlocutory order Minor v. Harris, 61 N. C. 322 (1867). of the court appointing freeholders to

§ 73-7. Meeting to be appointed and commissioners notified; witnesses examined.—The third commissioner shall cause the others to be notified of the time and place of meeting, and shall preside at their meetings. They may, if necessary, summon and examine witnesses, who shall be sworn by the presiding commissioner. Any commissioner named by or for either of the parties who, without just cause, fails to attend any meeting notified by the president, shall forfeit and pay to the opposite party fifty dollars; and if the president, in like manner, unreasonably delays to notify the other commissioners of a meeting, or fails to attend one that is appointed, he shall forfeit and pay to the plaintiff fifty dollars, and to the defendant a like sum. (1868-9, c. 158, s. 3; Code, s. 1851; Rev., s. 2124; C. S., s. 2537.)

§ 73-8. Oath and duty of commissioners.—The commissioners shall be sworn by some officer qualified to administer an oath to act impartially between the parties, and to perform the duties herein imposed on them honestly and to the best of their ability. They shall view the premises where the mill is proposed to be built, and shall lay off and value a portion of the land of the plaintiff, not to exceed one acre in area, and an equal area of land of the defendants opposite thereto, and report their proceedings to the court within a reasonable time, not exceeding sixty days. (1868-9, c. 158, s. 4; Code, s. 1852; Rev., s. 2125; C. S., s. 2538.)

§ 73-9. Contents of commissioners' report.—The report of the commissioners shall set forth:

1. The location, quantities and value of the several areas laid off by them.
2. Whether either of them includes houses, gardens, orchards or other immediate conveniences.
3. Whether the proposed mill will overflow another mill or create a nuisance in the neighborhood.
4. Any other matter upon which they have been directed by the court to report, or which they may think necessary to the doing of full justice between the parties. (1868-9, c. 158, s. 5; Code, s. 1853; Rev., s. 2126; C. S., s. 2539.)

§ 73-10. When building not to be allowed.—If the area laid off on the land of either party take away houses, gardens, orchards, or other immediate conveniences; or if the mill proposed will overflow another mill, or will create a nuisance in the neighborhood, the court shall not allow the proposed mill to be built. (1868-9, c. 158, s. 6; Code, s. 1854; Rev., s. 2127; C. S., s. 2540.)

Cross Reference.—As to restrictions on condemnation of dwelling houses, gardens and burial grounds, see § 40-10.

In General.—The court is forbidden to confirm a report which takes away houses, etc., put on the land by the owner, or on it before the proceedings were commenced. Burgess v. Clark, 35 N. C. 109 (1851).

Denial of Injunction.—An injunction will not be granted to restrain the erection of a dam when money damages will suffice. Burnett v. Nicholson, 72 N. C. 334 (1875).

§ 73-11. Power of court on return of report.—If the report is in favor of building the proposed mill, and is confirmed, then the court may, in its discretion, allow either the plaintiff or defendant to erect such mill at the place proposed, and shall order the costs, and the value of the opposite area, to be paid by the party to whom such leave is granted; and upon such payment, the party to whom such leave is granted shall be vested with title in fee to the opposite area. Such payment may be made into court for the use of the parties entitled thereto. (1868-9, c. 158, s. 7; Code, s. 1855; Rev., s. 2128; C. S., s. 2541.)

§ 73-12. **Time for beginning and building mill; to be kept up.**—The person to whom leave is granted shall, within one year, begin to build such water mill, and shall finish the same within three years; and thereafter keep it up for the use and ease of its customers, or such as shall be customers to it; otherwise, the said land shall return to the person from whom it was taken, or to such other person as shall have his right, unless the time for finishing the mill, for reasons approved by the court, be enlarged. (1868-9, c. 158, s. 8; Code, s. 1856; Rev., s. 2129; C. S., s. 2542.)

§ 73-13. **Rebuilding mill after destruction.**—If a water mill belonging to a person of unsound mind, a minor, or to one who is imprisoned, should fall, burn or be otherwise destroyed, such person and his heirs shall have three years from the removal of such disability within which to rebuild or repair such mill. (1868-9, c. 158, s. 9; Code, s. 1857; 1903, c. 74, ss. 1, 2; Rev., s. 2130; C. S., s. 2543; 1947, c. 781.)

Editor's Note.—The 1947 amendment rewrote this section.

ARTICLE 3.

Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite.

§ 73-14. **Special proceedings; summons.**—Any person who has land on one or both sides of a stream and wishes to build a water mill, or has a water mill already built and may find it necessary for the better operation of said mill or the building of the said mill to convey water either to or from his mill by ditch, waterway, drain, millrace or tailrace, or in any other manner, over the lands of any other person, or erect a dam to pond said water over the lands of any other person, or raise any dam already built, may make application by petition in writing to the clerk of the superior court of the county in which the said lands to be affected, or a greater part thereof, are situated, for the right to so convey the said water or pond the same by the erection of a dam or the raising of any dam already built; and the procedure shall be as in other special proceedings. (1905, c. 534, s. 1a, k; Rev., s. 2131; C. S., s. 2544.)

§ 73-15. **Contents of petition.**—The petition shall specify the lands to be affected, the name of the owner of said lands, and the character of the ditch, race, waterway or drain or pond intended to be made, and said owner or owners shall be made parties defendant. The petition shall state the distance desired to be condemned on each side of the ditch, waterway or drain to be constructed or erected, and not more than thirty feet from each bank can be condemned. (1905, c. 534, s. 1b; Rev., s. 2132; C. S., s. 2545.)

§ 73-16. **Commissioners to be appointed.**—Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the said lands by the contemplated work, and shall issue a notice to them to meet upon the premises on a day specified, not to exceed ten days from the date of said notice. (1905, c. 534, s. 1c; Rev., s. 2133; C. S., s. 2546.)

§ 73-17. **Oath and duty of commissioners.**—The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by the said work and assess the damage thereto and make report thereof under their hands and seals to the clerk from whom the notice issued, who shall have power to confirm the same. (1905, c. 534, s. 1d; Rev., s. 2134; C. S., s. 2547.)

§ 73-18. **Assessment of damages.**—In determining the amount of such compensation to be paid to the owners of the said lands and assessing the damages thereto by reason of the erection or construction of such waterway, ditch, drain or dam, they shall make an allowance or deduction on account of any benefits which the parties in interest may derive from the construction or erection of such waterway, ditch, drain or dam, and shall ascertain the damages, as near as may be, to the extent it may damage each acre of land so appropriated or occupied by the said millowner. The damage assessed by the appraisers under this article shall include all damages that the owners shall thereafter suffer or be entitled to by reason of the construction of the said waterways, races, ditches or dams. (1905, c. 534, s. 1e, m; Rev., s. 2135; C. S., s. 2548.)

§ 73-19. **When commissioners' report not to be affirmed.**—If the area laid off on the lands of either party take away houses, gardens, orchards or immediate conveniences, or if the mill proposed or erected will overflow another mill or pond water within two hundred feet of another mill, or will overflow or pond water within two hundred feet of the millsite or premises of a person who has the right under this chapter, or by the authority of law, to rebuild a mill after its destruction, or if the mill create a nuisance in the neighborhood, the court shall not allow the report of the appraisers to be affirmed. (1905, c. 534, s. 1g; Rev., s. 2136; C. S., s. 2549.)

§ 73-20. **When petitioner may enter on lands.**—After the return of the appraisers and the confirmation thereof the petitioner shall have full right and power to enter upon said lands and make such ditches, waterways, drains, races or other necessary works and construct such dams: Provided, he has first paid or tendered the damage assessed as above to the owner of such lands or his known or recognized agent in this State. If the owner is a nonresident and has no known agent in this State, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner: Provided, further, that the millowner shall not be compelled to pay said damages so assessed unless he shall enter upon such lands and make ditches, drains or other works or erect such dam. (1905, c. 534, s. 1f; Rev., s. 2137; C. S., s. 2550.)

§ 73-21. **Owners of mills and millsites protected.**—No other person shall have the right to erect or maintain any dam, ditch, waterway, drain or race that will overflow or pond water within two hundred feet of the millsite or premises of any person or body corporate who shall have erected a mill, dam, ditch, drain or race under the provisions of this chapter, or of any millsite owned by any person who has the right under this chapter, or by the authority of law, to rebuild a mill after its destruction. When any person violates the provisions of this section the owner of said mill or millsite shall have a right of action against said person to tear down said dam or other works so built or erected to the extent herein forbidden and to abate the same as prescribed by law for the abatement of nuisances. (1905, c. 534, s. 1h; Rev., s. 2138; C. S., s. 2551.)

§ 73-22. **Report to be registered.**—The petitioner, or any other person interested, may have the said assessment registered upon the certificate of the clerk, and shall pay the register the usual legal fees for registering such instruments in his office. (1905, c. 534, s. 1i; Rev., s. 2139; C. S., s. 2552.)

§ 73-23. **Fees of appraisers.**—Each appraiser shall be entitled to a fee of one dollar for each day actually employed in making said assessment, to be paid by the petitioner. (1905, c. 534, s. 1j; Rev., s. 2140; C. S., s. 2553.)

§ 73-24. **Obstructing millraces or dams a misdemeanor.**—Any person who shall obstruct any drain, ditch or dam constructed under this article shall be guilty of a misdemeanor. (1905, c. 534, s. 1l; Rev., s. 3381; C. S., s. 2554.)

ARTICLE 4.

Recovery of Damages for Erection of Mill.

§ 73-25. Action in superior court; procedure.—Any person conceiving himself injured by the erection of any gristmill, or mill for other useful purposes, may issue his summons returnable before the judge of the superior court of the county where the damaged land or any part thereof lies, against the persons authorized to be made parties defendant. In his complaint he shall set forth in what respect and to what extent he is injured, together with such other matters as may be necessary to entitle him to the relief demanded. The court shall then proceed to hear and determine all the questions of law and issues of fact arising on the pleadings as in other civil actions. (1876-7, c. 197, s. 1; Code, s. 1858; Rev., s. 2141; C. S., s. 2555.)

Cross Reference.—As to damages, see § 73-27 and note.

Exclusiveness of Remedy.—Ordinarily, in cases to which this section applies, the remedy given must be pursued. *Kinsland v. Kinsland*, 186 N. C. 760, 120 S. E. 358 (1923).

Section Does Not Apply to Trespass.—The remedy under this section does not apply to an action for damages for a trespass committed on the plaintiff's land. *Henley v. Wilson*, 77 N. C. 216 (1877).

Sufficiency of Description in Petition.—A petition for damages, caused by the erection of a mill upon the stream below, which described it as a "grist-mill" without calling it a public mill, or a grist-mill grinding for toll, was sufficient. *Little v. Stanback*, 63 N. C. 285 (1869).

Procedure to Assess Damages.—Under an early statute, it was held that, in a petition for damages for ponding water back, where in the county court the plaintiff's right to relief was denied, the proper course was to impanel a jury to try the allegations made in bar of such right, and if such allegations were found for the plaintiff, the proper course was then to order a jury on the premises to assess the damages, but in all cases where there was an appeal to the superior court, the facts were to be ascertained by a jury at bar, but in that court, those issues pertaining to the question of relief, and those issues as to that of damages, were to be separately submitted. *Jones v. Clarke*, 52 N. C. 418 (1860).

Proper Issue.—In an action for damages resulting from ponding water upon plaintiff's land, caused by the erection of defendant's milldam, an issue involving the amount of annual damage done thereby is the proper one to be submitted to the jury. *Hester v. Broach*, 84 N. C. 252 (1881).

Easement Limited to Mill Purposes.—Where the lower proprietor has acquired an easement in the lands of the upper

proprietor to pond water back thereon from a dam erected on his own land to operate a public mill, the exercise of this right under the easement does not affect the title to the submerged land of the upper proprietor or subject the lower proprietor to an action for damages so as to start the running of the statute of limitations, nor will this use of the water ponded on the land of the upper proprietor by the lower proprietor for fishing with hook and seine ripen into his exclusive use for these purposes. *Thomas v. Morris*, 190 N. C. 244, 129 S. E. 623 (1925).

Liability for Defect in Bridge.—Where water was thrown, by the erection of a milldam, upon the highway, and the former proprietor of the mill had built bridges over the water, which, during his ownership, he repaired, and which were also repaired by the present proprietor, who did no other work on the roads, it was held that the present proprietor was answerable in damages to an individual who sustained an injury by reason of a defect in one of the bridges. *Mulholland v. Brownrigg*, 9 N. C. 349 (1823).

Proof of Ownership.—In an action for overflowing the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support this action against a wrongdoer. *Yeargain v. Johnston*, 1 N. C. 180 (1800).

Plaintiff Entitled to Nominal Damage.—Instructions to a jury, that if a plaintiff sustains no injury from the ponding of water upon his mill wheel, still he is entitled to nominal damages, are correct. *Little v. Stanback*, 63 N. C. 285 (1869).

A motion for a new trial for failure of the court to instruct the jury to return at least nominal damages, because some overflow was admitted, it appearing that no such instruction was asked, that the admission was qualified and the testimony conflicting, and that there was evidence to show that no damage was actually done,

was properly refused in the discretion of the court. *McGee v. Fox*, 107 N. C. 766, 12 S. E. 369 (1890).

Same—Injury Unnecessary.—In an action for damages for the maintenance of a dam across a stream, the plaintiff is entitled to recover nominal damages, without showing an injury capable of being estimated, or one that is perceptible in the sense that it is attended with some actual damage; for the mere fact of ponding back the water on plaintiff's premises is sufficient to entitle him to nominal damages. *Chaffin v. Fries Mfg. Co.*, 135 N. C. 95, 47 S. E. 226 (1904), rehearing denied in 136 N. C. 364, 48 S. E. 770 (1904).

If the water be ponded back on the land of another by the erection of a milldam, he is entitled, in the remedy by petition, to nominal damages, whether there be actual damage or not. *Wright v. Stowe*, 49 N. C. 516 (1857).

Measure of Damages.—The measure of damages for backing water on land by means of a dam is the difference in the value of the land before and after the injury complained of. *Borden v. Carolina Power, etc., Co.*, 174 N. C. 72, 93 S. E. 442 (1917).

Permanent Damages.—In an action for backing water on plaintiff's land by means of a dam, the plaintiff is entitled to permanent damages, past, present, and prospective. *Borden v. Carolina Power, etc., Co.*, 174 N. C. 72, 93 S. E. 442 (1917). See § 73-27.

Damages to Health.—Damages may be given for injury to health as well as to land by overflowing. *Gillet v. Jones*, 18 N. C. 339 (1835). See also, *Waddy v. Johnson*, 27 N. C. 333 (1844).

Exemplary Damages.—In an action for overflowing plaintiff's land by the erection of a milldam, where a recovery has been had before, and the nuisance was not abated, plaintiff can recover sufficient exemplary damages to compel an abatement of the nuisance. *Carruthers v. Tillman*, 2 N. C. 501 (1797).

§ 73-26. When dams, etc., abated as nuisances.—When damages are recovered in final judgment in such civil actions, and execution issues and is returned unsatisfied, and the plaintiff is not able to collect the same either because of the insolvency of the defendant or by reason of the exemptions allowed to defendant, the judge shall, on the facts being made to appear before him by affidavit or other evidence, order that the dam, or portion of the dam, or other cause creating the injury, shall be abated as a nuisance, and he shall have power to make all necessary orders to effect this purpose. (1876-7, c. 197, s. 3; Code, s. 1859; Rev., s. 2142; C. S., s. 2556.)

When Section Applicable.—This section applies where water is ponded upon the plaintiff's land by a dam constructed on the property of another or where a trespass

Where Damage Suffered Only When Stream Is Swollen.—Where the erection of a mill on a stream causes the water to overflow the land of a proprietor above only when the stream is swollen, that circumstance will not excuse such party from damages altogether, but will only diminish the quantum of such damages. *Pugh v. Wheeler*, 19 N. C. 50 (1836).

Decrease of Custom.—Where, in suit for damages for ponding water, it appeared that plaintiff sustained injury to his mill by reason of defendant's erecting another mill and dam lower down on the same stream, the measure of damages was the amount of the damages actually sustained by plaintiff up to the time of trial; and, in estimating the same, the decrease of custom (in the matter of toll) could not be considered. *Burnett v. Nicholson*, 86 N. C. 99 (1882).

Counterclaim Inadmissible.—In an action for damages for ponding water back on plaintiffs' land, it was no error for the judge to charge that defendants could not set up as offset and counterclaim any benefit which plaintiff had received thereby, and add that the jury should, upon all the evidence, ascertain if plaintiff had sustained any damage. *McGee v. Fox*, 107 N. C. 766, 12 S. E. 369 (1890).

Action May Be Brought at Any Time.—Ponding a stream so as to throw the water over the land of a proprietor above, which the water did not before cover, gives him a good cause of action at any time when he may wish to use his land, unless he has granted the easement, either actually, or by presumption of law from the length of time he has permitted the easement to be enjoyed. *Pugh v. Wheeler*, 19 N. C. 50 (1836).

Easement Not Purchased by Payment of Judgment.—The payment of a judgment for ponding water by a milldam does not amount to the purchase by defendant of an easement to pond back water on plaintiff's land. *Candler v. Asheville Elec. Co.*, 135 N. C. 12, 47 S. E. 114 (1904).

of like character is committed, because at common law an action could be brought each day so long as the trespass continued. But the statute does not apply and was never intended to apply to an actual entry upon the complainant's premises and the construction thereon of a dam for the purpose of ponding water and retaining possession. *Kinsland v. Kinsland*, 188 N. C. 810, 125 S. E. 625 (1924).

Denial of Injunction.—An injunction will not be granted to restrain the erection of a dam whereby the mill wheel of the plaintiff is flooded so as to become useless. *Burnett v. Nicholson*, 72 N. C. 334 (1875).

For such an injury damages will adequately compensate, and should the annual damage exceed twenty dollars the plaintiff is remitted to his common-law action, and can compel an abatement of the nuisance. *Burnett v. Nicholson*, 72 N. C. 334 (1875).

Where the owner of land adjoining an old millsite sought to enjoin the erection of a new mill, and it was ascertained by a verdict, that the mill, though injurious to the health of the plaintiff's family, was advantageous to the public, relief was refused; especially as the old mill was erected before the plaintiff purchased. *Eason v. Perkins*, 17 N. C. 38 (1831).

When Injunction Granted.—In the case of the erection of a milldam, a court of equity will not interfere by injunction, unless it be shown that it will be a public nuisance, or, if it will be a private nuisance only to an individual, unless it manifestly appears, that so great a difference will

exist between the injury to the individual and the public convenience as will bear no comparison, or that the erection of the dam will be followed by irreparable mischief. *Bradsher v. Lea*, 38 N. C. 301 (1844).

Existence of Another Remedy.—On application for an injunction to restrain the defendant from building a new mill, on the ground that the construction of the dam would injure the land of the plaintiff and the health of his family, testimony being heard, the court held that it is not every slight or doubtful injury that will justify the use of the extraordinary power of injunction to restrain a man from using his property as his interests may demand, especially as, if the injury apprehended should result, the complainant could resort to law for damages. *Wilder v. Strickland*, 55 N. C. 386 (1856).

When Demand and Allegation of Insolvency Unnecessary.—The demand for damages in the complaint for ponding water upon and injuring the lands of the upper proprietor, required by this section, is not necessary when the relief sought is to enjoin the maintenance of a dam on the plaintiff's own land by the defendant's trespass thereon, and the abatement of the nuisance thus caused, and the trespass being continuing, the allegation of defendant's insolvency is not necessary. *Kinsland v. Kinsland*, 188 N. C. 810, 125 S. E. 625 (1924).

Cited in *Hester v. Broach*, 84 N. C. 252 (1881).

§ 73-27. Judgment for annual sum as damages.—A judgment giving to the plaintiff an annual sum by way of damages shall be binding between the parties for five years from the issuing of the summons, if the mill is kept up during that time, unless the damages are increased by raising the water or otherwise.

In all cases where the final judgment of the court assesses the yearly damage of the plaintiff as high as twenty dollars, nothing contained in this chapter shall be construed to prevent the plaintiff, his heirs or assigns, from suing as heretofore, and in such case the final judgment aforesaid shall be binding only for the year's damage preceding the issuing of the summons. (1868-9, c. 158, ss. 12, 14; Code, ss. 1860, 1861; Rev., ss. 2143, 2144; C. S., s. 2557.)

Cross Reference.—See note to § 73-25.

Assessment Cannot Go Back Further than Preceding Year.—In proceedings under the statute for ponding water on plaintiff's land, the jury have no right to go back further than one year in assessing damages, but if they do, the error may be corrected by the court only giving judgment for one year preceding the issuing of the summons. *Goodson v. Mullen*, 92 N. C. 207 (1885). See § 73-28.

Judgment May Be for Sum in Gross.—Where, in an action for damages to land by ponding water on it, the jury found

that the land was damaged eighty dollars per year, it was not erroneous for the court to give judgment for a sum in gross, and not for each year's damages. *Goodson v. Mullen*, 92 N. C. 207 (1885).

Recurring Causes of Action.—Case for nuisance in erecting a mill will lie for every fresh continuance after action brought; heavy damages are not usual in the first verdict, but in a second action the damages should be high to compel an abatement of the nuisance. — *v. Deberry*, 2 N. C. 248 (1796).

Conclusiveness of Verdict and Judg-

ment.—In a proceeding to recover damages for ponding water by a milldam, the verdict of the jury and the judgment of the court thereon are conclusive as to the assessment of damages, up to the time when such judgment was rendered. An application for relief from damages, assessed for a period subsequent to the time of the judgment, can only be heard if the dam is taken away or lowered. *Beatty v. Conner*, 34 N. C. 341 (1851).

Judgment Not Res Judicata.—An action to abate a dam and for damages to land caused by the ponding back of water was submitted to arbitrators to find whether plaintiffs were entitled to damages, and, if so, to distinguish in finding the same between damages from perma-

nent injuries and annual damages for five years from a certain date. The arbitrators assessed "the permanent damage of the plaintiffs to this date to their lands" at a certain sum, and also awarded a certain annual damage for each of the five years. Judgment was entered on the award, the judgment providing that the execution should be subject to the provisions of § 73-26. The judgment was not res judicata of plaintiff's right to recover damages after the termination of the five-year period for all except a fresh injury, since the judgment contemplated the removal of the dam at the end of the five years. *Candler v. Asheville Elec. Co.*, 135 N. C. 12, 47 S. E. 114 (1904).

§ 73-28. Final judgment; costs and execution.—If the final judgment of the court is that the plaintiff has sustained no damage, he shall pay the costs of his proceeding; but if the final judgment is in favor of the plaintiff, he shall have execution against the defendant for one year's damage, preceding the issuing of the summons, and for all costs: Provided, that if the damage adjudged does not amount to five dollars, the plaintiff shall recover no more costs than damages. And if the defendant does not annually pay the plaintiff, his heirs or assigns, before it falls due, the sum adjudged as the damages for that year, the plaintiff may sue out execution for the amount of the last year's damage, or any part thereof which may remain unpaid. (1868-9, c. 158, s. 15; Code, s. 1862; Rev., s. 2145; C. S., s. 2558.)

Chapter 74.

Mines and Quarries.

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ARTICLE 1.

Operation of Mines and Quarries.

§ 74-1. **Lessor not held partner of lessee.**—No lessor of property, real or personal, for mining purposes, although the lessor may receive an uncertain sum of the proceeds or net profits, or any other consideration, which, though uncertain at first, may afterwards become certain, shall be held as a partner of the lessee; nor shall any of the legal or equitable relations or liabilities of co-partners exist between them, unless it is so stipulated in the contract between the lessor and lessee. (1830, c. 46; R. C., c. 72; Code, s. 3292; Rev., s. 4930; C. S., s. 6896.)

Cross Reference.—For provision making this article applicable to quarries, see § 74-24.

§ 74-2. **Minors under sixteen not to be employed.**—No minor under sixteen years of age shall be allowed to work in any mine, and in all cases of minors applying for work the agent of such mine shall see that the provisions of this section are not violated; and the inspector may, when doubt exists as to the age of any person found working in any mine, examine under oath such person and his parents, or other witnesses, as to his age. (1897, c. 251, s. 7; Rev., s. 4931; 1919, c. 100, s. 6; C. S., s. 6897.)

§ 74-3. **Operator to furnish timber.**—The owner, agent, or operator of

every coal mine shall keep a supply of timber constantly on hand, and shall deliver the same to the working place of the miner, and no miner shall be held responsible for accident which may occur in the mine where the provisions of this section have not been complied with by the owner, agent, or operator thereof, resulting directly or indirectly from the failure to deliver such timber. (1897, c. 251, s. 8; Rev., s. 4932; C. S., s. 6898.)

§ 74-4. **Unused mines to be fenced.**—All underground entrances to any place not in actual course of working or extension shall be properly fenced across the whole width of such entrance so as to prevent persons from inadvertently entering the same. (1897, c. 251, s. 5; Rev., s. 4933; C. S., s. 6899.)

§ 74-5. **Means of ingress and egress provided.**—No owner or agent of any coal mine worked by shaft shall permit any person to work therein unless there are, to every seam of coal worked in such mine, at least two separate outlets, separated by natural strata of not less than one hundred feet in breadth, by which shafts or outlets distinct means of ingress and egress are always available to the persons employed in the mine; but it is not necessary for the two outlets to belong to the same mine if the persons employed therein have safe, ready, and available means of ingress or egress by not less than two openings. This section shall not apply to opening a new mine while being worked for the purpose of making communications between the two outlets, so long as not more than twenty persons are employed at one time in such mine; neither shall it apply to any mine or part of a mine in which the second outlet has been rendered unavailable by reason of the final robbing of pillars previous to abandonment, as long as not more than twenty persons are employed therein at any one time. The cage or cages and other means of egress shall at all times be available for the persons employed when there is no second outlet. The escapement shafts shall be fitted with safe and available appliances, which shall always be kept in a safe condition, by which the persons employed in the mine may readily escape in case an accident occurs; and in no case shall an air shaft with a ventilating furnace at the bottom be construed to be an escapement shaft within the meaning of this section. To all other coal mines, whether slopes or drifts, two such openings or outlets must be provided within twelve months after shipments of coal have commenced from such mine; and in case such outlets are not provided as herein stipulated, it shall not be lawful for the agent or owner of such slope or drift to permit more than ten persons to work therein at any one time. (1897, c. 251, s. 4; Rev., s. 4934; C. S., s. 6900.)

§ 74-6. **Hoisting engines; how operated.**—No owner or agent of any mine operated by a shaft or slope shall place in charge of any engine used for lowering into or hoisting out of mines persons employed therein any but experienced, competent, and sober engineers, and no engineers in charge of such engine shall allow any persons except as may be deputed for such purposes by the owner or agent to interfere with it or any part of the machinery, and no person shall interfere or in any way intimidate the engineer in the discharge of his duties, and in no case shall more than six men ride on any cage or car at one time, and no person shall ride upon a loaded cage or car in any shaft or slope. (1897, c. 251, s. 6; Rev., s. 4935; 1911, c. 183; C. S., s. 6901.)

§ 74-7. **Ventilation.**—The owner or agent of any coal mine, whether shaft, slope, or drift, shall provide and maintain for every such mine an amount of ventilation of not less than one hundred cubic feet per minute per person employed in such mine, which shall be circulated and distributed throughout the mine in such a manner as to dilute, render harmless and expel the poisonous and noxious gases from every working place in the mine. No working place shall be driven more than sixty feet in advance of a break-through or airway, and all break-throughs or airways, except those last made near the working

places of the mine, shall be closed up by brattice trap doors, or otherwise, so that the currents of air in circulation in the mine may spread to the interior of the mine when the persons employed in such mine are at work. All mines governed by this chapter shall be provided with artificial means of producing ventilation, such as forcing or suction fans, exhaust steam furnaces, or other contrivances of such capacity and power as to produce and maintain an abundant supply of air, and all mines generating fire damp shall be kept free from standing gas. (1897, c. 251, s. 5; Rev., s. 4936; C. S., s. 6902.)

§ 74-8. Daily examinations; safety lamps.—Every working place shall be examined every morning with a safety lamp by a competent person before any workmen are allowed to enter the mine. All safety lamps used in examining mines, or for working therein, shall be the property of the operator of the mine, and a competent person shall be appointed, who shall examine every safety lamp before it is taken into the workings for use, and ascertain it to be clean, safe, and securely locked, and safety lamps shall not be used until they have been so examined and found safe and clean and securely locked, unless permission be first given by the mine foreman to have the lamps used unlocked. No one except the duly authorized person shall have in his possession a key, or any other contrivance, for the purpose of unlocking any safety lamp in any mine where locked lamps are used. No matches or any other apparatus for striking lights shall be taken into any mine, or parts thereof, except under the direction of the mine foreman. (1897, c. 251, ss. 5, 6; Rev., s. 4937; C. S., s. 6903.)

§ 74-9. Report of ventilation.—The mine foreman shall measure the ventilation at least once a week, at the inlet and outlet, and also at or near the face of all the entries, and the measurement of air so made shall be noted on blanks furnished by the inspector; and on the first day of each month the mine boss of each mine shall sign one of such blanks, properly filled with the actual measurement, and present the same to the inspector. (1897, c. 251, s. 6; Rev., s. 4938; C. S., s. 6904.)

§ 74-10. Notice of opening or changing mines given.—The owner, agent, or manager of any mine shall give notice to the inspector in the following cases: 1. When any working is commenced for the purpose of opening a new shaft, slope, or mine, to which this chapter applies. 2. When any mine is abandoned, or the working thereof discontinued. 3. When the working of any mine is recommenced after an abandonment or discontinuance for a period exceeding three months. 4. When a squeeze or crush, or any other cause or change, may seem to affect the safety of persons employed in the mine, or when fire occurs. (1897, c. 251, s. 7; Rev., s. 4939; C. S., s. 6905.)

§ 74-11. Notice of accidents given.—The owner, agent, or manager of every mine shall, within twenty-four hours next after any accident or explosion, whereby loss of life or personal injury may have been occasioned, send notice, in writing, by mail or otherwise, to the inspector, and shall specify in such notice the character and cause of the accident, and the name or names of the persons killed and injured, with the extent and nature of the injuries sustained. When any personal injury of which notice is required to be sent under this section results in the death of the person injured, notice in writing shall be sent to the inspector within twenty-four hours after such death comes to the knowledge of the owner, agent, or manager; and when loss of life occurs in any mine by explosion, or accident, or results from personal injuries so received, the owner, agent, or manager of such mine shall notify the coroner of the county in which such mine is situated, and the coroner shall hold an inquest upon the body of the person whose death has been thus caused, and inquire carefully into the cause thereof, and return a copy of the finding of the jury and all the testimony to the inspector. (1897, c. 251, s. 6; Rev., s. 4940; C. S., s. 6906.)

§ 74-12. **Report to inspector.**—The owner, lessee, or agent in charge of any mine or quarry, or who is engaged in mining or quarrying or producing any mineral whatsoever in this State, shall, on or before the thirtieth day of January in every year, send to the office of the inspector upon blanks to be furnished by him a correct return, specifying with respect to the preceding calendar year the quantity of coal, iron ore, fire clay, limestone, or other mineral product of such mine or quarry, and the number of persons ordinarily employed in or about such mine or quarry below and above ground, distinguishing the persons and labor below ground and above ground: Provided, that nothing in this section shall require the owner, lessor or agent in charge of any quarry who does not employ more than ten persons to work in any one quarry at the same time, to file or make any of the reports required under this section. (1897, c. 251, s. 3; Rev., s. 4941; C. S., s. 6907; 1939, c. 223, s. 2.)

Editor's Note.—Prior to the 1939 amendment the report was required to be made on or before the thirtieth of November.

§ 74-13. **Liability for injuries.**—For any injury to person or property occasioned by any willful violation of this chapter, or any willful failure to comply with its provisions, by any owner, agent, or manager of the mine, a right of action shall accrue to the party injured for any damage he may sustain thereby; and in any case of loss of life by reason of such willful neglect or failure a right of action shall accrue to the personal representative of the deceased, as in other actions for wrongful death. (1897, c. 251, s. 6; Rev., s. 4942; C. S., s. 6908.)

§ 74-14. **Punishment for violation.**—If any person shall knowingly violate any of the provisions of the law relating to mines or shall do anything whereby the life or health of persons or the security of any mine and machinery is endangered, or if any miner or other person employed in any mine governed by the statutes shall intentionally or willfully neglect or refuse to securely prop the roof of any working place under his control, or neglect or refuse to obey any orders given by the superintendent of a mine in relation to the security of a mine in the part thereof where he is at work and for fifteen feet back of his working place, or if any miner, workman, or other person shall knowingly injure any water gauge, barometer, air course, or brattice, or shall obstruct or throw open any airways, or shall handle or disturb any part of the machinery of the hoisting engine or signaling apparatus or wire connected therewith, or air pipes or fittings, or open a door of the mine and not have the same closed again, whereby danger is produced either to the mine or those that work therein, or shall enter any part of the mine against caution, or shall disobey any order given in pursuance of law, or shall do any willful act whereby the lives and health of the persons working in the mine or the security of the mine or the machinery thereof is endangered, or if the person having charge of a mine whenever loss of life occurs by accident connected with the machinery of such mine or by explosion shall neglect or refuse to give notice thereof forthwith by mail or otherwise to the inspector and to the coroner of the county in which such mine is situated, or if any such coroner shall neglect or refuse to hold an inquest upon the body of the person whose death has been thus caused, and return a copy of his findings and a copy of all the testimony to the inspector, he shall be guilty of a misdemeanor, and upon conviction fined not more than fifty dollars or imprisoned in the county jail not more than thirty days, or both. (1897, c. 251, s. 8; Rev., s. 3797; C. S., s. 6909.)

ARTICLE 2.

Inspection of Mines and Quarries.

§ 74-15. **Commissioner of Labor to inspect mines and quarries.**—The Commissioner of Labor, acting through the Director of the Division of

Standards and Inspection of the Department of Labor, shall perform the duties of mine inspector as provided in this chapter. (1897, c. 251, s. 1; Rev., s. 4943; C. S., s. 6910; 1931, c. 312.)

Cross Reference.—For provision making this article applicable to quarries, see § 74-24.

§ **74-16. Inspector to examine mines.**—It shall be the duty of the inspector to examine all the mines in the State as often as possible to see that all the provisions and requirements of this chapter are strictly observed and carried out; he shall particularly examine the works and machinery belonging to any mine, examine into the state and condition of the mines as to ventilation, circulation, and condition of air, drainage, and general security. (1897, c. 251, s. 2; Rev., s. 4944; C. S., s. 6911.)

§ **74-17. May enter to make examinations.**—For the purpose of making the inspection and examinations provided for in this chapter, the inspector shall have the right to enter any mine at all reasonable times, by night or by day, but in such manner as shall not unnecessarily obstruct the working of the mine; and the owner or agent of such mine is hereby required to furnish the means necessary for such entry and inspection; the inspection and examination herein provided for shall extend to fire clay, iron ore, and other mines as well as coal mines. (1897, c. 251, s. 2; Rev., s. 4945; C. S., s. 6912.)

§ **74-18. Death by accident investigated.**—Upon receiving notice of any death resulting from accident it shall be the duty of the inspector to go himself, or send a representative, at once to the mine in which the death occurred and inquire into the cause of the same, and to make a written report fully setting forth the condition of that part of the mine where such death occurred and the cause which led to the same; which report shall be filed by the inspector in his office as a matter of record and for future reference. (1897, c. 251, s. 6; Rev., s. 4946; C. S., s. 6913.)

§ **74-19. Record of examinations.**—He shall make a record of all examinations of mines, showing the date when examination is made, the condition in which the mines are found, the extent to which the laws relating to mines and mining are observed or violated, the progress made in the improvements and security of life and health sought to be secured by the provisions of this chapter, number of accidents, injuries received, or deaths in or about the mines, the number of mines in the State, the number of persons employed in or about each mine, together with all such other facts and information of public interest, concerning the condition of mines, development and progress of mining in the State as he may think useful and proper, which record shall be filed in the office of the inspector, and as much thereof as may be of public interest to be included in his annual report. (1897, c. 251, s. 2; Rev., s. 4947; C. S., s. 6914.)

§ **74-20. Papers to be preserved.**—He shall keep in his office and carefully preserve all maps, surveys, and other reports and papers required by law to be filed with him, and so arrange and preserve the same as shall make them a permanent record of ready, convenient, and connected reference. (1897, c. 251, s. 3; Rev., s. 4948; C. S., s. 6915.)

§ **74-21. Inspector to enforce law; counsel furnished.**—In case of any controversy or disagreement between the inspector and the owner or operator of any mine or the persons working therein, or in case of conditions or emergencies requiring counsel, the inspector may call on the Governor for such assistance and counsel as may be necessary. If the inspector finds any of the provisions of this chapter violated or not complied with by any owner, lessee, or agent in charge, unless the same is within a reasonable time rectified, and the provisions of this

chapter fully complied with, he shall institute an action in the name of the State to compel the compliance therewith. The inspector shall exercise a sound discretion in the enforcement of this chapter. (1897, c. 251, s. 2; Rev., s. 4949; C. S., s. 6916.)

§ 74-22. Operation enjoined when law violated.—On application of the inspector, after suit brought as directed in § 74-21, any court of competent jurisdiction may enjoin or restrain the owner or agent from working or operating such mine until it is made to conform to the provisions of this chapter; and such remedy shall be cumulative, and shall not take the place of or affect any other proceedings against such owner or agent authorized by law for the matter complained of in such action. (1897, c. 251, s. 7; Rev., s. 4950; C. S., s. 6917.)

§ 74-23. Report to Governor.—The inspector shall annually make report to the Governor of all his proceedings, the condition and operation of the different mines of the State, and the number of mines and the number of persons employed in or about such mines, the amount of coal, iron ore, limestone, fire clay, or other mineral mined in this State; and he shall enumerate all accidents in or about the mines, and the manner in which they occurred, and give all such other information as he thinks useful and proper, and make such suggestions as he deems important relative to mines and mining, and any legislation that may be necessary on the subject for the better preservation of the life and health of those engaged in such industry. (1897, c. 251, s. 3; Rev., s. 4951; C. S., s. 6918.)

§ 74-24. Articles one and two made applicable to quarries.—For the purpose of providing for the safety of workers in quarries in North Carolina, the provisions of articles one and two of this chapter, relating to the operation and inspection of mines, are hereby made applicable to quarries insofar as such provisions are suitable to the operation and inspection of quarries. (1939, c. 223, s. 1.)

ARTICLE 3.

Waterways Obtained.

§ 74-25. Water and drainage rights obtained.—Any person or body corporate engaged or about to engage in mining, who may find it necessary for the furtherance of his operations to convey water either to or from his mine or mines over the lands of any other person or persons, may make application by petition in writing to the clerk of the superior court of the county in which the lands to be affected or the greater part are situate, for the right so to convey such water. The owner of the lands to be affected shall be made a party defendant, and the proceedings shall be conducted as other special proceedings. (1871-2, c. 158, ss. 1, 3; Code, ss. 3293, 3294, 3300; Rev., s. 4953; C. S., s. 6920.)

§ 74-26. The petition, what to contain.—The petition shall specify the lands to be affected, the name of the owner of such lands, and the character of the ditch or drain intended to be made. (1871-2, c. 158, s. 3; Code, s. 3294; Rev., s. 4954; C. S., s. 6921.)

§ 74-27. Appraisers; appointment and duties.—Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons, qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the lands by the contemplated work, and shall issue a notice to them to meet upon the premises at a day specified, not to exceed ten days from the date of such notice. The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by such work, and assess the damage thereto, and make report there-

of under their hands and seals to the clerk from whom the notice issued. (1871-2, c. 158, ss. 4, 5, 9; Code, ss. 3295, 3296, 3299; Rev., s. 4955; C. S., s. 6922.)

§ 74-28. Confirmation of report; payment of damages; rights of petitioner.—After the filing of the report and confirmation thereof by the clerk, who shall have power to confirm or, for good cause, set aside the same, the petitioner shall have full right and power to enter upon such lands and make such ditches, drains, or other necessary work: Provided, he has first paid or tendered the damages, assessed as above, to the owner of such lands or his known and recognized agent, if he be a resident of this State, or have such agent in this State. If the owner be a nonresident and have no known agent in this State, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner. (1871-2, c. 158, s. 12; Code, s. 3298; Rev., s. 4957; C. S., s. 6923.)

§ 74-29. Registration of report.—The petitioner, or any other person interested, may have the report of the appraisers registered upon the certificate of the clerk and shall pay the register a fee of twenty-five cents therefor. (1871-2, c. 158, s. 8; Code, s. 3298; Rev., s. 4957; C. S., s. 6924.)

§ 74-30. Obstructing mining drains.—If any person shall obstruct any drain or ditch constructed under the provisions of this chapter, he shall be guilty of a misdemeanor. (1871-2, c. 158, s. 12; Code, s. 3301; Rev., s. 3380; C. S., s. 6925.)

§ 74-31. Disposition of waste.—In getting out and washing the products of kaolin and mica mines, the persons engaged in such business shall have the right to allow the waste, water, and sediment to run off into the natural courses and streams. (1917, c. 123; C. S., s. 6926; 1937, c. 378.)

Editor's Note.—The 1937 amendment made this section applicable to mica mines.

ARTICLE 4.

Adjustment of Conflicting Claims.

§ 74-32. Liability for damage for trespass.—If any owner or person in possession of any mine or mining claim shall enter upon, either on the surface or underground, any mine or mining claim, the property of another, and shall mine or carry away any valuable mineral therefrom, he shall be liable to the owner of the mine so trespassed upon for double the value of all such mineral mined or carried away and for all other damages; and the value of the mineral mined or carried away shall be presumed to be the amount of the gross value ascertained by an average assay of the excavated material or vein or ledge from which it was taken. If such trespass is wrongfully and willfully made, punitive damages may be allowed. (1913, c. 51, s. 1; C. S., s. 6927.)

Action by Cotenant.—Where tenants in common, under the erroneous impression that they owned the fee, removed valuable minerals from the property, upon suit by the other tenant in common for damages under this section and admission by the defendants of the cotenancy, removal and value, plaintiff was entitled to judgment on

the pleadings, though not to the damages provided in this section. *Jones v. McBee*, 222 N. C. 152, 22 S. E. (2d) 226 (1942).

Applied in *Vance v. Guy*, 224 N. C. 607, 31 S. E. (2d) 766 (1944).

Cited in *Carolina Mineral Co. v. Young*, 211 N. C. 387, 190 S. E. 520 (1937).

§ 74-33. Persons entitled to bring suit.—The owner of a mine in this State, or any person in possession under a lease or other contract, may maintain an action to recover damages to such property arising from the operation of any

adjacent mine by the owner thereof or other person in possession and working the same under lease or contract, and also to prevent the continuance of the operation of the adjacent mine in such a manner as to injure or endanger the safety of the complainant's mine. (1913, c. 51, s. 1; C. S., s. 6928.)

§ 74-34. Application and order for survey.—The person entitled to bring an action, as provided in § 74-33, may apply to any judge of the superior court having jurisdiction to grant injunctions and restraining orders, and obtain an order of survey in the following manner: He shall file an affidavit giving the names of the parties and the location as near as may be, of the mine complained of; the location of the plaintiff's mine, and that he has reason to believe that the defendant, or his agents or employees, are or have been trespassing upon his mine, or working the defendant's mine in such a manner as to damage or endanger the plaintiff's property. Upon the filing of the affidavit, the judge shall cause a notice to be issued to the defendant or his agents, stating the time and place and before whom the application will be heard, and requiring them to appear, in not less than ten nor more than twenty days from the date thereof, and show cause why an order of survey should not be granted. Upon the hearing, and for good cause shown, the judge shall grant an order directed to some competent disinterested surveyor or mining engineer, or both, as the case may be, who shall proceed to make the necessary examination and surveys, as directed by the court, and report their action to the court. The persons selected by the judge to make the survey and examination shall be residents of the State, and, before entering upon the discharge of their duty, shall take and subscribe an oath that they will fairly and impartially survey the mines described in the petition. In all other respects, except as stated above, the surveyors appointed by the judge shall proceed as in surveys in disputed boundaries. (1913, c. 51, s. 2; C. S., s. 6929.)

§ 74-35. Free access to mine for survey.—Upon the order made for the survey in the manner, at the time, and by the persons mentioned in the order, which shall include a representative of the party making the application, who shall not be one of the surveyors, there shall be given free access to the mine for the purpose of survey, and any interference with the persons acting under the order of survey shall be contempt of court and punished accordingly. If the persons named in the order of survey so require, they, with their instruments, shall be carefully lowered and raised in and out of the mine with the cage, bucket, or skip ordinarily used in the shafts of the mine; and they may demand of the owner of the mine, or his manager or agent, that they be so raised and lowered at a speed agreeable to them and not to endanger their comfort and safety or to injure the accuracy of their instruments. The owner of the mine, his managers or agents, shall be liable in damages to the persons making the examination for any injury to them or to their instruments, caused by the careless and negligent operation of any bucket, cage, or skip at such a high rate of speed as to injure the persons or their instruments while being lowered or raised in the mine. (1913, c. 51, s. 2; C. S., s. 6930.)

§ 74-36. Costs of the survey.—The costs of the order and survey shall be paid by the person making the application; but if he shall maintain an action and recover damages for the injury done or threatened prior to such survey and examination, the costs of the order and survey shall be taxed against the defendant as other costs in the action. The party obtaining the survey shall be liable for any unnecessary injury done to the property examined and surveyed in making the survey. (1913, c. 51, s. 2; C. S., s. 6931.)

Chapter 75.

Monopolies and Trusts.

Sec.

- 75-1. Combinations in restraint of trade illegal.
- 75-2. Any restraint in violation of common law included.
- 75-3. Burden of proof as to reasonableness on defendant.
- 75-4. Contracts to be in writing.
- 75-5. Particular acts defined.
- 75-6. Violation a misdemeanor; punishment.
- 75-7. Persons encouraging violation guilty.
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Sec.

- 75-9. Duty of Attorney General to investigate.
- 75-10. Power to compel examination.
- 75-11. Person examined exempt from prosecution.
- 75-12. Refusal to furnish information; false swearing.
- 75-13. Criminal prosecution; solicitors to assist; expenses.
- 75-14. Action to obtain mandatory order.
- 75-15. Actions prosecuted by Attorney General.
- 75-16. Civil action by person injured; treble damages.

§ 75-1. **Combinations in restraint of trade illegal.**—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars. (1913, c. 41, s. 1; C. S., s. 2559.)

Cross References.—As to civil action for damages and injunction against violation of this chapter, see note to § 75-5. For provision declaring certain agreements between employers and labor organizations to be illegal combinations in restraint of trade, see § 95-79.

History of Chapter.—See *Shute v. Shute*, 176 N. C. 462, 97 S. E. 392 (1918).

Monopoly Defined.—“A monopoly consists in the ownership or control of so large a part of the market supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices.” *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412 (1936), quoting *Black’s Law Dictionary* (3rd Ed.), p. 1202.

In the modern and wider sense monopoly denotes a combination, organization, or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market, and to secure the power to control prices to the public harm with respect to any commodity which people are under a practical compulsion to buy. *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412 (1936).

Agreement Not to Compete May Be

Forbidden.—Persons and corporations cannot be ordered to compete, but they properly can be forbidden to give directions, or make agreements, not to compete. *State v. Craft*, 168 N. C. 208, 83 S. E. 772 (1914).

Agreement Not to Sell to Particular Individual.—A complaint alleging that defendants conspired and agreed not to sell plaintiff ice, and that as a result thereof plaintiff’s business was ruined, fails to state a cause of action, this and the following sections not being applicable. *Lineberger v. Colonial Ice Co.*, 220 N. C. 444, 17 S. E. (2d) 502 (1941).

Reduction of Prices to Consuming Public No Defense.—Plaintiff, a carrier by truck, instituted this action against certain railroad companies, to recover damages to his business, which he alleged resulted from an unlawful conspiracy between defendants to reduce transportation rates in order to eliminate plaintiff as a competitor, with the purpose of raising rates after competition had been removed. Defendants alleged that the reduction in rates resulted in lower prices to the consuming public on the products on which the rates had been reduced. Held: The matter alleged does not constitute a defense to the action,

since the express policy of the State is against both the raising and lowering of prices by unlawful means for an unlawful purpose, and since the law is interested in preserving competition rather than obtaining for the public temporary benefits from price wars in which competition is extinguished. *Patterson v. Southern Ry. Co.*, 214 N. C. 38, 198 S. E. 364 (1938).

A general averment without allegation of specific facts is insufficient to constitute a cause of action, under this and the following sections. *State v. Standard Oil Co.*, 205 N. C. 123, 170 S. E. 134 (1933).

Stated in *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240 (1937).

Cited in *Patterson v. Southern Ry. Co.*, 219 N. C. 23, 12 S. E. (2d) 652 (1941).

§ 75-2. Any restraint in violation of common law included.—Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of § 75-1. (1913, c. 41, s. 2; C. S., s. 2560.)

Distinction between Common-Law and Modern Rules.—Originally at common law, agreements in restraint of trade were held void as being against public policy. The position, however, has been more and more modified by the decisions of the courts until it has come to be the very generally accepted principle that agreements in partial restraint of trade will be upheld when they are “founded on valuable considerations.

are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest.” *Mar-Hof Co. v. Rosenbacker*, 176 N. C. 330, 331, 97 S. E. 169 (1918). The distinction may now be made between “general restraint” and “partial restraint.” *Morehead Sea Food Co. v. Way & Co.*, 169 N. C. 679, 86 S. E. 603 (1915).

§ 75-3. Burden of proof as to reasonableness on defendant.—All contracts, combinations in the form of trust, and conspiracies in restraint of trade or commerce prohibited in §§ 75-1 and 75-2 are hereby declared to be unreasonable and illegal, unless the persons entering into such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce can show affirmatively upon an indictment or civil action for violation of §§ 75-1 and 75-2 that such contract, combination in the form of trust, conspiracy in restraint of trade or commerce does not injure the business of any competitor, or prevent anyone from becoming a competitor because his or its business will be unfairly injured by reason of such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce. (1913, c. 41, s. 3; C. S., s. 2561.)

§ 75-4. Contracts to be in writing.—No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the State of North Carolina, or at any point in the State of North Carolina, which contract is now illegal, or which contract is made illegal by any other section of this chapter. (1913, c. 41, s. 4; C. S., s. 2562.)

Applied in *Sonotone Corp. v. Baldwin*, 227 N. C. 387, 42 S. E. (2d) 352 (1947).

§ 75-5. Particular acts defined.—In addition to the matters and things hereinbefore declared to be illegal, the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association directly or indirectly to do or to have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section.

1. To agree or conspire with any other person, firm, corporation or association to put down or keep down the price of any article produced in this State by the labor of others, which article the person, firm, corporation or association intends, plans or desires to buy.

2. To make a sale of any goods, wares, merchandise, articles or things of value

whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in the goods, wares, merchandise, articles or things of value of a competitor or rival in the business of the person, firm, corporation or association making such sales.

3. To willfully destroy or injure, or undertake to destroy or injure, the business of any opponent or business rival in the State of North Carolina with the purpose or intention of attempting to fix the price of anything of value when the competition is removed.

4. To directly or indirectly buy or sell within the State, through himself or itself, or through any agent of any kind or as agent or principal, or together with or through any allied, subsidiary or dependent person, firm, corporation or association, any article or thing of value which is sold or bought, in the State to injure or destroy or undertake to injure or destroy the business of any rival or opponent, by lowering the price of any article or thing of value sold, so low, or by raising the price of any article or thing of value bought, so high as to leave an unreasonable or inadequate profit for a time, with the purpose of increasing the profit on the business when such rival or opponent is driven out of business, or his or its business is injured.

5. To deal in any thing of value within the State of North Carolina, to give away or sell, at a place where there is competition, such thing of value at a price lower than is charged by such person, firm, corporation or association for the same thing at another place, where there is not good and sufficient reason, on account of transportation or the expense of doing business, for charging less at the one place than at the other, with the view of injuring the business of another.

6. To engage in buying or selling any thing of value in North Carolina, to make or have any agreement or understanding, express or implied, with any other person, firm, corporation or association, not to buy or sell such things of value within certain territorial limits within the State, with intention of preventing competition in selling or to fix the price or prevent competition in buying of such things of value within these limits: Provided, nothing herein shall be construed to prevent an agent from representing more than one principal; but nothing in this proviso shall be construed to authorize two or more principals to employ a common agent for the purpose of suppressing competition or lowering prices: Provided, further, that nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good will to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as is now allowed under the common law: Provided, such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this chapter. (1913, c. 41, s. 5; C. S., s. 2563.)

Restrictive Stipulations in Sale.—Transactions involving the sale and disposition of a business, trade or profession between individuals with stipulations restrictive of competition on the part of the vendor do not, as a rule, tend to unduly harm the public and are ordinarily sustained to the extent required to afford reasonable protection to the vendee in the enjoyment of property or proprietary rights he has bought and paid for, and to enable a vendor to dispose of his property at its full and fair value. *Mar-Hof Co. v. Rosenbacker*, 176 N. C. 330, 97 S. E. 169 (1918).

Test as to Reasonableness.—A valid contract in partial restraint of trade, while primarily for the advantage of the purchaser of a business, inures to the benefit

of the seller by enhancing the value of the good will and enabling him to obtain a better price for the sale of his business, the test as to territory being whether the restraint agreed upon is such as to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public; and such will not be held to be unreasonable when they do not affect the public and go no further than to remove the danger to the purchaser of competition with the seller. *Morehead Sea Food Co. v. Way & Co.*, 169 N. C. 679, 86 S. E. 603 (1915).

Contract Not to Engage in Competing Business.—A provision of an agreement for the sale of a partner's interest that he

would not again engage in the mercantile business in a certain town or near enough thereto to interfere with plaintiff's business was not in violation of this section. *Wooten v. Harris*, 153 N. C. 43, 68 S. E. 898 (1910).

An exchange of the defendant's fish business for stock in the plaintiff company, with an agreement not to engage in similar business for ten years within 100 miles is valid, and not in violation of this section. *Morehead Sea Food Co. v. Way & Co.*, 169 N. C. 679, 86 S. E. 603 (1915).

Combination of Railroads to Eliminate Motor Truck Competition.—A combination of railroads for the purpose of reducing rates on gasoline transportation within a certain area with the intent to eliminate motor truck competition and with the further purpose of raising and fixing a higher rate on the same commodity after the elimination of competition is a violation of this section. *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240 (1937).

Reasonableness of Agreement to Raise Price Immaterial.—An agreement among dealers in a necessary article of food, to raise its price, is an indictable offense at the common law, and evidence that dealers controlling a large part of the supply of milk in a town having by agreement raised its price, testimony is irrelevant that a dealer not a party to the agreement had also raised the price of his milk to his customers, or whether the agreement was reasonable or necessary for the article to yield a profit in its sale. *State v. Craft*, 168 N. C. 208, 83 S. E. 772 (1914).

Same—Intent Immaterial.—The intent of milk dealers combining to raise the price of milk is immaterial. *State v. Craft*, 168 N. C. 208, 83 S. E. 772 (1914).

Illegal Division of Territory.—Under a contract dividing a county into separate territory, within which each of the respective parties was not to interfere with the business of the other in operating cotton gins, etc., the plaintiff sold the defendant a cotton ginning plant, the latter agreeing to remove the plant and not to again operate one there, the intent of the agreement was a division of territory, with the object to eliminate competition therein, and the agreement will not be enforced. *Shute v. Shute*, 176 N. C. 462, 97 S. E. 392 (1918).

Exclusive Sale for Specified Period.—A contract made in good faith between a vendor and purchaser of a certain particular make or character of a manufactured product that restricts the former from selling articles of the same make or kind to other dealers within the town wherein

the purchaser conducts his mercantile business, and which requires the expenditure of large sums of money and much time in advertising the goods and popularizing them on the local market, does not come within the intent and meaning of this chapter; and in vendor's action for the purchase price the seller may recover damages as a counterclaim for breach of the seller's contract in that respect. *Mar-Hof Co. v. Rosenbacker*, 176 N. C. 330, 97 S. E. 169 (1918).

An agreement that a retailer should handle a certain product upon condition that he should not sell like products of other manufacturers within the same price range is held prohibited by this section, and unenforceable in our courts, and does not fall within subsection 6, permitting, in the absence of an intent to stifle competition, a contract granting the seller an exclusive agency for a product within a certain territory. *Florsheim Shoe Co. v. Leader Dept. Store*, 212 N. C. 75, 193 S. E. 9 (1937).

Covenant Not to Sell Products Other than Those of Lessor.—Lessee alleged that lessor covenanted not to sell any petroleum products other than those of lessee within a radius of 2,000 feet of the demised premises or from the demised premises. Held: There being no allegation that lessor agreed to purchase petroleum products from anyone, the provisions of paragraph 2 of this section are not applicable. Such a covenant apparently runs afoul of no statute. *Grubb Oil Co. v. Garner*, 230 N. C. 499, 53 S. E. (2d) 441 (1949).

Contract to Sell at Label Price.—A contract of sale of merchandise for resale by the buyer, which stipulates that the buyer will not sell the merchandise except at label prices and will not sell or permit the sale of any other similar merchandise, is violative of this section. *Standard Fashion Co. v. Grant*, 165 N. C. 453, 81 S. E. 606 (1914).

A contract for sale of cafe and good will for a period of five years does not affect the interest of the public or fall within the terms of subsection 6 of this section. *Hill v. Davenport*, 195 N. C. 271, 141 S. E. 752 (1928).

Discrimination Not Allowed.—Where a public service corporation has acquired the exclusive right to furnish hydroelectric power and light to municipalities, and to other public service corporations, for distribution to consumers, including subsidiary companies that it controls, it may not discriminate among its patrons under the same or substantially similar conditions as

to the rate charged, or select its customers. *North Carolina Public Serv. Co. v. Southern Power Co.*, 179 N. C. 18, 101 S. E. 593 (1919).

Attempt to Drive Competitor out of Business.—An indictment charging that the employees of a rival company in the sale of lawful commodities had combined together to break up their competitor's business by systematically following its salesmen from house to house and place to place and to so abuse, vilify, and harass them as to deter them in their lawful business and to break up their sales; that they falsely represented that their rival company was composed of a set of thieves and liars, endeavoring to cheat and defraud the people, etc., charges a conspiracy indictable at common law. *State v. Dalton*, 168 N. C. 204, 83 S. E. 693 (1914).

Grant of Municipal Franchise.—A private sale of public utilities by the city authorities to an electrical power plant with a grant of a municipal franchise does not create or tend towards a monopoly. *Allen v. Reidsville*, 178 N. C. 513, 101 S. E. 267 (1919).

Ordinance Restricting Sale of Commodity.—A municipal ordinance prohibiting the sale of milk within the city without a permit, is not invalid as tending to create a monopoly although the permit "may be suspended or revoked at any time for cause." *State v. Kirkpatrick*, 179 N. C. 747, 103 S. E. 65 (1920).

Contract in Violation of Section Unenforceable.—A contract made in violation of the terms of this section will not be enforced. *Standard Fashion Co. v. Grant*, 165 N. C. 453, 81 S. E. 606 (1914); *Shute v. Shute*, 176 N. C. 462, 97 S. E. 392 (1918).

Threats to Retaliate unless Competition Withdrawn.—Threats by one ice company that it would sell ice in the town of a second ice company, if that company continued to supply ice to a rival of the first company are not prohibited by this section. *Smith v. Morganton Ice Co.*, 159 N. C. 151, 74 S. E. 961 (1912).

The refusal by wholesalers of ice to sell a retailer on the same terms as those offered to other retailers in the city is not a violation of this section, it not appearing that the parties were business competitors. *Rice v. Asheville Ice, etc., Co.*, 204 N. C. 768, 169 S. E. 707 (1933).

The violation of this section is made criminal by § 75-6, and as ordinarily the violation of a criminal statute may not be enjoined, individuals who apprehend injury by such violation are afforded a remedy by indictment and prosecution under § 1-5. *Carolina Motor Service v. Atlantic Coast Line R. Co.*, 210 N. C. 36, 185 S. E. 479, 104 A. L. R. 1165 (1936).

The provisions of the monopoly statutes apply to railroads just as they do to individuals and other corporations. *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240 (1937).

Subdivision 3 Constitutional.—Subdivision 3 sufficiently defines the offense therein prohibited and is constitutional. *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412 (1936).

"Willful" Defined.—"Willful" means the wrongful doing of an act without justification or excuse. *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412 (1936).

Coal Dealers Held to Be Competent Witnesses.—Where in the prosecution for violation of subdivision 3 of this section the State was allowed to introduce the testimony of coal dealers in the same city as to the cost of handling coal, the opinion testimony being based upon complicated and detailed facts relating to costs of buying, shipping, trucking, handling, shrinkage, labor, repairs, etc., the witnesses having had years of experience in operating their respective businesses in the city, it was held that the witnesses were experts and their opinion testimony was competent and was properly received in evidence. *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412 (1936).

Proper Instruction as to Injuring or Destroying Competitors.—In a prosecution for violating this section relating to monopolies, an instruction that a person violates this section if he lowers the price of the product in question for the purpose of injuring or destroying competitors, and then, after competition is removed, he sells at a higher price to the detriment of the public, was held without error. *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412 (1936).

Cited in *Lewis v. Archbell*, 199 N. C. 205, 154 S. E. 11 (1930); *Brown v. Norfolk So. R. Co.*, 208 N. C. 423, 181 S. E. 279 (1935).

§ 75-6. Violation a misdemeanor; punishment.—Any corporation, either as agent or principal, violating any of the provisions of § 75-5 shall be guilty of a misdemeanor, and such corporation shall upon conviction be fined not less than one thousand dollars for each and every offense, and any person, whether acting for himself or as officer of any corporation or as agent of any corporation or

person violating any of the provisions of this chapter shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 41, s. 5; C. S., s. 2564.)

Cross Reference.—See note to § 75-5.

Cited in Bennett v. Southern Ry. Co.,

Applied in State v. Atlantic Ice, etc., 211 N. C. 474, 191 S. E. 240 (1937).

Co., 210 N. C. 742, 188 S. E. 412 (1936).

§ 75-7. Persons encouraging violation guilty.—Any person, being either within or without the State, who encourages or willfully allows or permits any agent or associates in business in this State to violate any of the provisions of this chapter shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in § 75-6. (1913, c. 41, s. 6; C. S., s. 2565.)

§ 75-8. Continuous violations separate offenses.—Where the things prohibited in this chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense. (1913, c. 41, s. 7; C. S., s. 2566.)

Quoted in State v. Atlantic Ice, etc., Co.,

210 N. C. 742, 188 S. E. 412 (1937).

§ 75-9. Duty of Attorney General to investigate.—The Attorney General of the State of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations doing business in this State, which are or may be embraced within the meaning of the statutes of this State defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations in North Carolina doing business in violation of law; and all other corporations of every character engaged in this State in the business of transporting property or passengers, or transmitting messages, and all other public service corporations of any kind or nature whatever which are doing business in the State for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the Utilities Commission or Commission of Banks is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted. (1913, c. 41, s. 8; C. S., s. 2567; 1931, c. 243, s. 5; 1933, c. 134, s. 8; 1941, c. 97, s. 5.)

Editor's Note.—It would seem that the twelve of this section were intended to words "Commission of Banks" in line read "Commissioner of Banks."

§ 75-10. Power to compel examination.—In performing the duty required in § 75-9, the Attorney General shall have power, at any and all times, to require the officers, agents or employees of any such corporation, and all other persons having knowledge with respect to the matters and affairs of such corporations, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such corporations, or which are in any way connected with the business thereof; and the Attorney General is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any judge of the supreme or superior court, after five days' notice of such application, for an order on any such person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge. (1913, c. 41, s. 9; C. S., s. 2568.)

§ 75-11. Person examined exempt from prosecution.—No person examined, as provided in § 75-10 shall be subject to indictment, prosecution, punishment or penalty by reason or on account of anything disclosed by him upon

such examination, and full immunity from prosecution and punishment by reason or on account of anything so disclosed is hereby extended to all persons so examined. (1913, c. 41, s. 9; C. S., s. 2569.)

§ 75-12. Refusal to furnish information; false swearing.—Any corporation unlawfully refusing or willfully neglecting to furnish the information required by this chapter, when it is demanded as herein provided, shall be guilty of a misdemeanor and fined not less than one thousand dollars: Provided, that if any corporation shall in writing notify the Attorney General that it objects to the time or place designated by him for the examination or inspection provided for in this chapter, it shall be his duty to apply to a judge of the supreme or superior court, who shall fix an appropriate time and place for such examination or inspection, and such corporation shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this chapter. False swearing by any person examined under the provisions of this chapter shall constitute perjury, and the person guilty of it shall be punishable as in other cases of perjury. (1913, c. 41, s. 10; C. S., s. 2570.)

§ 75-13. Criminal prosecution; solicitors to assist; expenses.—The Attorney General in carrying out the provisions of this chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of the solicitors in the State, who shall, upon being required to do so by the Attorney General, send bills of indictment and assist him in the performance of the duties of his office. (1913, c. 41, s. 13; C. S., s. 2571.)

§ 75-14. Action to obtain mandatory order.—If it shall become necessary to do so, the Attorney General may prosecute civil actions in the name of the State on relation of the Attorney General to obtain a mandatory order to carry out the provisions of this chapter, and the venue shall be in any county as selected by the Attorney General. (1913, c. 41, s. 11; C. S., s. 2572.)

§ 75-15. Actions prosecuted by Attorney General.—It shall be the duty of the Attorney General, upon his ascertaining that the laws have been violated by any trust or public service corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the State, or any officer or department thereof, as provided by law, or in the name of the State on relation of the Attorney General, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it. (1913, c. 41, s. 12; C. S., s. 2573.)

§ 75-16. Civil action by person injured; treble damages.—If the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. (1913, c. 41, s. 14; C. S., s. 2574.)

Civil Action for Damages and Injunctive Relief.—While conspiracies in restraint of trade, and undertakings to destroy or injure the business of a competitor, with the purpose of attempting to fix the price when competition is removed, are made unlaw-

ful, these provisions do not prevent one whose business as a common carrier has been injured and threatened by any of the acts thus denounced from pursuing a remedy by civil action for damages and seeking the interposition of equity, if neces-

sary to restrain wrongful acts which threaten irreparable loss. *Burke Transit Co. v. Queen City Coach Co.*, 228 N. C. 768, 47 S. E. (2d) 297 (1948).

Causal Relation between Violation and Injury Must Be Shown.—Section 75-5 condemns a contract of sale only when such sale is made "upon the condition" that the purchaser shall not deal in the goods or merchandise of a competitor of the seller, and in order for a party to recover damages for a breach of the statute under the provisions of this section, he must show a vio-

lation of the statute and a causal relation between the violation and injury to his business. *Lewis v. Archbell*, 199 N. C. 205, 154 S. E. 11 (1930). See *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240 (1937).

Who May Bring Action.—The contention that an action for the violation of this chapter resulting in injury to a party's business can only be brought by the Attorney General is contrary to the provisions of this section. *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240 (1937).

Chapter 76.

Navigation.

Article 1.

Cape Fear River.

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- 76-55. Commissioners of navigation to designate place for trash.
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Article 6.**Morehead City Navigation and Pilotage Commission.**

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- 76-66. Cancellation of licenses.
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 76-68. Retirement of pilots from active service.
 76-69. When employment compulsory; rates of pilotage.
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ARTICLE 1.*Cape Fear River.*

§ 76-1. **Board of commissioners of navigation and pilotage.**—A board of commissioners of navigation and pilotage for the Cape Fear River and bar, to consist of five members, at least four of whom shall be residents of New Hanover County, and none of whom shall be licensed pilots, is hereby created. The members of the board shall be appointed by the Governor and their terms of office shall begin on the fifteenth day of April of the year in which they are appointed and continue for four years and until their successors shall be appointed and qualified. They shall be and are hereby declared to be commissioners for a special purpose, within the purview of section seven, article fourteen, of the Constitution of North Carolina. It shall be the duty of the Governor to appoint, on or before the fifth day of April, one thousand nine hundred and twenty-one, and on or before the fifth day of April of every fourth year thereafter, the members of said board of commissioners. A majority of the board shall constitute a quorum and may act in all cases. The board shall have power to fill vacancies in its membership as they occur during their term, to appoint a clerk to record in a book, rules, orders and proceedings of the board, and the board shall have authority in all matters that may concern the navigation of waters from seven miles above Negrohead Point downwards, and out of the bar and inlets. They shall annually, on the first Monday in May, appoint a harbor master for the port of Wilmington. (1921, c. 79, s. 1; C. S., s. 6943(a).)

Editor's Note.—The cases cited below were decided under former § 6943 of the Consolidated Statutes, which contained substantially the same provisions.

Constitutionality.—This article is constitutional as it is an exercise of the State's right to regulate pilotage, and should be construed liberally as a part of the maritime law. It does not create a monopoly or grant special privileges, but only regulates for the protection of the public. *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920 (1908).

Cruising Grounds for Pilot Boats.—The

legislature may confer upon a local board of commissioners of navigation and pilotage authority to mark out cruising grounds for pilot boats. *Morse v. Heide*, 152 N. C. 625, 68 S. E. 173 (1910).

Time of Appointment of Commissioners.

—The time of making the appointment of commissioners is merely directory, and if appointment is made after the fifth day of April, but before the fifteenth day of April, it is valid. *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920 (1908).

§ 76-2. **Rules to regulate pilotage service.**—The board shall from time to time make and establish such rules and regulations respecting the qualifications, arrangements, and station of pilots as to them shall seem most advisable, and shall impose such reasonable fines, forfeitures and penalties as may be prescribed for the purpose of enforcing the execution of such rules and regulations. The board shall also have power and authority to prescribe, reduce, and limit

the number of pilots necessary to maintain an efficient pilotage service for the Cape Fear River and bar, as in its discretion may be necessary: Provided, that the present number of eleven pilots now actively engaged in the service shall not be reduced except for cause or by resignation, disability, or death. When, in the opinion of a majority of the board, the best interests of the port of Wilmington, the State of North Carolina, and the pilotage service shall require it, the board shall have power and authority to organize all pilots licensed by it into a mutual association, under such reasonable rules and regulations as the board may prescribe; any licensed pilot refusing to become a member of such association shall be subject to suspension, or to have his license revoked, at the discretion of the board. (1921, c. 79, s. 2; C. S., s. 6943(b); 1927, c. 158, s. 1.)

Editor's Note.—The 1927 amendment inserted the second sentence.

Reasonable Regulations.—A rule and regulation of the board to the effect that pilots shall not cruise beyond certain territory and that no pilot, except under certain unusual circumstances, shall be entitled to his fee for such services if they be tendered beyond the cruising ground they had laid off, is valid and reasonable. *Morse v. Heide*, 152 N. C. 625, 68 S. E. 173 (1910).

Limiting Number of Pilots.—The limiting of the number of pilots is a valid exercise of the police power, and is not such a grant of special privileges to certain persons as is provided against by the Constitution. *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920 (1908).

Providing for the qualifications of pilots is a valid exercise of the police power. *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920 (1908).

§ 76-3. Examination and licensing of pilots.—The board, or a majority of them, may from time to time examine, or cause to be examined, such persons as may offer themselves to be pilots for the Cape Fear River and bar, and shall give to such as are approved commissions under their hands and the seal of the board, to act as pilots for the river and bar; and the number of pilots so commissioned, not exceeding fifteen at any one time, shall be left to the discretion of the board, but the limitation as to number herein shall not deprive the board of the power to issue license to any person who is a duly licensed pilot at the time of the passage of this article. (1921, c. 79, s. 3; C. S., s. 6943(c); 1927, c. 158, s. 2.)

Editor's Note.—The 1927 amendment substituted the word "may" for the word "shall" near the beginning of this section.

Providing for examinations is a valid exercise of the police power. *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920 (1908).

§ 76-4. Appointment and regulation of pilots' apprentices.—The board, when it deems necessary for the best interests of the port, is hereby authorized to appoint in its discretion apprentices, and to make and enforce reasonable rules and regulations relating to apprentices. No apprentice shall be required to serve for a longer period than three years in order to obtain a license to pilot vessels of a draught of not exceeding fifteen feet, and one year thereafter for a license to pilot vessels of a draught of more than fifteen feet. No one shall be entered as an apprentice who is of the age of more than twenty-five years. (1921, c. 79, s. 4; C. S., s. 6943(d); 1927, c. 158, s. 3.)

Editor's Note.—The 1927 amendment inserted the words "appoint in its discre-

tion apprentices, and to" appearing in the first sentence.

§ 76-5. Classes of licenses issued.—The board shall have authority to issue two classes of licenses as follows:

(1) A license to pilot vessels whose draught of water does not exceed eighteen feet, to such applicants above the age of twenty-one years who have served as apprentices for such length of time as is required by the rules and regulations of the board to entitle such applicant to such license;

(2) An unlimited or full license to those who have served at least one year under a license of the first class: Provided, that the board shall have power to

appoint pilots without reference to apprenticeship record as in its judgment the service may require. (1921, c. 79, s. 5; C. S., s. 6943(e); 1927, c. 158, s. 4.)

Editor's Note.—The 1927 amendment section (1) and added the proviso in substituted "eighteen" for "fifteen" in sub-section (2).

§ 76-6. Renewal of license; license fee.—All licenses shall be renewed annually upon payment of a fee of five dollars (\$5): Provided, the holder of such license shall have, during the year preceding the date for such renewal, complied with the provisions of this article and the reasonable rules and regulations prescribed by the board under authority hereof. (1921, c. 79, s. 6; C. S., s. 6943(f).)

§ 76-7. Expenses of the board.—Each pilot, or the association of pilots, when organized as in this article provided, shall pay over to the board under such reasonable rules as the board shall prescribe two per cent (2%) of each and every pilotage fee received, for the purpose of providing funds to defray the necessary expenses of the board. In the event that the total of the sums so paid over in any one year shall exceed the expenses of the board, the excess, upon being duly ascertained, shall be paid over to the fund for the benefit of widows and orphans of the deceased pilots, as said fund is now constituted and provided for by law. (1921, c. 79, s. 7; C. S., s. 6943(g).)

§ 76-8. Pilots to give bond.—Every person before being commissioned as a pilot shall give bond for the faithful performance of his duties, with two or more sureties, payable to the State of North Carolina in the sum of five hundred dollars (\$500); the board may, from time to time, and as often as it may deem necessary, enlarge the penalty of the bond, or require new or additional bonds to be given in a sum or sums not to exceed in all, one thousand dollars (\$1,000). Every bond taken of a pilot shall be filed with and preserved by the board, in trust for every person, firm, or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm, or corporation, so injured may severally bring suit for the damage by each one sustained. (1921, c. 79, s. 8; C. S., s. 6943(h).)

§ 76-9. Permission to run as pilots on steamers; other ports.—The board shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilots on steamers running between the port of Wilmington and other ports of the United States, under such rules and regulations as the board shall prescribe. (1921, c. 79, s. 9; C. S., s. 6943(i).)

§ 76-10. Cancellation of licenses.—The board shall have the power to call in and cancel the license of any pilot who has refused or neglected, except in case of sickness, his duty as a pilot for a period of six months in succession, and any pilot who has been absent from the State for a longer period than six months in succession shall, upon his return, surrender his license to the board, or the board may declare the same void, except when such absence has been under permission from the board as provided in § 76-9. (1921, c. 79, s. 10; C. S., s. 6943(j).)

§ 76-11. Jurisdiction over disputes as to pilotage.—Each member of the board shall have power and authority to hear and determine any matter of dispute between any pilot and any master of a vessel, or between pilots themselves, respecting the pilotage of any vessel and any one of them may issue a warrant against any pilot for the recovery of any demand which one pilot may have against another, relative to pilotage, and for the recovery of any forfeiture or penalty provided by law, relating to pilotage on Cape Fear River and Bar, or provided by any bylaw or rule or regulation enacted by the board by virtue of any such law, which warrant the sheriff or any constable in New Hanover

or Brunswick counties, shall execute together with any other process authorized by this article. On any warrant issued as herein provided any one of said commissioners may give judgment for any sum not exceeding five hundred dollars (\$500), and may issue execution thereon, in like manner as is provided for the issuing of execution on judgments rendered by justices of the peace, which writ of execution shall be executed agreeably to the law regulating the levy and sale under executions issuing from courts of justices of the peace. Any member of the board shall have authority to issue summons for witnesses and to administer oaths, and hearings before any member of the board of any matters as provided in this section shall conform as nearly as may be to procedure provided by law in courts of justices of the peace. From any judgment rendered by any member of the board, either party shall have the right of appeal to the superior court of New Hanover or Brunswick counties, in like manner as is provided for appeals on judgments of justices of the peace. (1921, c. 79, s. 11; C. S., s. 6943(k).)

Editor's Note.—For dictum questioning the validity of the provisions of this section allowing members of the board to hear and determine disputes between pilots and masters of vessels, etc., see *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920 (1908).

§ 76-12. Retirement of pilots from active service.—The board shall have and is hereby given authority in its discretion, and under such reasonable rules and regulations as it may prescribe, to retire from active service any pilot who shall become physically or mentally unfit to perform his duties as pilot, and to provide for such pilot or pilots so retired such compensation as the board shall deem proper: Provided, however, that no pilot shall be retired, except with his consent, for physical or mental disability, unless and until such pilot shall have first been examined by the public health officers or county physicians of New Hanover or Brunswick counties, and such public health officers or physicians shall have certified, either separately or jointly, to the board the fact of such physical or mental disability. (1921, c. 79, s. 12; C. S., s. 6943(1).)

§ 76-13. When employment compulsory; rates of pilotage.—All vessels, coastwise or foreign, over sixty (60) gross tons, shall on and after the first day of May, one thousand nine hundred and twenty-one, take a State licensed pilot from sea to Southport, and from Southport to sea, and the rates of pilotage shall be the rates given in column number one below, designated "From sea to Southport, or vice versa;" the employment of pilots from Southport to Wilmington and from Wilmington to Southport is optional, but any vessel taking a pilot from Southport to Wilmington, or from Wilmington to Southport, shall employ only a State licensed pilot, and the rate of pilotage shall be the rates in column number two below, designated "From Southport to Wilmington, or vice versa."

COLUMN No. 1

From Sea to Southport or Vice Versa

| Feet and under | Rate |
|----------------|----------|
| 6 | \$ 11.00 |
| 7 | 13.00 |
| 8 | 15.00 |
| 9 | 16.00 |
| 10 | 21.00 |
| 11 | 26.00 |
| 12 | 29.00 |
| 12-6 | 30.00 |
| 13 | 32.00 |
| 13-6 | 34.00 |
| 14 | 39.00 |

| Feet and under | Rate |
|----------------|----------|
| 14-6 | \$ 43.00 |
| 15 | 45.00 |
| 15-6 | 47.00 |
| 16 | 50.00 |
| 16-6 | 54.00 |
| 17 | 57.00 |
| 17-6 | 61.00 |
| 18 | 65.00 |
| 18-6 | 67.00 |
| 19 | 71.00 |
| 19-6 | 75.00 |
| 20 | 78.00 |
| 20-6 | 83.00 |
| 21 | 87.00 |
| 21-6 | 94.00 |
| 22 | 100.00 |
| 22-6 | 106.00 |
| 23 | 112.00 |
| 23-6 | 116.00 |
| 24 | 120.00 |
| 24-6 | 124.00 |
| 25 | 128.00 |
| 25-6 | 131.00 |
| 26 | 135.00 |
| 26-6 | 139.00 |
| 27 | 143.00 |
| 27-6 | 146.00 |
| 28 | 150.00 |
| 28-6 | 154.00 |
| 29 | 158.00 |
| 29-6 .. | 161.00 |
| 30 | 165.00 |

COLUMN No. 2

From Southport to Wilmington or Vice Versa

| | |
|------------|---------|
| 6 | \$ 6.00 |
| 7 | 8.00 |
| 8 | 9.00 |
| 9 | 10.00 |
| 10 | 13.00 |
| 11 | 15.00 |
| 12 | 17.00 |
| 12-6 | 18.00 |
| 13 | 19.00 |
| 13-6 | 20.00 |
| 14 | 23.00 |
| 14-6 | 26.00 |
| 15 | 27.00 |
| 15-6 | 28.00 |
| 16 | 30.00 |
| 16-6 | 33.00 |
| 17 | 35.00 |
| 17-6 | 37.00 |
| 18 | 38.00 |
| 18-6 | 40.00 |

| Feet and under | Rate |
|----------------|---------|
| 19 | \$44.00 |
| 19-6 | 45.00 |
| 20 | 47.00 |
| 20-6 | 50.00 |
| 21 | 53.00 |
| 21-6 | 56.00 |
| 22 | 60.00 |
| 22-6 | 64.00 |
| 23 | 68.00 |
| 23-6 | 70.00 |
| 24 | 72.00 |
| 24-6 | 74.00 |
| 25 | 76.00 |
| 25-6 | 79.00 |
| 26 | 81.00 |
| 26-6 | 83.00 |
| 27 | 85.00 |
| 27-6 | 88.00 |
| 28 | 90.00 |
| 28-6 | 92.00 |
| 29 | 94.00 |
| 29-6 | 97.00 |
| 30 | 99.00 |

Vessels calling at the port solely for the purpose of obtaining bunker coal shall pay one-half the fees hereinbefore prescribed. (1921, c. 79, s. 13; C. S., s. 6943(m); 1927, c. 158, s. 5.)

Editor's Note.—The 1927 amendment changed a majority of the pilotage rates as fixed by this section.

Pilot Entitled to Pilotage.—The first pilot speaking a vessel shall be entitled to the pilotage fees over the bar to Southport and out to sea again, provided said pilot shall be ready and willing to serve as a

pilot, etc. *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920 (1908).

A barge of over sixty gross tons having a United States licensed pilot on board is subject to pilotage, tender and refusal under this section upon entering North Carolina waters. *Craig v. Gulf Barge, etc., Co.*, 201 N. C. 250, 159 S. E. 424 (1931).

§ 76-14. Pay for detention of pilots.—Every master of a vessel who shall detain a pilot at the time appointed so that he cannot proceed to sea, though wind and weather permit, shall pay such pilot ten dollars (\$10) per day during the time of his actual detention, the pilot to have due notice from the master or agent of said vessel. (1921, c. 79, s. 14; C. S., s. 6943(n).)

§ 76-15. Vessels not liable for pilotage.—Any vessel coming into Southport from sea without the assistance of a pilot, the wind and weather being such that such assistance or service could have been reasonably given, shall not be liable for pilotage inward from sea, and shall be at liberty to depart without payment of any pilotage, unless the services of a pilot be secured. (1921, c. 79, s. 15; C. S., s. 6943(o).)

Validity.—This section is valid, when construed with the other sections, being an incentive to render pilots vigilant. *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920 (1908).

§ 76-16. First pilot to speak vessel to get fees.—The first pilot speaking a vessel from a regularly numbered and licensed boat of this board shall be entitled to the pilotage fees over the bar to Southport, and out to sea again: Provided, said pilot shall be ready and willing to serve as pilot when the vessel is ready to depart, due notice having been given by the master or agent to said pilot. (1921, c. 79, s. 16; C. S., s. 6943(p).)

§ 76-17. **Vessels entering for harborage exempt.**—Any vessel coming in from sea for harbor shall not be required to take a pilot either from sea inward or back to sea. (1921, c. 79, s. 17; C. S., s. 6943(q).)

§ 76-18. **Harbor master of Wilmington; duties.**—The harbor master appointed for the port of Wilmington shall hold his office for one year next ensuing and until his successor is appointed. The harbor master shall have power and is required:

1. To keep the channel way of the Cape Fear River and the track of vessels clear; to berth vessels at appropriate wharves or docks; to change the berth of any vessel at request of the owner of the wharf or dock; to move such vessels to some other wharf or to a safe anchorage in the stream; and he is further authorized and required to determine in all cases how far and in what instances it is the duty of masters and others having charge of vessels, flats, rafts, or crafts to accommodate each other in their respective berths and situations.

2. To arrest any person violating this chapter, and to immediately bring such offender before some justice of the peace of the county in which such offense may be committed, for trial.

3. Whenever in his judgment it shall be necessary to cast loose from any wharf or dock any raft, flat, vessel, or other craft by untying or cutting the lines by which it is made fast, if the owner after notice refuses to remove such vessel.

4. Whenever any of the public docks of the city of Wilmington are obstructed by any vessels, flats, barges, logs, hulks, trash, or garbage, and the owner thereof cannot be found or fails to remove the same from said docks, to take the most speedy method to clear the docks.

5. To appoint in writing some competent person to act in his place and stead during his temporary absence, or at such times as he is unable to attend to the duties of his office, and such person shall, while acting for such harbor master, have all the power and authority conferred upon and vested in the harbor master by law.

6. To collect from all vessels arriving in the port of Wilmington the following fees and no others, to wit: If over one hundred tons and under three hundred tons, three dollars; if over three hundred tons and under five hundred tons, five dollars; if over five hundred tons and under seven hundred tons, seven dollars; if over seven hundred tons, ten dollars. (Code, s. 3482; 1903, c. 662; 1905, c. 321; Rev., s. 4958; C. S., s. 6960.)

§ 76-19. **Port wardens of Wilmington; election; oath.**—There shall be three competent persons at the port of Wilmington, to be known as port wardens. The persons so elected shall at once take and subscribe before the clerk of the superior court of New Hanover County the following oath:

I, A. B., do solemnly and sincerely swear that I will faithfully, honestly, and impartially execute and discharge the duty of port warden for the port of Wilmington, by duly appraising and estimating the damage sustained on any vessel or goods arriving in or stranded within the bounds of said port, and will make a true and fair estimate and report of and regarding the seaworthiness of any vessel by me surveyed. (1889, c. 437; 1905, c. 321; Rev., s. 4959; C. S., s. 6961.)

§ 76-20. **Port wardens of Wilmington; duties; fees.**—The port wardens of Wilmington shall, on request made by the master, owner, freighter, or supercargo of any vessel arriving in said port, or stranded within the bounds thereof, survey and make report of her situation and condition, and the causes thereof, and whether she should be repaired or condemned; inspect the conditions of vessels which may arrive in distress or may have suffered by gales of wind or otherwise at sea; the situation and condition of goods, wares, and merchandise which may arrive in said vessels or may have received damage at

sea, and report thereon and the probable causes thereof; inspect the storage of cargoes of vessels arriving as aforesaid, or having received damage as aforesaid, before the same shall be discharged, except where vessels may be stranded, in which cases their cargoes may be inspected after the same are removed, and report thereon, whether faulty or not, in which report shall be stated the probable cause of the damage; make surveys of goods, wares, and merchandise, and the cargoes of vessels damaged as aforesaid, and make and report estimates of the amount of the damage sustained as aforesaid; and make and report, if required, surveys of vessels outward bound, and report whether they are seaworthy or not, and fit for the voyage intended. All goods which shall be sold by reason of their having received damage as aforesaid, and shall have been surveyed or inspected by the said port wardens, shall be sold under their inspection and direction; and the said port wardens shall respectively receive for their services: For a survey at the town of Wilmington, the sum of ten dollars; for a survey at the Flats, the sum of twelve dollars; and for a survey at Fort Johnson, the sum of fifteen dollars, to be paid by the party at whose request the same is made, and recovered before any court of competent jurisdiction. (1889, c. 437, ss. 2, 3; Rev., s. 4960; C. S., s. 6962.)

§ 76-21. Repairing boats in street docks at Wilmington forbidden.—If any person shall, for the purpose of repair, put any flat, steamboat, or other craft, in any of the street docks of the city of Wilmington, or shall, for the purpose of repair, ground any such flat, steamboat, or other craft in any of the public docks of such city on the east side of the Cape Fear River between Church Street dock and Red Cross Street dock, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1903, c. 662, s. 2; Rev., s. 3554; C. S., s. 6963.)

§ 76-22. Obstructing docks by flats and barges at Wilmington forbidden.—The owner of any rafts, flats, vessels, or other craft lying alongside any wharf or wharves or before the entrance of any public dock, his or their agents or servants, shall, upon notice from the harbor master, immediately remove the same, and upon his or their refusal so to do, it shall be the duty of the harbor master, and he is hereby authorized and directed, after notice as aforesaid to the owner or owners thereof, their agents or servants, forthwith to cause all such rafts, flats, vessels, or other craft to be removed at the cost and expense of such owner or owners or their agent or agents, and the owner shall be guilty of a misdemeanor. (1903, c. 662, s. 3; Rev., s. 3549; C. S., s. 6964.)

§ 76-23. Obstructing harbor master of Wilmington forbidden.—If any person shall hinder, delay, obstruct, or in any manner willfully interfere with the harbor master of Wilmington in the discharge of his duty he shall be guilty of a misdemeanor, and be fined not more than fifty dollars or imprisoned not more than thirty days. (1903, c. 662, s. 8; Rev., s. 3552; C. S., s. 6965.)

§ 76-24. Encumbering docks at Wilmington forbidden.—If any person shall encumber any of the public docks of the city of Wilmington with logs, hulks, flats, or barges, trash or garbage, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined ten dollars, and if the encumbrance be not removed immediately upon notice from the harbor master, he shall be fined ten dollars for each and every day thereafter such nuisance shall remain. (1903, c. 662, s. 9; Rev., s. 3547; C. S., s. 6966.)

ARTICLE 2.

Beaufort Harbor.

§ 76-25. Commissioners of navigation; election.—The commissioners of navigation for Old Topsail Inlet and Beaufort Harbor shall be composed of

three persons, to be elected as follows: The board of commissioners of Carteret County shall elect one, the commissioners of the town of Beaufort shall elect one, and the commissioners of the town of Morehead City shall elect one. They shall be elected at the regular meeting of such boards in June, one thousand nine hundred and five, and every two years thereafter, and shall qualify by taking the oath required by law before the clerk of the superior court or some justice of the peace of Carteret County, and enter upon the discharge of their duties on the first Monday in July following their election. (1899, c. 9, ss. 1, 2; Rev., s. 4964; C. S., s. 6967.)

§ 76-26. Authority of commissioners.—They shall have authority in all matters that may concern the navigation of the harbor, Old Topsail Inlet, and all the waters of the sound and rivers within ten miles of the town of Beaufort, and in the construction of wharves, and when there is no harbor master, the commissioners aforesaid shall decide all disputes about the moving of vessels and other matters which properly fall within the Department of Harbor Master. (1868-9, c. 208, s. 3; Code, s. 3528; Rev., s. 4965; C. S., s. 6968.)

§ 76-27. Harbor master for Beaufort.—The said commissioners immediately after their election shall appoint a harbor master for the port of Beaufort, who shall hold his office for the term of one year, unless sooner removed by the commissioners for neglect of duty. He shall be entitled to receive of the master of each vessel that shall enter said port, and for other services, such fees as the commissioners may prescribe. (1868-9, c. 208, s. 4; Code, s. 3529; Rev., s. 4966; C. S., s. 6969.)

§ 76-28. Pilots; how appointed and licensed.—Such commissioners shall elect the pilots for said inlet and harbor, and may make such rules and regulations for their government as the commissioners may deem right and proper, not inconsistent with the Constitution and laws of this State or of the United States: Provided, that all persons who may be licensed as pilots shall have had at least two years' practical experience as apprentices under some regular licensed pilot of Beaufort Harbor and Old Topsail Inlet, and shall secure two pilots in good standing to endorse in writing each application for license. Application for pilot licenses or branches shall be made to the commissioners in writing, giving the name, age, and occupation of applicants for two years next preceding the date of application. The commissioners shall examine all applicants for pilot's licenses, and may also examine other persons as to qualification of applicants to perform the duties of pilot, and may in their discretion reject any applicant whom they may deem incompetent. (1899, c. 9, ss. 3, 4, 5; Rev., s. 4967; C. S., s. 6970; 1921, c. 74, s. 6.)

§ 76-29. Fees for issuing pilot's license.—The said commissioners shall give to every pilot elected by them a license or branch under their hands and seals, which shall be and remain in force for one year unless, for good cause to said commissioners appearing, the same shall be sooner revoked by them. They shall charge for each license or branch, fifteen dollars, which they may retain for their expenses and services. (1899, c. 9, s. 6; Rev., s. 4968; C. S., s. 6971; 1921, c. 74, s. 5.)

§ 76-30. Expiration of pilot's license; reinstatement.—Each pilot shall forfeit his branch after fifteen days' expiration of the same; however, such pilot may be reinstated by securing two pilots in good standing to sign his branch. (1915, c. 142, s. 3; C. S., s. 6972.)

§ 76-31. Pilot boats to be numbered.—Each and every pilot vessel in Carteret County shall be numbered; and any pilot piloting a vessel or barge in or out of the territory as set out in this article, without a number, shall be guilty of a misdemeanor and be subject to a fine of not more than fifty dollars or impris-

oned not more than thirty days, or both, in the discretion of the court. The commissioners of navigation of Beaufort Harbor shall make provision for numbering of pilot vessels as required by this section. All said fines collected under this article to be applied to the public school fund of Carteret County. (1915, c. 142, ss. 2, 3; C. S., s. 6973.)

§ 76-32. Rates of pilotage.—The pilotage for Old Topsail Inlet and Beaufort Harbor shall be as follows: For vessels drawing eight feet and under, two dollars and fifty cents per foot; ten feet and over eight, three dollars per foot; twelve feet and over ten, four dollars per foot; all over twelve feet, four dollars and fifty cents per foot. The above fees to be collectible in Beaufort Harbor from Middle marsh to Lewis thoroughfare, and from the Neuse River side of the inland waterway through the said waterway and out of Beaufort Inlet. For every vessel piloted without these bounds an additional charge of fifty cents per foot may be charged. The commissioners shall have the rates of pilotage printed or written on every license or branch issued by them, and every pilot shall exhibit his license to the master of every vessel he has in charge, when demanded by said master. The rates of pilotage as set out in this section shall apply to all vessels entering or leaving "Old Topsail Inlet" and "Beaufort Harbor." (1899, c. 9, ss. 7, 8; 1901, c. 639; Rev., s. 4969; 1909, c. 250, s. 1; 1915, c. 142, s. 1; C. S., s. 6974; 1921, c. 74, ss. 1-3.)

§ 76-33. Vessels required to take pilots.—All vessels, coastwise or foreign, over sixty gross tons shall take a State-licensed pilot from sea to Pier One, Morehead City, North Carolina, and from Pier One, Morehead City, North Carolina, to sea, and the rates of pilotage shall be the rates as are set out in § 76-32. (1921, c. 74, s. 4; C. S., s. 6974(a).)

§ 76-34. Vessel under sixty tons not liable for pilotage.—No pilot, acting under the authority of the commissioners of navigation for Old Topsail Inlet, shall be entitled to pilotage for any vessel under sixty tons burden, unless such vessel shall have given a signal for a pilot, or otherwise shall have required the assistance of a pilot. (1801, c. 600, s. 3; 1806, c. 711, s. 1; R. C., c. 85, s. 33; Code, s. 3523; Rev., s. 4970; C. S., s. 6975.)

ARTICLE 3.

Bogue Inlet.

§ 76-35. Commissioners of navigation for Bogue Inlet.—The board of commissioners of the county of Onslow shall appoint five commissioners of navigation for Bogue Inlet and its waters. When vacancies occur in said board, by refusal to act, by resignation, or otherwise, the remaining members of such board shall fill the same until the same be supplied by the appointing board, which is directed to be done at the first meeting after the vacancy occurs. And the said board shall have the same powers and authority as to pilots and pilotage as the commissioners for Old Topsail Inlet and Beaufort Harbor. (1783, c. 194; 1784, c. 208, s. 2; R. C., c. 85, s. 25; 1879, c. 216, s. 4; Code, s. 3515; Rev., s. 4971; C. S., s. 6976.)

§ 76-36. Rates of pilotage.—The branch pilots for Bogue Inlet shall be entitled to receive of the commander of such vessel as they may have charge of the following pilotage, namely: For bringing any vessel into the said inlet, drawing less than seven feet, from the outside of the bar to the anchorage before the town, or the customary place in Hill's Channel, one dollar per foot; for a vessel drawing more than seven feet, one dollar and fifty cents per foot; and the same fees for pilotage outward as inward. (Code, s. 3535; 1889, c. 121; Rev., s. 4972; C. S., s. 6977.)

ARTICLE 4.

Hatteras and Ocracoke.

§ 76-37. **Board of commissioners of navigation; organization; oath; pilots' licenses.**—John W. Rolinson, R. R. Quidley, George L. Styron, William Balance, and Charles L. Odine shall constitute a board of commissioners of navigation for the port of Hatteras Inlet, of the county of Dare; William E. Howard, Christopher O. Neal, Sr., and Gilbert O. Neal, of the county of Hyde; D. R. Roberts and J. W. Gilgo, of the county of Carteret, shall constitute a board of navigation for the port of Ocracoke Inlet, whose duty it shall be to meet at Hatteras and Ocracoke respectively three times in each year, or a majority of the respective board, after giving at least twenty days' notice of each meeting, and when any person is desirous of becoming a pilot at Hatteras or Ocracoke Inlet, over the swashes through Pamlico and Albemarle Sounds, he shall be examined by said board, and when found competent to take charge of any ship or vessel as a pilot the board shall issue to him a branch and take the bond authorized by law, and no person shall be authorized to act as a bar or swash pilot unless he shall have a branch from said boards. The said boards shall have their offices at Hatteras and Ocracoke respectively, in which shall be filed the bonds of the pilots, and every pilot receiving a branch from said boards shall pay to the board from which he receives such branch two dollars and fifty cents, of which sum the commissioners of Ocracoke who live in Carteret County shall receive ten cents per mile traveling to and from the meeting of said board, and the residue shall be divided between all the members of said board, and the commissioners shall belong to each board respectively. When a vacancy shall occur in either board by death, resignation, or refusal to act, a majority thereof of each board shall appoint some suitable person thereto, whose residence shall be at the same place where the vacancy occurred; said commissioners shall keep a regular journal of their proceedings, and before entering on the duties of their office they shall take and subscribe before any justice of the peace of the counties of Dare, Carteret, or Hyde the following oath:

I do solemnly swear that I will truly and faithfully and impartially examine every person who shall apply to me for a branch, to the best of my ability: So help me, God.

The branch shall expire in three years from the date thereof. (R. C., c. 85, s. 24; 1871-2, c. 134; 1879, c. 216; Code, s. 3512; 1897, c. 211; Rev., s. 4961; C. S., s. 6978.)

§ 76-38. **Rates of pilotage.**—Branch pilots of Ocracoke or Hatteras shall be entitled to receive of the commander of such vessel as they may have in charge the following pilotage, namely: For every vessel of sixty and not over one hundred and forty tons burden, from the other side of the bar, at any place within the limits of the pilot ground, to Beacon Island Road, or Wallace's Channel, ten cents for each ton, and the further sum of two and a half cents for each ton over one hundred and forty, and two dollars for each vessel over either of the swashes (that is, over said swashes either to or from Beacon Island Road, or Wallace's Channel, or over any shoal lying intermediate between either of said swashes and Beacon Island Road or Wallace's Channel); for every ship or vessel from the mouth of the swash to either of the ports of New Bern or Washington, one dollar per foot, and for every ship or vessel from the same place to the port of Edenton, twelve dollars; and to the port of Elizabeth City, ten dollars; and the same allowance down as up, and outward as inward. (1794, c. 426; 1806, c. 711; 1846, c. 49, ss. 1, 2, 3; R. C., c. 85, s. 34; Code, s. 3524; Rev., s. 4962; C. S., s. 6979.)

§ 76-39. **Who may be pilots for Hatteras or Ocracoke Inlet.**—The said boards shall not issue or grant any branch to pilot vessels through Hatteras

Inlet to any person who does not reside in Hatteras precinct, which precinct extends from Cape Hatteras lighthouse to Hatteras Inlet. And the said boards shall not issue or grant a branch to pilot vessels through or over Ocracoke Inlet to any person who does not reside upon the island of Ocracoke or in the precinct of Portsmouth. (1856-7, c. 29; 1879, c. 216, s. 3; Code, s. 3514; Rev., s. 4963; C. S., s. 6980.)

ARTICLE 5.

General Provisions.

§ 76-40. Obstructing navigable waters; removing beacons; penalty; pilot's liability.—If any person shall cast or throw from any vessel, into the navigable water of Carteret or Onslow counties, of Tar or Pamlico rivers, or into the navigable waters of the Cape Fear, or any other river in the State, or into any channel of navigable water elsewhere than in a river, any ballast, stone, shells, earth, trash, or other substance likely to be injurious to the navigation of such waters, rivers, or channel; or if any person shall willfully pull down any beacon, stake, or other mark, erected or placed by virtue of any bylaw, order, or regulation passed or ordained by any commissioners of navigation, he shall be guilty of a misdemeanor and shall forfeit and pay two hundred dollars, to be recovered for the use of the commissioners in whose waters the offense was committed. If any pilot shall knowingly suffer any such unlawful act to be done, and shall not within ten days thereafter give to the said commissioners, or one of them, information thereof, such pilot shall likewise be guilty of a misdemeanor; and, besides the usual punishment of such offense, on conviction, shall be forever incapable of acting as a pilot in the State. (1784, c. 206, s. 11; 1811, c. 839; 1833, c. 146; R. S., c. 88, ss. 23, 24, 45; 1842, c. 65, s. 4; 1846, c. 60, s. 3; R. C., c. 85, ss. 40, 41; Code, ss. 3537, 3538; Rev., s. 3560; C. S., s. 6981.)

Cited in *State v. Eason*, 114 N. C. 787,
19 S. E. 88 (1894).

§ 76-41. Obstructing waters of Currituck Sound.—It shall be unlawful for any person to obstruct navigation in the waters of Currituck Sound and tributaries, and all persons, corporations, companies, or clubs, who have heretofore placed or caused to be placed any hedging across the mouth of a bay, creek, strait, or lead of water in Currituck Sound or tributaries, made of iron, wire, or wood or other material, for the purpose of preventing the free passage of boats or vessels of any size or class, or to stop the public use of such bay, creek, strait, or lead of water, are required to forthwith remove the same. Any person, corporation, or club violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars nor less than ten dollars, or imprisoned not more than thirty days, at the discretion of the court. (1897, c. 277; Rev., s. 3553; C. S., s. 6982.)

§ 76-42. Lumbermen to remove obstructions in Albemarle Sound.—If any lumberman shall fail to remove all obstructions placed by him in the waters of Albemarle Sound and its tributaries, as soon as practicable, after they have ceased to use them for the purpose for which they were placed in said waters, from all places where the water is not less than two feet deep, and also from all landing places on both sides, for the space of sixty feet from the shore outward, he shall be guilty of a misdemeanor, and fined not less than one dollar nor more than fifty dollars, at the discretion of the court. (1880, c. 37, ss. 1, 2; Code, s. 3303; Rev., s. 3551; C. S., s. 6983.)

§ 76-43. Anchoring in range of lighthouses.—If the master of any vessel shall anchor on the range line of any range of lights established by the United States lighthouse board, unless such anchorage is unavoidable, he shall

be guilty of a misdemeanor, and punished by a fine not to exceed fifty dollars. (1883, c. 165, s. 2; Code, s. 3086; Rev., s. 3550; C. S., s. 6984.)

§ 76-44. Vessels on inland waterways exempt from pilot laws; proviso as to steam vessels.—All vessels, barges, schooners, or other craft passing through the inland waterway of this State, when bound to a port or ports in this or any other state, be and the same are hereby exempt from the operations of the pilot laws of North Carolina and are not compelled to take a State licensed pilot: Provided, that steam vessels not having a United States licensed pilot for the waters navigated on board shall be subject to the State pilot laws. (1917, c. 33, s. 2; C. S., s. 6985.)

Under the Federal Law.—Vessels passing through the inland waterways of the State are exempt from the pilot laws by the State statutes, subject to the proviso of this section; and, under the federal statutes, whether a vessel has a gross tonnage of more than fifteen tons should be determined by the method prescribed by the federal statutes requiring a pilot; and in an

action for damages alleged to have been caused by defendant's negligence in a collision, it is reversible error for the trial judge to direct an affirmative answer to the issue of contributory negligence in navigating without a pilot upon plaintiff's assertion that his vessel would carry thirty tons. *Harris v. Slater*, 187 N. C. 163, 121 S. E. 437 (1924).

§ 76-45. Bond of pilot.—Every person, before he obtains a commission or a branch to be a pilot, shall give bond with two sufficient sureties payable to the State of North Carolina, in the sum of five hundred dollars, with condition for the due and faithful discharge of his duties, and the duties of his apprentices; and the body appointing such pilot may, from time to time, and as often as they may deem it necessary, enlarge the penalty of the bond, or require new and additional bonds to be given; and every bond taken of a pilot shall be filed with, and preserved by, the said body appointing such pilot in trust for every person that shall be injured by the neglect or misconduct of such pilot, or his apprentices; who may severally bring suit thereon for the damage by each one sustained. (1784, c. 207, s. 3; R. C., c. 85, s. 6; Code, s. 3487; Rev., s. 307; C. S., s. 6986.)

§ 76-46. Pilots to have spyglasses.—Every pilot, within such convenient time as the commissioners may direct, who has control over the waters within which he acts, shall furnish himself with a good telescope or spyglass, under the penalty of fifty dollars, to be paid to the commissioners. (1790, c. 320, s. 3; R. C., c. 85, s. 27; Code, s. 3517; Rev., s. 4973; C. S., s. 6987.)

§ 76-47. Acting as pilot without license.—If any person shall act as a pilot, who is not qualified and licensed in the manner prescribed in this chapter, he shall be guilty of a misdemeanor and upon conviction shall be fined not more than \$50.00 and not less than \$25.00, or imprisoned not more than thirty days at the discretion of the court: Provided, that should there be no licensed pilot in attendance, any person may conduct into port any vessel in danger from stress of weather or in a leaky condition. (1783, c. 194, s. 3; 1784, c. 208, s. 4; R. C., c. 85, s. 29; Code, s. 3519; Rev., s. 4974; C. S., s. 6988; 1933, c. 325.)

Editor's Note.—The 1933 amendment rewrote this section.

§ 76-48. Penalty on pilot neglecting to go to vessel having signal set.—When any pilot shall see any vessel on the coast, having a signal for a pilot, or shall hear a gun of distress fired off the coast, and shall neglect or refuse to go to the assistance of such vessel, such pilot shall forfeit and pay one hundred dollars, to be recovered in the name of the State, one-half to the use of the informer and the other half to the master of the vessel, unless such pilot is then actually in charge of another vessel. (1783, c. 194, s. 6; 1784, c. 207, s. 10;

1790, c. 320, s. 2; R. C., c. 85, s. 31; Code, s. 3521; Rev., s. 4975; C. S., s. 6989.)

§ 76-49. Pilots may be removed.—Unless otherwise provided in the first article of this chapter for the Cape Fear River, whenever any pilot appointed, as authorized in this chapter, shall, on trial, be found incompetent, or shall be guilty of improper conduct by intoxication or otherwise, or of any misbehavior in his office, or shall absent himself from the State for a period of six months, the pilot so offending may be removed from his office by the board of commissioners under whose authority he is acting, by a notice to him in writing; and if after such removal he shall attempt to take charge of any vessel, he shall forfeit and pay two hundred dollars for the use of said board. And it shall be the duty of the board to put up a written notice of the removal, in the public places within the port, or publish it in some convenient newspaper. But no pilot for the navigation of Hatteras Inlet shall be required to surrender or forfeit his branch by reason of absence from the State for a period of less than six months. (1784, c. 207, s. 4; 1800, c. 565; 1819, c. 1025, s. 4; R. S., c. 88, ss. 7, 31, 35; R. C., c. 85, s. 28; 1869-70, c. 235, s. 7; 1876-7, c. 22; 1881, c. 261, ss. 1, 2; Code, ss. 3490, 3518; Rev., s. 4976; C. S., s. 6990.)

Entitled to Fees Until Removed.—A duly licensed pilot may recover charges for his services, and while his failure to have his boat registered and numbered will cause a forfeiture of his license, the lawful pilotage charges for the service of such

boat is recoverable by him until the commissioners of navigation and pilotage have acted thereon and revoked his license. *Davis v. Heide & Co.*, 161 N. C. 476, 77 S. E. 691 (1913).

§ 76-50. Pilots refused, entitled to pay.—If a branch pilot shall go off to any vessel bound in, and offer to pilot her over the bar, the master or commander of such vessel, if he refuses to take such pilot, shall pay to such pilot, if not previously furnished with one, the same sum as is allowed by law for conducting such vessel in, to be recovered before a justice of the peace, if the sum be within his jurisdiction: Provided, that the first pilot, and no other, who shall speak such vessel so bound in shall be entitled to the pay provided for in this section. (R. C., c. 85, s. 32; 1871-2, c. 117; Code, s. 3522; Rev., s. 4978; C. S., s. 6991.)

§ 76-51. Pay of pilots when detained by vessel.—Every master of a vessel who shall detain a pilot at the time appointed, so that he cannot proceed to sea, though wind and weather should permit, shall pay to such pilot three dollars per day during the time of his actual detention. (1858-9, c. 23, s. 7; Code, s. 3495; Rev., s. 4979; C. S., s. 6992.)

§ 76-52. Rates of pilotage annexed to commission.—The commissioners of navigation for the several ports of this State shall annex to the branch or commission, by them given to each pilot, a copy of the fees to which such pilot is entitled. (1784, c. 208, s. 4; 1796, c. 470, s. 5; R. C., c. 85, ss. 9, 38; Code, ss. 3497, 3536; Rev., s. 4980; C. S., s. 6993.)

§ 76-53. Harbor masters; how appointed.—The several boards of commissioners of navigation may appoint a harbor master for their respective ports. They shall appoint a clerk to keep books, in which shall be recorded all their proceedings. (R. C., c. 85, s. 35; Code, s. 3525; Rev., s. 4981; C. S., s. 6994.)

§ 76-54. Commissioners of navigation may hold another office.—A commissioner of navigation and pilotage shall be deemed a commissioner for a special purpose within the meaning of section seven of article fourteen of the Constitution of North Carolina, so as not to be prohibited from holding at the same time with his commissionership another office under the national or State governments. (Ex. Sess. 1913, c. 76; C. S., s. 6995.)

§ 76-55. **Commissioners of navigation to designate place for trash.**—The several boards of commissioners established by this chapter may, subject to such regulations as the United States may make, designate the places whereat, within the waters under their several and respective control, may be cast and thrown ballast, trash, stone, and like matter. (1833, c. 146, ss. 1, 2, 3; R. S., c. 88, ss. 23, 24, 45; 1846, c. 60, s. 3; R. C., c. 85, s. 40; Code, s. 3537; Rev., s. 4982; C. S., s. 6996.)

Cited in *State v. Eason*, 114 N. C. 787, 19 S. E. 88 (1894).

§ 76-56. **Harbor master; how appointed where no board of navigation.**—Where no board of navigation exists the governing body of any incorporated town, situated on any navigable watercourse, shall have power to appoint a harbor master for the port, who shall have the same power and authority in their respective ports as the harbor master of Wilmington is by this chapter given for that port, and shall receive like fees and no others. (Rev., s. 4983; C. S., s. 6997.)

§ 76-57. **Rafts to exercise care in passing buoys, etc., penalty.**—If any person having charge of any raft passing any buoy, beacon, or day mark, shall not exercise due diligence in keeping clear of it, or, if unavoidably fouling it, shall not exercise due diligence in clearing it, without dragging from its position such buoy, beacon, or day mark, he shall be guilty of a misdemeanor, and punished by fine not to exceed fifty dollars. (1883, c. 165, s. 3; Code, s. 3087; Rev., s. 3545; C. S., s. 6998.)

§ 76-58. **Interfering with buoys, beacons, and day marks.**—If any person shall moor any kind of vessel, or any raft or any part of a raft, to any buoy, beacon, or day mark placed in the waters of North Carolina by the authority of the United States lighthouse board, or shall in any manner hang on with any vessel or raft, or part of a raft, to any such buoy, beacon, or day mark, or shall willfully remove, damage, or destroy any such buoy, beacon, or day mark, or shall cut down, remove, damage, or destroy any beacon erected on land in this State by the authority of the said United States lighthouse board, or through unavoidable accident run down, drag from its position, or in any way injure any buoy, beacon, or day mark, as aforesaid, and shall fail to give notice as soon as practicable of having done so, to the lighthouse inspector of the district in which said buoy, beacon, or day mark may be located, or to the collector of the port, or, if in charge of a pilot, to the collector of the port from which he comes, he shall for every such offense be guilty of a misdemeanor and shall be punished by a fine not to exceed two hundred dollars, or imprisoned not to exceed three months, or both, at the discretion of the court. (1858-9, c. 58, ss. 2, 3; 1883, c. 165, s. 1; Code, s. 3085; Rev., s. 3546; C. S., s. 6999.)

ARTICLE 6.

Morehead City Navigation and Pilotage Commission.

§ 76-59. **Board of commissioners of navigation and pilotage.**—A board of commissioners of navigation and pilotage for Old Topsail Inlet and Beaufort Bar to consist of three members, none of whom shall be licensed pilots, is hereby created. The members of the board shall be appointed by the Morehead City port commission, and their terms of office shall begin on the 15th day of July of the year in which they are appointed and continue for four years and until their successors shall be appointed and qualified. They shall be and are hereby declared to be commissioners for a special purpose, within the purview of section 7, article 14 of the Constitution of North Carolina. It shall be the duty of the Morehead City port commission to appoint, on or before the 1st day of July, 1947, and on or before the 1st day of July every fourth year

thereafter, the members of said board of commissioners. A majority of the board shall constitute a quorum and may act in all cases. The board shall have power to fill vacancies in its membership as they occur during their term, to appoint a clerk to record in a book, rules, orders and proceedings of the board, and the board shall have authority in all matters that may concern the navigation of waters from the Beaufort Sea Buoy to Morehead City, and out of the bar and inlet. (1947, c. 748.)

§ 76-60. Rules to regulate pilotage service.—The board shall from time to time make and establish such rules and regulations respecting the qualifications, arrangements, and station of pilots as to them shall seem most advisable, and shall impose such reasonable fines, forfeitures and penalties as may be prescribed for the purpose of enforcing the execution of such rules and regulations. The board shall also have power and authority to prescribe, reduce and limit the number of pilots necessary to maintain an efficient pilotage service for Old Topsail Inlet and Beaufort Bar, as in its discretion may be necessary: Provided, that the present number of two pilots now actively engaged in the service shall not be reduced except for cause or by resignation, disability, or death. The board shall have power and authority to organize all pilots licensed by it into a mutual association, under such reasonable rules and regulations as the board may prescribe; any licensed pilot refusing to become a member of such association shall be subject to suspension, or to have his license revoked, at the discretion of the board. (1947, c. 748.)

§ 76-61. Examination and licensing of pilots.—The board, or a majority of them, may from time to time examine, or cause to be examined, such persons as may offer themselves to be pilots for Old Topsail Inlet and Beaufort Bar, and shall give to such as are approved commissions under their hands and the seal of the board, to act as pilots for Old Topsail Inlet and Beaufort Bar; and the number of pilots so commissioned, not exceeding three at any one time, shall be left to the discretion of the board, but the limitation as to number herein shall not deprive the board of the power to issue license to any person who is a duly licensed pilot at the time of the passage of this article. (1947, c. 748.)

§ 76-62. Appointment and regulation of pilots' apprentices.—The board is hereby authorized to appoint in its discretion apprentices, and to make and enforce reasonable rules and regulations relating to apprentices. No apprentice shall be required to serve for a longer period than three years in order to obtain a license to pilot vessels of a draught of not exceeding fifteen feet, and one year thereafter for a license to pilot vessels of any draught. No one shall be entered as an apprentice who is under the age of 21 years, nor shall the board license a pilot except upon written approval of two licensed pilots. (1947, c. 748.)

§ 76-62.1. Renewal of license; license fee.—All licenses shall be renewed annually upon payment of a fee of five dollars (\$5.00); provided, the holder of such license shall have, during the year preceding the date of such renewal, complied with the provisions of this article and the reasonable rules and regulations prescribed by the board under authority hereof. (1947, c. 748.)

§ 76-63. Expenses of the board.—Each pilot, or the association of pilots, when organized as in this article provided, shall pay over to the board under such reasonable rules as the board shall prescribe two per cent (2%) of each and every pilotage fee received, for the purpose of providing funds to defray the necessary expenses of the board. (1947, c. 748.)

§ 76-64. Pilots to give bond.—Every person before being commissioned as a pilot shall give bond for the faithful performance of his duties, with two

or more personal sureties or a bond in some surety company licensed to do business in North Carolina payable to the State of North Carolina in the sum of five hundred (\$500.00) dollars; the board may, from time to time, and as often as it may deem necessary, enlarge the penalty of the bond, or require new or additional bonds to be given in a sum or sums not to exceed in all, one thousand (\$1,000.00) dollars. Every bond taken of a pilot shall be filed with and preserved by the board in trust for every person, firm, or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm, or corporation so injured may severally bring suit for the damage by each one sustained. (1947, c. 748.)

§ 76-65. Permission to run as pilots on steamers; other ports.—The board shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilots on steamers running between Old Topsail Inlet and Beaufort Bar, and the port of Morehead City, and other ports of the United States, under such rules and regulations as the board shall prescribe. (1947, c. 748.)

§ 76-66. Cancellation of licenses.—The board shall have the power to call in and cancel the license of any pilot who has refused or neglected, except in case of sickness, his duty as a pilot. Any pilot who has been absent from the State for a longer period than six months in succession shall, upon his return, surrender his license to the board, or the board may declare the same void, except when such absence has been under permission from the board as provided above. (1947, c. 748.)

§ 76-67. Jurisdiction over disputes as to pilotage.—Each member of the board shall have power and authority to hear and determine any matter of dispute between any pilot and any master of a vessel, or between pilots themselves, respecting the pilotage of any vessel and any one of them may issue a warrant against any pilot for the recovery of any demand which one pilot may have against another, relative to pilotage, and for the recovery of any forfeiture or penalty provided by law, relating to pilotage in Old Topsail Inlet and Beaufort Bar, or provided by any bylaw or rule or regulation enacted by the board by virtue of any such law, which warrant the sheriff or any constable in Carteret County, shall execute together with any other process authorized by this article. On any warrant issued as herein provided any one of said commissioners may give judgment for any sum not exceeding five hundred (\$500.00) dollars, and may issue execution thereon, in like manner as is provided for the issuing of execution of judgments rendered by justices of the peace, which writ of execution shall be executed agreeably to the law regulating the levy and sale under executions issuing from courts of justices of the peace. Any member of the board shall have authority to issue summons for witnesses and to administer oaths, and hearings before any member of the board and any matters as provided in this section shall conform as nearly as may be to procedure provided by law in the courts of justices of the peace. From any judgment rendered by any member of the board, either party shall have the right of appeal to the superior court of Carteret County, in like manner as is provided for appeals on judgments of justices of the peace. (1947, c. 748.)

§ 76-68. Retirement of pilots from active service.—The board shall have and is hereby given authority in its discretion, and under such reasonable rules and regulations as it may prescribe, to retire from active service any pilot who shall become physically or mentally unfit to perform his duties as pilot, and to provide for such pilot or pilots so retired such compensation as the board shall deem proper: Provided, however, that no pilot shall be retired, for physical or mental disability, unless and until such pilot shall have first been examined by the public health officer or county physician of Carteret County, and such pub-

lic health officer or physician shall have certified, either separately or jointly, to the board the fact of such physical or mental disability. (1947, c. 748.)

§ 76-69. When employment compulsory; rates of pilotage.—All vessels, coastwise or foreign, over 60 gross tons, shall on and after the 1st day of August, 1947, take a State licensed pilot from Beaufort Sea Buoy to Morehead City and from Morehead City to sea, and the rates of pilotage shall be such as may be prescribed from time to time by the board of commissioners.

Vessels calling at the port solely for the purpose of obtaining bunkers shall pay one-half of the fees prescribed by the said board. (1947, c. 748.)

§ 76-70. Pay for detention of pilots.—Every master of a vessel who shall detain a pilot at the time appointed so that he cannot proceed to sea, though wind and weather permit, shall pay such pilot ten dollars (\$10.00) per day during the time of his actual detention, the pilot shall have due notice from the master or agent of said vessel. (1947, c. 748.)

§ 76-71. Vessels not liable for pilotage.—Any vessel coming into Morehead City from sea without assistance of a pilot, the wind and weather being such that such assistance or service could not have been reasonably given, shall not be liable for pilotage inward from sea, and shall be at liberty to depart without payment of any pilotage, unless the service of a pilot be secured. (1947, c. 748.)

§ 76-72. First pilot to speak vessel to get fees.—The first licensed pilot speaking a vessel from a regularly numbered pilot boat of this board shall be entitled to the pilotage fees over Old Topsail Inlet and Beaufort Bar to Morehead City, and out to sea again. Provided, said pilot shall be ready and willing to serve as pilot when the vessel is ready to depart, due notice having been given by the master or agent to said pilot. (1947, c. 748.)

§ 76-73. Vessels entering for harborage exempt.—Any vessel coming in from sea for harbor shall not be required to take a pilot either from sea inward or back to sea. (1947, c. 748.)

Chapter 77.

Rivers and Creeks.

Article 1.

Commissioners for Opening and Clearing Streams.

Sec.

77-1. County commissioners to appoint commissioners.

77-2. Flats and appurtenances procured.

77-3. Laid off in districts; passage for fish.

77-4. Gates and slopes on milldams.

77-5. Owner to maintain gate and slope.

77-6. Gates and slopes discontinued.

77-7. Failure of owner of dam to keep gates, etc.

Sec.

77-8. Repairing breaks.

77-9. Entry upon lands of another to make repairs.

77-10. Draws in bridges.

77-11. Public landings.

Article 2.

Obstructions in Streams.

77-12. Obstructing passage of boats.

77-13. Obstructing streams a misdemeanor.

ARTICLE 1.

Commissioners for Opening and Clearing Streams.

§ 77-1. **County commissioners to appoint commissioners.**—Where any inland river or stream runs through the county, or is a line of their county, the boards of commissioners of the several counties may appoint commissioners to view such river or stream, and make out a scale of the expense of labor with which the opening and clearing thereof will be attended; and if the same is deemed within the ability of the county, and to be expedient, they may appoint and authorize the commissioners to proceed in the most expeditious manner in opening and clearing the same. (Code, s. 3706; 1887, c. 370; Rev., s. 5297; C. S., s. 7363.)

Cross Reference.—As to building bridges, see § 136-68 et seq.

§ 77-2. **Flats and appurtenances procured.**—The board of county commissioners appointing the commissioners may direct them to purchase or hire a flat with a windlass and the appurtenances necessary to remove loose rock and other things, which may by such means be more easily removed, and allow the same to be paid for out of the county funds. (1785, c. 242, s. 2; R. C., c. 100, s. 3; Code, s. 3708; Rev., s. 5299; C. S., s. 7365.)

§ 77-3. **Laid off in districts; passage for fish.**—The board of county commissioners may appoint commissioners to examine and lay off the rivers and creeks in their county; and where the stream is a boundary between two counties, may lay off the same on their side; in doing so they shall allow three-fourths for the owners of the streams for erecting slopes, dams and stands; and one-fourth part, including the deepest part, they shall leave open for the passage of fish, marking and designating the same in the best manner they can; and if mills are built across such stream, and slopes may be necessary, the commissioners shall lay off such slopes, and determine the length of time they shall be kept open; and such commissioners shall return to their respective boards of county commissioners a plan of such slopes, dams, and other parts of streams viewed and surveyed. (1787, c. 272, s. 1; R. C. c. 100, s. 5; Code, s. 3710; Rev., s. 5301; C. S., s. 7367.)

Cross References.—See note to § 77-4. streams, see §§ 113-251, 113-252 and 113-299. As to erecting artificial islands or

lumps in public waters, see § 14-133. As to injuries to dams and water channels of mills and factories, see § 14-142.

Cited in *Gwaltney v. Scottish Carolina*

Timber, etc., Co., 111 N. C. 547, 16 S. E. 692 (1892); *Hutton v. Webb*, 124 N. C. 749, 33 S. E. 169 (1899).

§ 77-4. Gates and slopes on milldams.—The commissioners appointed by the board of county commissioners to examine and lay off the rivers and creeks within the county, or where the stream is a boundary between counties, shall have power to lay off gates, with slopes attached thereto, upon any mill-dam built across such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber, in cases where it may be deemed necessary by the said board of county commissioners; and they shall return to the board of county commissioners appointing them a plan of such gates, slopes, and dams in writing. (1858-9, c. 26, s. 1; Code, s. 3712; Rev., s. 5302; C. S., s. 7368.)

Only Applicable to Floatable Streams.—It would seem that these sections were passed entirely with reference to floatable streams because without condemnation the commissioners would have no right to enter upon and clean out beds of streams which were not natural highways. *Commissioners v. Catawba Lumber Co.*, 116 N. C. 731, 21 S. E. 941 (1895).

Dams Built under Permit.—Authority over streams, conferred upon county commissioners while it stands and is unim-

peached by allegations of fraud or other illegal conduct, is a bar to the remedy by injunction. Therefore, a defendant will not be restrained from erecting a dam across a stream, when he is proceeding under the permit and direction of the commissioners. *McLaughlin v. Hope Mfg. Co.*, 103 N. C. 100, 9 S. E. 307 (1889).

Cited in *Gwaltney v. Scottish Carolina Timber, etc., Co.*, 111 N. C. 547, 16 S. E. 692 (1892).

§ 77-5. Owner to maintain gate and slope.—Upon the confirmation of the report made by the commissioners, and notice thereof given to the owner or keeper of said mill, it shall be his duty forthwith to construct, and thereafter to keep and maintain, at his expense, such gate and slope, for the use of persons floating logs and other timber as aforesaid, so long as said dam shall be kept up, or until otherwise ordered by the board of county commissioners. (1858-9, c. 26, s. 2; Code, s. 3713; Rev., s. 5303; C. S., s. 7369.)

§ 77-6. Gates and slopes discontinued.—The commissioners appointed as aforesaid, at any time that they may deem such gate and slope no longer necessary, may report the fact to their respective boards of county commissioners, and said boards of county commissioners may order the same to be discontinued. (1858-9, c. 26, s. 3; Code, s. 3714; Rev., s. 5304; C. S., s. 7370.)

§ 77-7. Failure of owner of dam to keep gates, etc.—If any owner or keeper of a mill, whose dam is across any stream, shall fail to build a gate and slope therein, or thereafter to keep and maintain the same as required by commissioners to lay off rivers and creeks, he shall be guilty of a misdemeanor. (1858-9, c. 26, s. 4; Code, s. 3715; Rev., s. 3383; C. S., s. 7371.)

§ 77-8. Repairing breaks.—Wherever any stream of water which is used to propel machinery shall be by feshet or otherwise diverted from its usual channel so as to impair its power as used by any person, such person shall have power to repair the banks of such stream at the place where the break occurs, so as to cause the stream to return to its former channel. (1879, c. 53, s. 1; Code, s. 3716; Rev., s. 5305; C. S., s. 7372.)

§ 77-9. Entry upon lands of another to make repairs.—In case the break occurs on the lands of a different person from the one utilizing the stream, the person utilizing the stream shall have power to enter upon the lands of such other person to repair the same, and in case such person objects, the clerk of the superior court of the county in which the break occurs shall, upon

application of the party utilizing the stream, appoint three disinterested freeholders, neither of whom shall be related to either party, who after being duly sworn shall lay off a road, if necessary, by which said person may pass over the lands of such other person to the break and repair said break from time to time as often as may be necessary, so as to cause the stream to return to its original channel, and assess any damage which may thereby be occasioned: Provided, the party upon whose land the work is proposed to be done shall have five days' notice in writing served on him or left at his place of residence: Provided further, that it shall be the duty of said commissioners to assess the damages of anyone on whose land the road shall be laid off to be paid by the applicant for said road: Provided, also, that either party shall have the right of appeal to the superior court. (1879, c. 53, s. 2; Code, s. 3717; Rev., s. 5306; C. S., s. 7373.)

§ 77-10. Draws in bridges.—Whenever the navigation of any river or creek which, in the strict construction of law, might not be considered a navigable stream, shall be obstructed by any bridge across said stream, it shall be lawful for any person owning any boat plying on said stream to make a draw in such bridge sufficient for the passage of such boat; and the party owning such boat shall construct and maintain such draw at his own expense, and shall use the same in such manner as to delay travel as little as possible. (1879, c. 279, ss. 1, 2; Code, s. 3719; Rev., s. 5307; C. S., s. 7374.)

Cited in *Staton v. Wimberly*, 122 N. C. 107, 29 S. E. 63 (1898).

§ 77-11. Public landings.—The board of county commissioners may establish public landings on any navigable stream or watercourse in the county upon petition in writing. Unless it shall appear to the board that the person owning the lands sought to be used for a public landing shall have had twenty days' notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof shall be posted during the same period at the courthouse door. At said meeting of the board, the allegations of the petition shall be heard, and if sufficient reason be shown, the board shall order the establishment of the public landing.

The board is authorized to enter upon any land and locate a public landing after service of notice on the landowner that a landing is to be established under the authority of this section. If the board and landowner cannot agree on the damages, if any, the board shall, on the expiration of sixty days from the completion of the landing, cause to be summoned three disinterested freeholders of the county, who shall go upon the land and assess the damages and benefits according to the general law. All damages assessed shall be a county charge. In assessing damages, the jury shall take into consideration any special benefits accruing to the landowner, and if such benefits exceed the damages, the amount of such excess of benefits shall be assessed against the landowner and constitute a lien on the land adjoining the landing, and shall be collected in the same manner as county taxes. The board shall order how the costs shall be paid.

No suit shall be instituted by a landowner for damages for the location of the landing earlier than sixty days, nor later than six months, after the completion of the landing. Either party may appeal to the superior court for the assessment of damages and benefits, where the matter shall be heard de novo by the court and jury. No cost shall be awarded against the county upon appeals when the recovery awarded on appeal is not more favorable to the appellant than the award of the referees. All places heretofore established as public landings shall remain such. (1784, c. 206, s. 4; 1789, c. 303; 1790, c. 331, s. 3; 1793, c. 386; 1813, c. 862, s. 1; 1822, c. 1139, s. 2; R. C., c. 60, s. 1; c. 101, ss. 2, 4; 1869, c. 20, s. 8, subsec. 29; 1872-3, c. 189, s.

3; 1879, c. 82, s. 9; Code, ss. 2038, 2040, 2982; Rev., ss. 2684, 2685, 5308; 1917, c. 284, s. 33; 1919, c. 68; C. S., ss. 3667, 3762, 3763, 7375.)

ARTICLE 2.

Obstructions in Streams.

§ 77-12. Obstructing passage of boats.—If any person shall obstruct the free passage of boats along any river or creek, by felling trees, or by any other means whatever, he shall be guilty of a misdemeanor. (1796, c. 460, s. 2; R. C., c. 100, s. 6; Code, s. 3711; Rev., s. 3561; C. S., s. 7376.)

Cross Reference.—See note to § 77-13.

Cited in Hutton v. Webb, 124 N. C. 749, 33 S. E. 169 (1899).

§ 77-13. Obstructing streams a misdemeanor.—If any person shall willfully fell any tree, or willfully put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, and whereby the navigation of such stream by any raft or flat may be impeded, delayed, or prevented, the person so offending shall be guilty of a misdemeanor, and fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. Nothing in this section shall prevent the erection of fish dams or hedges which do not extend across more than two-thirds of the width of any stream where erected, but if extending over more than two-thirds of the width of any stream, the said penalties shall attach. (1872-3, c. 107, ss. 1, 2; Code, s. 1123; Rev., s. 3559; C. S., s. 7377.)

Compared with Common-Law Offense.

—At common law it was an offense to obstruct any navigable stream, but by this section, unless the act is willful and not for the purpose of utilizing the water as a motive power the offense is not indictable. *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. 411 (1888); *State v. Baum*, 128 N. C. 600, 38 S. E. 900 (1901).

“Motive Power” Defined.—Water used in “sluicing” is not used as a “motive power” within the meaning of this section. The section has obvious reference to the use of the energies of water dammed, as a moving force, and not to the operation of the current in motion. *State v. Duplin Canal Co.*, 91 N. C. 637 (1884).

“Or” Construed to Read “And.”—The word “and” between the words “retarded” and “whereby” formerly read “or,” and the court in *State v. Pool*, 74 N. C. 402 (1876), held that the word “or” should read “and.”

Section Applicable to Navigable Streams.

—If a creek is not navigable an obstruction cannot “impede, delay, or prevent” navigation, and so there is no violation of the statute by cutting trees so as to obstruct a nonnavigable stream. *State v. Pool*, 74 N. C. 402 (1876).

Section Applicable Though Stream Is Private Property.—The bed of a lake or watercourse may be private property, but if the waters are navigable in their natural

state the public have an easement of navigation in them, which easement the owner of the soil cannot obstruct. *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. 411 (1888).

Indictment.—The indictment under this section must charge that the obstruction was not “for the purpose of utilizing.” Such a charge is not necessary in an indictment for obstructing waters, at common law. *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. 411 (1888).

Railroad Bridges.—A railroad bridge built over a navigable stream if obstructing passage of vessels is a nuisance, and tearing a portion of it down so that vessels may pass is not indictable. *State v. Parrott*, 71 N. C. 311 (1874).

Action for Damages.—In an action wherein actual damages were claimed, with punitive damages, for damming a navigable stream, made a misdemeanor by this section, it was held that to recover punitive damages it was insufficient to show merely that the stream was obstructed to plaintiff’s damage, it being necessary to prove, in such cases, malice, fraud, wanton or willful disregard of the plaintiff’s rights, or other circumstances of recklessness or aggravation. *Warren v. Coharie Lumber Co.*, 154 N. C. 34, 69 S. E. 685 (1910).

Cited in Gwaltney v. Scottish Carolina Timber, etc., Co., 111 N. C. 547, 16 S. E. 692 (1892).

Chapter 78. Securities Law.

- Sec.
 78-1. Title.
 78-2. Definitions.
 78-3. Exempted securities.
 78-4. Transactions exempted from operation of this chapter.
 78-5. Burden of proof as to such transactions.
 78-6. Registration of securities.
 78-7. Advertisement of securities.
 78-8. Registration by notification.
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 78-11. Hearing before Secretary of State.
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- Sec.
 78-14. Report to Secretary of State.
 78-15. Examination and examiners.
 78-16. Complaints, investigations, findings of facts.
 78-17. Certain information and records open to inspection by public.
 78-18. Appeal.
 78-19. Dealers and salesmen; registration.
 78-20. Assistants, clerks, etc., employment of.
 78-21. Fee paid into State treasury; expenses of administration.
 78-22. Remedies.
 78-23. Violation of chapter; punishment.
 78-24. Foreign corporations to name process officer within State.

§ 78-1. **Title.**—This chapter may be cited and shall be known as the “Securities Law” of the State of North Carolina. (1925, c. 190, s. 1; 1927, c. 149, s. 1; 1943, c. 104, s. 1.)

- I. In General.
 II. Note to § 6363, Consolidated Statutes.
 III. Note to § 6367, Consolidated Statutes.
 IV. Note to § 6372, Consolidated Statutes.

I. IN GENERAL.

Editor's Note.—The 1927 amendment repealed the law of 1925 and substituted new provisions therefor. See *Durham Citizens Hotel Corp. v. Dennis*, 195 N. C. 420, 142 S. E. 578 (1928).

The 1943 amendment substituted the words “Securities Law” for the words “Capital Issues Law.”

The following note includes cases decided under the present statutes—placed under the analysis line “I. In General.”—and cases decided under §§ 6363 to 6375, Consolidated Statutes, prior to their repeal by Laws 1925, c. 190 and Laws 1927, c. 149, s. 26—placed under appropriate analysis lines. Said §§ 6363 to 6375 pertained to similar subject matter, and it is believed the decisions construing those provisions will be of value in considering the present chapter.

An article discussing the history of blue sky laws and summarizing the various statutes will be found in 3 N. C. Law Rev. 150 et seq. The North Carolina cases are also discussed.

Chapter Is within Police Power.—The regulation of the sale of securities for the protection of the public is within the police power of the State. *State v. Allen*, 216 N. C. 621, 5 S. E. (2d) 844 (1939).

Application of Chapter.—This chapter applies where money is invested in stock, securities, profit-sharing agreements, etc., with the purpose of securing an income from the employment of the money, and a contract whereby the owner of a copyright system gives the exclusive right to another to operate the system in certain counties, and in return is to receive a percentage of the gross receipts from the operation of the system, with further provision for a division of net profits from sales or contracts written by either party, does not contemplate the placing of money in a way to secure an income from its employment, but the earning of a portion of the gross receipts in return for individual services, and the agreement is not a profit-sharing scheme or investment contract within the intent and meaning of the statute. *State v. Heath*, 199 N. C. 135, 153 S. E. 855 (1930).

II. NOTE TO § 6363, CONSOLIDATED STATUTES.

Constitutionality.—It is within the police power of the State to pass a statute for the protection of its citizens against the sale to them of worthless shares of stock in speculative companies in the exercise of a power in the State reserved from that granted to the federal government, and such a statute does not contravene either the State or federal Constitution. *State v. Fidelity, etc., Co.*, 191 N. C. 634, 132 S. E. 792 (1926).

The purpose of "Blue Sky Laws" is to protect the general public from "wildcat" organizers, promoters and their agents, whether foreign or domestic, preying upon an unsuspecting and confiding public by selling "blue sky stock," without obtaining license and giving bond. *State v. Fidelity, etc., Co.*, 191 N. C. 634, 132 S. E. 792 (1926).

The object of the "Blue Sky Laws" is not only to keep worthless stock off the market but to make actual values and par values correspond. Thus, if the par value of a share of stock is one hundred dollars, the part of the assets of the corporation represented by a share of stock must be worth one hundred dollars. 1 N. C. Law Rev. 27.

Scope of Section.—A corporation was an "investment company" offering to the public an investment in lands and fig orchards in Georgia. It was also offering the "obligation of said corporation" to cultivate said land, and giving its contract to make title in compliance with certain terms; and, lastly, it was offering for sale "evidences of property." Under all three of these provisions it was within the scope of § 6363. *State v. Agey*, 171 N. C. 831, 88 S. E. 726 (1916).

Limitations of Suit.—Contracts of indemnity against loss, or surety bonds, for the faithful performance of a building contract were regarded in the nature of contracts of insurance coming under the provisions of § 6363 and any conflicting restriction in such a contract as to the time of bringing an action to recover damages for the breach of the contract was void. *Guilford Lumber Mfg. Co. v. Johnson*, 177 N. C. 44, 97 S. E. 732 (1919).

Process and Service.—Section 6363 did not require service of process upon the Insurance Commissioner, in cases of bonding companies, although licensed by the Insurance Commissioner; service on a local agent was sufficient. *Pardue v. Absher*, 174 N. C. 676, 94 S. E. 414 (1917).

Agent's Liability for Violation.—The failure or refusal of the corporation to comply with the requirements of our statutes to obtain a license made the defendant, its agent, guilty of the offense charged. *State v. Agey*, 171 N. C. 831, 88 S. E. 726 (1916).

One who sold certificates of shares of stock in a corporation upon a commission basis without having obtained a license to do so came within the inhibition of § 6363, though the sale might have been effected by another acting through such solicitor without compensation. *Burlington Hotel*

Corp. v. Bell, 192 N. C. 620, 135 S. E. 616 (1926).

Enforcement of Contract.—Where a subscription contract for purchase of shares of stock in a corporation was procured by one who had not obtained a license from the Insurance Commissioner, the contract was not enforceable against the subscriber. *Burlington Hotel Corp. v. Bell*, 192 N. C. 620, 135 S. E. 616 (1926).

Contract to Be Performed in Another State.—Where a foreign corporation had issued a bond indemnifying a North Carolina concern against loss under a contract with an agency, located in another state, established to collect moneys, etc., for insurance premiums, which bond was delivered to the agent to be sent to the indemnified here for approval and acceptance, the contract of indemnity was to be construed and enforced in accordance with our own laws. *Dixie Fire Ins. Co. v. American Bonding Co.*, 162 N. C. 384, 78 S. E. 430 (1913).

Domestic Corporations.—Section 6363 applied to sales of stock in a domestic corporation as well as a foreign one, irrespective of whether the same was either fraudulently procured or fell within the intent and meaning of the "Blue Sky Law." *Burlington Hotel Corp. v. Bell*, 192 N. C. 620, 135 S. E. 616 (1926).

Notes given for the purchase of shares of stock in a corporation being organized were not void for noncompliance with the provisions of §§ 6363 and 6367, when the shares were not put upon the market by agents, or commissions paid to anyone for procuring subscriptions thereto. *Durham Citizens Hotel Corp. v. Dennis*, 195 N. C. 420, 142 S. E. 578 (1928), citing and distinguishing *Burlington Hotel Corporation v. Bell*, 192 N. C. 620, 135 S. E. 616 (1926).

Cited in *Hotel Corporation v. Dixon*, 196 N. C. 265, 145 S. E. 244 (1928).

III. NOTE TO § 6367, CONSOLIDATED STATUTES.

Fraudulent Representations.—If the agent selling the stock represented to the plaintiff that certain parties would devote their time to the business, and that the statute had been complied with, and that the stock would not be sold below a certain price, such representation if false within the knowledge of the defendant constituted actionable fraud. *McNair v. Southern States Finance Co.*, 191 N. C. 710, 133 S. E. 85 (1926).

Knowledge of the Plaintiff.—When plaintiff did not know, and was not in a position to know of the falsity of the representations as made to him the parties

would not be considered in *pari delicto*. *McNair v. Southern States Finance Co.*, 191 N. C. 710, 133 S. E. 85 (1926).

Recovery of Damages.—A purchaser of shares of stock could recover damages upon the false representations of the seller that all of the provisions of the blue sky law, § 6367, had been complied with, with the burden of proof on the purchaser, the plaintiff in the action, to show his damages arising therefrom. *McNair v. Southern Finance Co.*, 191 N. C. 710, 133 S. E. 85 (1926).

Domestic Corporations.—The law was at first applied only to foreign corporations, but by Laws 1919, c. 121, it was made to apply as well to domestic corporations. The law appeared in toto in §§ 6363-6375, and the provision which in itself was known as the "Blue Sky Law," was § 6367. 3 N. C. Law Rev. 151.

The requirements of § 6367 as to soliciting the purchase of shares of stock in a certain corporation in accordance with certain conditions applied by statutory amendment of 1919 not only to corporations

formed in other states, but also to domestic corporations. *Seminole Phosphate Co. v. Johnson*, 188 N. C. 419, 124 S. E. 859 (1924). See also *Burlington Hotel Corp. v. Bell*, 192 N. C. 620, 135 S. E. 616 (1926).

Notes Given for Stock.—Where a negotiable note was given for shares of stock in a corporation, solicited in violation of the blue sky law, the note was voidable against a holder who had acquired it with notice of the illegality or fraud in the procurement of the instrument. *Planters Bank, etc., Co. v. Felton*, 188 N. C. 384, 124 S. E. 849 (1924).

IV. NOTE TO § 6372, CONSOLIDATED STATUTES.

Liability for Principal's Act.—The State has a right to require evidence of good faith, of assets, and of responsibility from nonresidence parties offering to sell to our people "investments" or "evidences of property" on contracts. An agent of a company who fails to do this, in defiance of our laws, is properly found guilty. *State v. Agey*, 171 N. C. 831, 88 S. E. 726 (1916).

§ 78-2. Definitions.—(a) The term "person" shall mean and include a natural person, firm, partnership, association, syndicate, joint-stock company, unincorporated company or organization, trust, incorporated or unincorporated, and any corporation organized under the laws of the District of Columbia, or of any state or territory of the United States, or of any foreign government. As used herein, the term "trust" shall be deemed to include a common-law trust, but shall not include a trust created or appointed under or by virtue of a last will and testament or by a court of law or equity.

(b) The term "securities" or "security" shall include any note, stock certificate, stock, treasury stock, bond, debenture, whiskey warehouse receipt, evidence of indebtedness, transferable certificate of interest or participation, certificate of interest in a profit-sharing agreement, any instrument representing any interest or right in or under any oil, gas or mining lease, fee or title, or rights or interests in land from which petroleum or minerals are, or are intended to be produced, certificate of interest in an oil, gas or mining lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in or title to property or profits or any contract or agreement in the promotion of a plan or scheme whereby one party undertakes to purchase the increase or production of the other party from the article or thing sold under the plan or scheme, or whereby one party is to receive the profits arising from the increase or production of the article or thing sold under the plan or scheme, or any other instrument commonly known as security.

(c) The term "sale" shall include any agreement whereby a person transfers or agrees to transfer either the ownership of or an interest in a security. Any security given or delivered with or as a bonus on account of any purchase of securities, or of any other thing shall be deemed to constitute a part of the subject of such purchase and to have been sold for value. "Sale," or "sell" shall also include an attempt to sell, an option of a purchase or sale, a solicitation of a sale, a subscription, or an offer to sell, either directly or by agent, or by a circular letter, advertisement, or otherwise; but nothing herein shall limit or diminish the full meaning of the term "sell" or "sale" as used by or accepted in courts of law or equity: Provided, that a privilege pertaining to a security

giving the holder the privilege to convert such security into another security of the same issuer shall not be deemed a sale, or offer to sell, or option of sale of such other security within the meaning of this definition and such privilege shall not be construed as affecting the status of the security to which such privilege pertains with respect to exemption or registration under the provisions of this chapter, but when such privilege of conversion shall be exercised such conversion shall be subject to the limitations hereinafter provided in subsection (8) of § 78-4; and provided further, that the issue or transfer of a right pertaining to a security entitling the holder to subscribe to another security of the same issuer, when such right is issued or transferred with the security to which it pertains, shall not be deemed a sale or offer to sell or option of sale of such other security within the meaning of this definition, and such right shall not be construed as affecting the status of the security to which such right pertains with respect to exemption or registration under the provisions of this chapter; but the sale of such other security upon the exercise of such right shall be subject to the provisions of this chapter.

(d) The term "issuer" shall include every person who proposes to issue or who issues or who has issued or shall hereafter issue any security (sold or to be sold, offered or to be offered for sale).

(e) The term "intangible assets" shall mean and include patents, formulae, good will, promotions, trade brands, franchises, evidences of indebtedness or corporate securities, titles or rights in and to intangible property, and all other like assets.

(f) "Tangible assets" shall mean all assets other than intangible assets, as above defined.

(g) "Mortgage" shall be deemed to include a deed of trust to secure a debt. (1925, c. 190, s. 2; 1927, c. 149, s. 2; 1933, c. 432; 1943, c. 104, ss. 2, 3.)

Editor's Note.—The enforcement and administration of this chapter was formerly intrusted, under Laws 1925, c. 190, s. 2, and Laws 1927, c. 149, s. 2, to a member of the Corporation Commission, to be designated by the Governor. With the abolition of the Corporation Commission and the creation of the office of Utilities Commissioner, the administration of the chapter was transferred to that officer. See Laws 1933, c. 134, s. 8. However, Laws 1937, c. 194, provided for the transfer of the powers, duties, functions, and authority of the Utilities Commissioner with reference to the Capital Issues Law to the Secretary of State, who now administers this chapter.

The 1943 amendment inserted in subsection (b) the words "whiskey warehouse receipt." It also inserted in said subsection the words "any instrument representing any interest or right in or under any oil,

gas or mining lease, fee or title, or rights or interests in land from which petroleum or minerals are, or intended to be produced."

Value of Property Does Not Affect Definition as a Security.—In a prosecution for violation of the Capital Issues Law the fact that the property sold is of little value is irrelevant to the question of whether the property is a security as defined by the statute. *State v. Allen*, 216 N. C. 621, 5 S. E. (2d) 844 (1939).

Certificate of Interest in Oil, etc., Lease.—Before the passage of the 1943 amendment to this section, it was held that an oil lease which by its terms amounted to a conveyance of real estate was not a certificate of interest in an oil, gas or mining lease or any other security as that term was defined in this section. *State v. Allen*, 216 N. C. 621, 5 S. E. (2d) 844 (1939).

§ 78-3. Exempted securities.—Except as hereinafter provided, the provisions of this chapter shall not apply to any security which, at the time of sale thereof, is within any of the following classes of securities:

(a) Any security issued or guaranteed by the United States or by any territory or insular possession thereof, or by the District of Columbia, or by any state or municipal corporation or political subdivision or agency thereof.

(b) Any security issued or guaranteed by any foreign government, or by any state, province or political subdivision thereof, having the power of taxation or as-

assessment, with which the United States is maintaining diplomatic relations and which security is recognized at the time it is offered for sale in this State as a valid obligation for its face value by such foreign government, or by the State, province or political subdivision thereof issuing same.

(c) Any security issued by a national bank, or by any federal land bank, or joint-stock land bank, or national farm loan association under the provisions of the Federal Farm Loan Act of July seventeen, nineteen hundred and sixteen, or any amendments thereof, or by the War Finance Corporation, or by any corporation created or acting as an instrumentality of the government of the United States pursuant to authority granted by the Congress of the United States, provided, that such corporation is subject to supervision of regulation by the government of the United States.

(d) Any security issued or guaranteed as to principal, interest or dividend, by a corporation, domestic, or foreign, owning or operating a railroad, or any other public service utility: Provided, that such corporation is subject to regulation or supervision, either as to its rates and charges or as to the issue of its own securities by a public commission, board or officer, or by any governmental, legislative or regulatory body of this State, or of the United States, or of any state, territory or insular possession thereof, or of the District of Columbia, or of the Dominion of Canada, or any province thereof; also equipment securities based on chattel mortgages, leases or agreements for conditional sale of cars, motive power or other rolling stock or equipment mortgaged, leased or sold to or furnished for the use of or upon a railroad or other public service utility corporation, or equipment securities where the ownership or title of such equipment is pledged or retained in accordance with the provisions of the laws of the United States, or of any state, or of the Dominion of Canada, to secure the payment of such equipment securities; also bonds, notes or other evidences of indebtedness issued by a holding corporation and secured by collateral consisting of any of the securities hereinabove in this clause (d) described: Provided, that such collateral securities equal in fair value at least one hundred and twenty-five (125%) per cent of the par value of the bonds, notes or other evidences of indebtedness, so secured.

(e) Securities appearing in any list of securities dealt in or any organized stock exchange having an established meeting place in a city of over five hundred thousand population according to the last preceding United States census and providing facilities for the use of its members in the purchase and sale of securities listed by such exchange and on which exchange actual transactions have accrued during each of the preceding twenty years in the purchase and sale of United States bonds, or other bonds of any of the classes exempted herein from the provisions of this chapter, and which require financial statements to be submitted at the time of listing and annually thereafter; or on any other recognized and responsible stock exchange which has been previously investigated and approved by the Secretary of State and which securities have been so listed pursuant to official authorization by such exchange, and also all securities senior to any securities so listed, or represented by subscription rights which have been so listed; or evidences of indebtedness guaranteed by companies any stock of which is so listed, if the company whose securities are guaranteed is a subsidiary of the guaranteeing company and controlled by lease or ownership of stock, such securities to be exempt only so long as such listing shall remain in effect: Provided, however, that the Secretary of State upon 10 days' notice and hearing may at any time withdraw his approval of any such stock exchange; and provided further, that the Secretary of State may at any time withdraw his approval of any security so listed on any stock exchange in a city of five hundred thousand population as above defined, or any other approved stock exchange, and thereafter such security shall not be entitled to the benefit of this exemption, except upon further order of the Secretary of State.

(f) Any security issued by, and representing an interest in, or a direct contract obligation of a bank, trust company or savings institution, which bank, trust company or savings institution is incorporated under the laws of, and subject to the examination, supervision and control of the United States, or of any state or territory of the United States, or of any insular possession thereof: Provided, this section shall not apply to any security based upon mortgages on real estate nor to saving institutions and trust companies not approved by the Commissioner of Banks of the State of North Carolina.

(g) Negotiable promissory notes or commercial paper if such issue of negotiable notes or commercial paper mature in not more than fifteen months from the date of issue and shall be issued within three months after date of sale.

(h) Securities issued by building and loan associations incorporated under the laws of the State of North Carolina.

(i) Securities issued by insurance companies in North Carolina, subject to State supervision.

(j) Securities issued by any corporation organized not for pecuniary profit or organized exclusively for educational, benevolent, fraternal, charitable or reformatory purposes.

(k) Securities evidencing indebtedness due under any contract made in pursuance to the provisions of any statute of any state of the United States providing for the acquisition of personal property under conditional sale contract.

(l) Bonds or notes secured by lien on vessels shown by policies of marine insurance taken out in responsible companies to be of value, after deducting any and all other indebtedness secured by prior lien, of not less than one hundred and twenty-five (125%) per cent of the par amount of such bonds or notes.

(m) Any security other than common stock outstanding and in the hands of the public for a period of not less than five years upon which no default in payment of principal, interest or dividend exists and upon which no such default has occurred for a continuous immediately preceding period of five years.

(n) Any security which, under the laws of this State, is a legal investment for savings banks of trust funds.

(o) Securities issued by a domestic corporation, partnership, association, company, syndicate or trust owning a property, business or industry which has been in continuous operation for not less than three years prior thereto, and which has shown during a period of not less than two years nor more than five years prior to the close of its last fiscal year preceding the offering of such securities average annual net earnings, after deducting all prior charges, not including the charges or prior securities to be retired out of the proceeds of such sale, as follows:

(1) In the case of interest bearing securities, not less than one and one-half times the annual interest charges thereon and upon all other outstanding interest-bearing obligations of equal rank.

(2) In the case of preferred stock not less than one and one-half times the annual dividend requirements on the total of the proposed issue of such preferred stock and on all other outstanding stock of equal rank.

(3) In the case of common stock with par value not less than six per cent upon all outstanding common stock of equal rank, or in the case of common stock without par value, not less than six per cent upon the amount charged to capital by reason of the issuance thereof: Provided, the tangible assets of such corporation, partnership, association, company, syndicate, or trust (not including any intangible assets), together with the proceeds of the sale of such securities accruing to the issuer, shall equal or exceed:

(I) In the case of evidence of indebtedness, one hundred twenty-five per centum of the par value of such evidence of indebtedness, and all other obliga-

tions of equal rank then outstanding and not to be retired out of the proceeds of the sale of such evidence of indebtedness.

(II) In the case of preferred stock one hundred twenty-five per centum of the par value of the aggregate amount of all outstanding preferred stock of equal and prior rank and the stock then offered for sale, after the deduction from such assets of all indebtedness which will be existing and of the par value of all stock of senior rank which will be outstanding after the application of the proceeds of the preferred stock offered for sale.

(III) In the case of common stock one hundred per centum of the aggregate of all outstanding stock of equal rank and the stock then offered for sale, reckoned at the price at which such stock is offered for sale or sold after the deduction from such assets of all indebtedness which will be existing and of the par value of all stock of senior rank which will be outstanding after the application of the proceeds of the common stock offered for sale: Provided, however, that in the case of preferred or common stock, without par value, computation hereunder shall be made upon the basis of the amount charged to capital by reason of the issuance thereof, instead of upon the basis of par value. (1925, c. 190, s. 3; 1927, c. 149, s. 3; 1931, c. 243, s. 5.)

Cross Reference.—See Editor's Note under preceding section.

one of subsection (e) is in the language of the 1927 enactment; however it was probably intended to read "on."

Editor's Note.—The word "or" in line

§ 78-4. Transactions exempted from operation of this chapter. —

Except as hereinafter provided, the provisions of this chapter shall not apply to the sale or the offering for sale of any security in any of the following transactions, viz.:

(1) At any judicial, executor's administrator's, or guardian's sale, or at any sale by a receiver or trustee in insolvency or bankruptcy.

(2) By or for the account of any pledgeholder or mortgagee selling or offering for sale, in the ordinary course of business, to liquidate a bona fide debt, a security pledged in good faith as security for such debt.

(3) In an isolated transaction in which any security is sold or offered for sale by the owner thereof, or by his representative for the owner's account in the usual and ordinary course of business and not for the direct or indirect promotion of any scheme or enterprise within the purview of this chapter, and when such sale or offer for sale is not made in the course of repeated and successive transactions of a like character by such owner or on his account by the representative of such owner, and neither such owner nor his representative is the maker or issuer or underwriter of such security.

(4) The sale of, or offer to sell such security to any bank, savings institution, trust company, insurance company, or to any corporation.

(5) The distribution by a corporation of capital stock, bonds or other securities to its stockholders or other security holders as a stock dividend or other distribution out of earnings or surplus; or the issue of securities by a corporation to security holders or creditors of such corporation in the process of a bona fide reorganization of such corporation made in good faith either in exchange for either or both the securities of such security holders or claims of such creditors, or partly for cash and partly in exchange for the securities or claims of such security holders or creditors; or the issue of increased capital stock of a corporation sold or distributed by it entirely among its own stockholders, when no commission or other remuneration is paid or given directly or indirectly in connection with the sale or distribution of such increased capital stock.

(6) The transfer or exchange by or on account of one corporation to another corporation or to its stockholders of their or its own securities in connection with a proposed consolidation or merger of such corporations, or in connection with the change of par value of stock to non par value stock or the

exchange of outstanding shares for a greater or smaller number of shares; the transfer or exchange by or on the account of one corporation of its own securities to the holders of the securities of another corporation, partnership, trust, person, firm or association, in any plan of distribution or exchange providing for the assumption or acquisition by the issuing corporation of the securities for which its own securities are issued or are to be issued, where the plan of distribution or exchange is contained in a registration statement which has been filed for more than twenty days with the securities and exchange commission of the United States government or like agency of the United States government, charged with the registration of securities.

(7) Subscriptions for shares or sales or negotiations for sales of shares of the capital stock in domestic corporations, when no expense is incurred, and no commission, compensation or remuneration is paid or given for, or in connection with, the sale or disposition of such securities.

(8) The issue and delivery of any security in exchange for any other security of the same issuer pursuant to a right of conversion entitling the holder of the security exchanged to make such conversion: Provided, that the security exchanged has been registered by notification under the law or was when sold exempt from the provisions of the law and that the security received in exchange if sold at the conversion price would at the time of such conversion fall within the class of securities entitled to registration by notification under the law. Upon such conversion the par value of the security surrendered in such exchange shall be deemed the price at which the securities received in such exchange are sold.

(9) Subscriptions for shares of the capital stock of a corporation prior to the incorporation thereof, when no expense is incurred, and no commission, compensation or remuneration is paid or given for, or in connection with, the sale or disposition of such securities.

(10) The sale of securities to a registered dealer.

(11) Bonds or notes secured by mortgage upon real estate where the entire mortgage together with all of the bonds or notes secured thereby are sold to a single purchaser at a single sale. (1925, c. 190, s. 4; 1927, c. 149, s. 4; 1935, cc. 90, 154.)

Editor's Note.—The 1935 amendments added the part of subsection 6 appearing after the semicolon in line five.

§ 78-5. Burden of proof as to such transactions.—It shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment or proceeding laid or brought under this chapter in either a court of law or equity, or before the Secretary of State, in either a civil or a criminal action or suit. The sale, unless the transaction is exempted from the operation of this chapter, of any security not exempt from the provisions of this chapter as hereinbefore provided and not admitted to the record and recorded as hereinafter provided, shall be prima facie evidence of the violation of this chapter and the burden of proof of any such exemption shall be upon the party claiming the benefit thereof. (1925, c. 190, s. 5; 1927, c. 149, s. 5.)

§ 78-6. Registration of securities.—No securities except of a class exempt under any of the provisions of § 78-3 or unless sold in any transaction exempt under any of the provisions of § 78-4 shall be sold within this State unless such securities shall have been registered by notification or by qualification as hereinafter defined. Registration of stock shall be deemed to include the registration of rights to subscribe to such stock if the notice under § 78-7 or the application under § 78-8 for registration of such stock includes a statement that such rights are to be issued. (1925, c. 190, s. 6; 1927, c. 149, s. 6.)

§ 78-7. Advertisement of securities.—It shall be unlawful hereafter:

(1) To advertise in this State, through or by means of any prospectus, circular, price list, letter, order blank, newspaper, periodical or otherwise, or

(2) To circulate or publish any newspaper, periodical or either written or printed matter in which any advertisement in this section specified shall appear, or

(3) To circulate any prospectus, price list, order blanks, or other matter for the purpose of inducing or securing any subscriptions to or sale of any security or securities not exempted under any of the provisions of § 78-3, and not sold or to be sold in one of the transactions exempted under the provisions of § 78-4 and except as provided in § 78-8, unless and until the requirements of § 78-6 have been fully complied with and such advertising matter has been filed and approved by the Secretary of State. (1925, c. 190, s. 7; 1927, c. 149, s. 7.)

§ 78-8. Registration by notification.—The following classes of securities shall be entitled to registration by notification in the manner provided in this section:

(1) Securities issued by a corporation, partnership, association, company, syndicate or trust owning a property, business or industry which has been in continuous operation not less than three years, and which has shown during a period of not less than two years, nor more than five years, next prior to the close of its last fiscal year preceding the offering of such securities, average annual net earnings, after deducting all prior charges not including the charges upon securities to be retired out of the proceeds of sale, as follows:

(a) In the case of interest bearing securities, not less than one and one-half times the annual interest charge thereon and upon all other outstanding interest bearing obligations of equal rank.

(b) In the case of preferred stock, not less than one and one-half times the annual dividend requirements on such preferred stock and on all other outstanding stock of equal rank.

(c) In the case of common stock not less than five per centum upon all outstanding common stock of equal rank, together with the amount of common stock then offered for sale reckoned upon the price at which such stock is then offered for sale or sold. The ownership by a corporation, partnership, association, company, syndicate or trust of more than 50 per cent of the outstanding voting stock of a corporation shall be construed as the proportionate ownership of the property, business or industry of such corporation, and shall permit the inclusion of the earnings of such corporation, applicable to the payment of dividends upon the stock so owned in the earnings of the corporation, partnership, association, company, syndicate, or trust issuing the securities sought to be registered by notification.

(2) Any bond or notes secured by a first mortgage upon agricultural lands used and valuable for agricultural purposes (not including oil, gas or mining property or leases), or upon city, town or village real estate situated in any state or territory of the United States or in the District of Columbia or in the Dominion of Canada as follows:

(a) When the mortgage is a first mortgage upon such agricultural lands, used and valuable for agricultural purposes, and when the aggregate face value of such bonds or notes, not including interest notes, or coupons secured thereby, does not exceed 60 per centum of the then fair market value of said lands plus 60 per centum of the insured value of any improvements thereon; or,

(b) When the mortgage is a first mortgage upon city, town or village real estate and when the aggregate face value of such bonds or notes, not including interest notes or coupons, secured by such real estate or leaseholds does not exceed 60 per centum of the then fair market value of said mortgaged real estate

or leaseholds, respectively, including any improvements appurtenant thereto, and when said mortgaged property is used principally to produce through rental a net annual income, after deducting operating expenses and taxes, or has a fair rental value, after deducting operating expenses and taxes, at least equal to the annual interest, plus not less than 3 per centum of the principal of said mortgage indebtedness.

(3) Bonds or notes secured by first lien on collateral pledged as security for such bonds or notes with a bank or trust company as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state of the United States, which collateral shall consist of (a) a principal amount of first mortgage bonds or notes conforming to the requirements of any one or more of the provisions of subsection (2) of this section and/or (b) a principal amount of obligations secured as hereinafter in this subsection provided, and/or (c) a principal amount of obligations of the United States, and/or (d) cash, equal to not less than 100 per cent of the aggregate principal amount of all bonds or notes secured thereby. The portion of such collateral referred to in clause (b) shall consist of obligations secured by a first lien on a principal amount of first mortgage bonds or notes conforming to the requirements of subsection (2) of this section, and/or a principal amount of obligations of the United States and/or cash equal to not less than 100 per cent of the aggregate principal amount of such obligations so secured thereby, and all such pledged securities including cash so securing such obligations shall have been deposited with a bank or trust company as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state of the United States.

Securities entitled to registration by notification shall be registered by the filing by the issuer or by any registered dealer interested in the sale thereof in the office of the Secretary of State of a statement with respect to such securities containing the following:

- (a) Name of issuer.
- (b) A brief description of the security including amount of the issue.
- (c) Amount of securities to be offered in the State.
- (d) A brief statement of the facts which show that the security falls within one of the classes in this section defined.
- (e) The price at which the securities are to be offered for sale.

In the case of securities falling within the class defined by subsection (1), if the circular to be used for the public offering is not filed with the statement, then a copy of such circular shall be filed in the office of the Secretary of State within two days thereafter, or within such further time as the Secretary of State shall allow.

In the case of securities falling within the classes defined by subsections (2) and (3) the circular to be used for the public offering shall be filed with the statement.

The filing of such statement in the office of the Secretary of State and the payment of the fee hereinafter provided shall constitute the registration of such security. Upon such registration, such securities equal to the amount so registered by notification may be sold in this State by any registered dealer by giving notice in the manner hereinafter provided in § 78-19, subject, however, to the further order of the Secretary of State as hereinafter provided.

If, at any time, in the opinion of the Secretary of State, the information contained in the statement or circular filed is misleading, incorrect, inadequate, or incomplete, or the sale or offering for sale of the security may work or tend to work a fraud or, in the opinion of the Secretary of State, be contrary to good business practices, the Secretary of State may require from the person filing such statement such further information as may, in his judgment, be necessary to establish the classification of such security as claimed in said statement, or to

enable the Secretary of State to ascertain whether the sale of such security would be fraudulent, or would result in fraud, and the Secretary of State may also suspend the right to sell such security pending further investigation by entering an order specifying the grounds for such action, and by notifying personally by mail, telephone or telegraph the person filing such statement and every registered dealer who shall have notified the Secretary of State of an intention to sell such security. The refusal to furnish information required by the Secretary of State, within a reasonable time to be fixed by the Secretary of State, may be a proper ground for the entry of such order of suspension. Upon the entry of any such order of suspension no further sales of such security shall be made until the further order of the Secretary of State, unless the person to be affected by such order shall file with the Secretary of State a bond in a penalty to be fixed by him in some solvent surety company licensed in the State of North Carolina, to pay all such damages as might be sustained by any purchaser of such security, which bond shall be made payable to the State of North Carolina and sued upon by any person damaged by such sale.

In the event of the entry of such order of suspension the Secretary of State shall upon request give a prompt hearing to the parties interested. If no hearing is requested within a period of twenty (20) days from the entry of such order, or if upon such hearing the Secretary of State shall determine that any such security does not fall within a class entitled to registration under this section, or that the sale thereof would be fraudulent or would result in fraud or the continued sale of the same, is in his opinion contrary to good business practices, he shall enter a final order prohibiting sales of such security, with his findings with respect thereto: Provided, that if the finding with respect to such security is that it is not entitled to registration under this section, the applicant may apply for registration by qualification by complying with the requirements of § 78-9. Appeals from such final order may be taken as hereinafter provided. If, however, upon such hearing, the Secretary of State shall find that the security is entitled to registration under this section, and that its sale will neither be fraudulent nor result in fraud, or that the continued sale thereof is not contrary to good business practices, he shall forthwith enter an order revoking such order of suspension and such security shall be restored to its status as a security registered under this section, as of the date of such order of suspension.

At the time of filing the statement, as hereinbefore prescribed in this section, the applicant shall pay to the Secretary of State a filing fee of ten dollars and a fee of one-twentieth of one per cent of the aggregate par value of the securities to be sold in this State for which the applicant is seeking registration, but in no case shall such latter fee be less than twenty-five dollars, and not exceeding one hundred and fifty dollars. In the case of stock having no par value, the price at which such stock is to be offered to the public shall be deemed to be the par value of such stock. (1927, c. 149, s. 8.)

§ 78-9. Registration by qualification.—All securities required by this chapter to be registered before being sold in this State, and not entitled to registration by notification, shall be registered only by qualification in the manner provided by this section.

The Secretary of State shall receive and act upon applications to have securities registered by qualification and may prescribe forms on which he may require such applications to be submitted. Applications shall be in writing and shall be duly signed by the applicant and sworn to by a proper person, and filed in the office of the Secretary of State and may be made either by the issuer of the securities for which registration is applied or by any registered dealer desiring to sell the same within this State.

The Secretary of State may require the applicant to submit to the Secretary of State the following information respecting the issuer and such other information as he may, in his judgment, deem necessary to enable him to ascertain

whether such securities shall be registered pursuant to the provisions of this section:

(a) The names and addresses of directors, trustees and officers, if the issuer be a corporation or association or trust organized or existing under the common law (as hereinbefore defined), of all partners, if the issuer be a partnership, and of the issuer if the issuer be an individual.

(b) The location of the issuer's principal business office and of its principal office in this State, if any, and if not, the name of its process officer within this State.

(c) The purposes of incorporation, (if incorporated) and the general character of the business actually to be transacted by the issuer, and the purpose of the proposed issue.

(d) A statement of the capitalization of the issuer; a balance sheet showing the amount and general character of its assets and liabilities on a day not more than sixty (60) days prior to the date of filing such balance sheet; a detailed statement of the plan upon which the issuer proposes to transact business; a copy of the security for the registration of which application is made; and a copy of all circulars, prospectuses, advertisements or other descriptions of such securities then prepared by or for such issuer, and/or by or for such applicant (if the applicant shall not be the issuer) to be used for distribution or publication in this State.

(e) A statement of the amount of the issuer's income, expenses, and fixed charges during the last fiscal year, or if in actual business less than one year, then for such time as the issuer has been in actual business.

(f) A statement showing the price at which such security is proposed to be sold, together with the maximum amount of commission or other form of remuneration to be paid in cash or otherwise, directly or indirectly, for or in connection with the sale, or offering for sale, of such securities.

(g) A detailed statement showing the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment.

(h) The amount of capital stock which is to be set aside and disposed of as promotion stock, and a statement of all stock issued from time to time as promotion stock.

(i) If the issuer is a corporation, there shall be filed with the application a certified copy of its articles of incorporation with all amendments and of its existing bylaws, if not already on file in the office of the Secretary of State of this State. If the issuer is a trustee there shall be filed with the application a copy of all instruments by which the trust is created or declared and in which it is accepted and acknowledged. If the issuer is a partnership or an unincorporated association, or joint-stock company, or any other form of organization whatsoever, there shall be filed with the application a copy of its articles of partnership or association and all other papers pertaining to its organization, if not already on file in the office of the Secretary of State of this State.

All of the statements, exhibits, and documents of every kind required by the Secretary of State under this section, except properly certified public documents, shall be verified in such manner and form as may be required by the Secretary of State.

With respect to securities required to be registered by qualification under the provisions of this section, the Secretary of State may by order duly entered fix the maximum amount of commission or other form of remuneration to be paid in cash or otherwise directly or indirectly, for or in connection with the sale or offering for sale of such securities which shall in no case exceed ten per cent of the actual sale price of the security.

At the time of filing the information, as hereinbefore prescribed in this section, the applicant shall pay to the Secretary of State a filing fee of twenty-five dollars and, upon the entry of an order for the registration of the securities,

shall pay to the Secretary of State a fee of one-tenth of one per cent of the aggregate par value of the securities to be sold in this State, for which the applicant is seeking registration, but in no case shall such latter fee be less than twenty-five dollars, and not exceeding two hundred and fifty dollars. In case of stock having no par value the price at which such stock is to be offered to the public shall be deemed to be the par value of such stock. (1927, c. 149, s. 9.)

§ 78-10. Consideration of application by Secretary of State.—(1)

As soon as practicable after the filing of an application, under § 78-9, the Secretary of State shall examine the application, statements and documents so filed; and if he deems it advisable, may make or cause to be made such inspection, examination, audit and investigation of the business and affairs of the issuer as he may deem necessary or advisable, which said inspection, examinations, audit and investigation, shall be at the expense of the applicant. As a part of the aforesaid inspection, examination, audit and investigation, the Secretary of State may, if he deems it necessary or advisable, cause an appraisal to be made of the property or assets of the issuer or parts thereof. Appraisals herein provided for may be made by three disinterested appraisers, and the Secretary of State is authorized to nominate and appoint such appraisers, who shall be paid not more than twenty-five dollars per day and their actual expenses while so employed, which compensation and expenses shall be paid by the applicant. The Secretary of State may require a bond sufficient to cover the expense of any such inspection, examination, audit or investigation as may be deemed necessary by the Secretary of State in connection with the application before, or after the granting of such application for registration.

(2) The Secretary of State shall make a complete report of the inspection, investigation, examination, etc., of the business and affairs of the applicant above provided for, which record shall include a copy of the appraisal aforesaid, provided such an appraisal be made. (1925, c. 190, s. 10; 1927, c. 149, s. 10.)

§ 78-11. Hearing before Secretary of State.—The Secretary of State shall, within fifteen days after the filing of the report of such investigation, give the applicant a hearing, if he so desires.

(1) If the Secretary of State shall act favorably upon the application, he shall issue an order, directing that such securities be admitted to record in the register of qualified securities, hereinafter provided for. The Secretary of State shall keep a permanent record of all proceedings, findings, judgments and orders. In granting to an applicant the privilege of offering securities to the public in the State of North Carolina the Secretary of State may impose such reasonable conditions, either precedent or concurrent thereto, as in his judgment may be necessary or advisable. If the statement containing information as to securities, as provided for in § 78-9, shall disclose that any such securities or any securities senior thereto shall have been or shall be intended to be issued for any patent right, copyright, trademark, process, lease, formulae or good will, or for promotion fees or expenses or for other intangible assets, the amount and nature thereof shall be fully set forth and the Secretary of State may require that such securities so issued in payment of such patent right, copyright, trademark, process, lease, formulae or good will, or for promotion fees or expenses, or for other intangible assets shall be delivered in escrow to the Secretary of State or other depository satisfactory to the Secretary of State under an escrow agreement that the owners of such securities shall not be entitled to withdraw such securities from escrow until all other stockholders who have paid for their stock in cash shall have been paid a dividend, or dividends aggregating not less than six per cent for three years, shown to the satisfaction of said Secretary of State to have been actually earned on the investment in any common stock so held, and in case of dissolution or insolvency during the time such securities are held in escrow, that the owners of such securities shall

not participate in the assets until after the owners of all other securities shall have been paid in full: Provided, that during the period such securities shall be held in escrow, the Secretary of State shall have the right to vote such stock in person, or by proxy as he shall deem advisable.

(2) If, however, the Secretary of State shall, in any case, believe from all the evidence:

(a) That the sale of such securities would work a fraud, deception or imposition upon the purchaser thereof; or

(b) That the articles of incorporation or association, declaration of trust, charter, constitution, bylaws, or other organization papers of the issuer are unfair, unjust, inequitable, illegal or oppressive; or

(c) That the issuers or guarantors of such securities are insolvent, or are in failing circumstances, or are not trustworthy; or

(d) That the issuer's plan of business is unfair, inequitable, dishonest or fraudulent; or

(e) That the issuer's literature or advertising is misleading or calculated to deceive purchasers or investors; or

(f) That the securities offered or to be offered, issued or to be issued in payment for property or assets, either tangible or intangible, are so in excess of the reasonable value thereof as to indicate fraud or bad faith; or

(g) That the enterprise or business of either the issuers or of the applicant, is unlawful or against public policy; or

(h) That the sale of such securities is a mere scheme of either the issuer or the applicant to dispose of worthless securities of no real intrinsic value, at the expense of the purchasers of said securities; or

(i) That the sale of such securities is contrary to good business practices.

Then the Secretary of State shall refuse to admit said securities to record in the register of qualified securities, or if such securities are admitted to record, such action may at any time thereafter be revoked by the Secretary of State for any of the reasons set out in this section, subsection two, and it shall thereafter be unlawful to sell such securities in this State or to circulate any advertisement thereof.

In any case the Secretary of State either before granting or after granting any application for registration by qualification under § 78-9, shall have the right to require of the applicant a bond, the form whereof shall be prescribed and the surety approved by the Secretary of State, penalty whereof shall be fixed by the Secretary of State at not more than twenty per centum of the sales price of the securities issued or proposed or authorized to be issued. The said bond shall be with surety and payable to the State of North Carolina, conditioned that the facts set forth in the application for such permit and in all other documents required by this chapter to be filed with the Secretary of State are true, and that the provisions of this chapter shall be strictly complied with, and that all moneys from the sale of such securities will be used for the proper purpose or purposes as set forth in the security sold and in the papers filed with the Secretary of State; and that the contract of the promoter as set forth in the securities issued will be complied with and also that all statements set forth in all literature or advertising matter used or circulated in connection with the sale, or offer of sale, of such securities shall be the truth; and that the contract of the promoter shall be fulfilled. Except when the surety offered is a surety company authorized to do business in this State, it shall be the duty of the Secretary of State to satisfy himself that such surety is amply solvent before accepting the same.

Any person who shall be induced to purchase any securities covered by such bond by reason of any misrepresentation of any material fact concerning such securities, contained in said application or other documents submitted in connection therewith or furnished to the Secretary of State, upon its request or any other written or printed matter issued or used by the person making such sale

or its, or his, agents in making such sale, or shall have suffered loss by reason of the fact that moneys paid by him to the said seller of such securities or the seller's agent, have not been applied to the proper purpose set forth in the security sold or the papers filed with the Secretary of State, or that the seller has failed or refused to comply with his contract, as set forth in the security issued, shall have the right to bring suit upon the bond above provided for, and such bond shall be security for such person for his losses; but such person shall not be entitled to recover more than the money paid, or the actual value of the property given, or the labor performed, in exchange for such securities, with legal interest from the date of payment or the performance of the services or the transfer of property. One or more recoveries upon such bond shall not vitiate the same, but it shall remain in full force and effect, but no recoveries upon such bond shall ever exceed the full amount of same, and upon suits being commenced in excess of the amount of same, the Secretary of State may require a new bond, and, if the same is not given within thirty days the Secretary of State may revoke the registration herein provided for: Provided, however, that any suit or action instituted under this section shall be commenced within one year from the date of any such sale. During the thirty days after notice to file a new bond, the securities shall not be sold or offered for sale. (1925, c. 190, s. 11; 1927, c. 149, s. 11.)

§ 78-12. No representation to be made of endorsement.—No person, dealer, or agent shall represent any securities sold under the provisions of this chapter as being endorsed or recommended by the State of North Carolina or any officer thereof, nor shall he make any mention whatever of their being recorded or admitted to record in the State of North Carolina. (1925, c. 190, s. 12; 1927, c. 149, s. 12.)

§ 78-13. Register of qualified securities.—The Secretary of State shall keep and maintain a permanent register of qualified securities and shall enter therein the names and amounts of all securities the privilege of offering which to the public in the State of North Carolina has been granted by the Secretary of State, and the date thereof, and such other data as the Secretary of State may deem proper. All securities admitted to record and recorded in such register shall be deemed, for the purpose of this chapter, to have been fully qualified for sale in the State of North Carolina and thereafter any person may lawfully sell or offer for sale any part of such issue as recorded; subject, however, to the provisions of this chapter. Such register shall be open to inspection by the public. (1925, c. 190, s. 13; 1927, c. 149, s. 13.)

§ 78-14. Report to Secretary of State.—Every issuer whose securities have been admitted to record and recorded as herein provided, may be required during the offering of such securities to file within thirty days after the close of business on December thirty-first, March thirty-first, June thirtieth, and September thirtieth, of each year, and at such other times as may be required by the Secretary of State, a statement, verified under oath by some person having actual knowledge of the facts therein stated, setting forth, in such form as may be prescribed by the Secretary of State, the financial condition, the amount of assets and liabilities, of such issuer on the above dates and such other information as said Secretary of State may require. It shall be unlawful for any issuer subject to the provisions of this chapter, who refuses or fails to comply with the provisions of this section, or for his agent or agents, to thereafter sell such securities in this State. (1925, c. 190, s. 14; 1927, c. 149, s. 14.)

§ 78-15. Examination and examiners.—The records and the business affairs of every company or person, whose securities have been admitted to record in the register of qualified securities shall be subject to examination and inspection by the Secretary of State or upon his direction by his assistants, ac-

countants, or examiners, at any time said Secretary of State may deem it advisable; and such company or person shall pay a fee for each of such examinations of not to exceed twenty-five dollars (\$25) for each day or fraction thereof, plus the actual traveling and hotel expenses of said Secretary of State, his assistant, accountant or examiner, that he is absent from the capital of the State for the purpose of making such examination. (1925, c. 190, s. 15; 1927, c. 149, s. 15.)

§ 78-16. Complaints, investigations, findings of facts.—The Secretary of State may, upon his own initiative or upon the complaint of any reasonable person, hold such public hearings or make or have made such special inspection, examination or investigation as he may deem necessary, in connection with the promotion, sale or disposal in this State of any security or securities, to determine whether the same constitutes a violation of law; and the said Secretary of State, his assistant or deputy shall have power and authority:

(1) To issue subpoenas and process compelling the attendance of any person and the production of any paper, records or books relating to any matter of which the Secretary of State has jurisdiction under this article, and

(2) To administer an oath to any person whose testimony may be required on such inspection, examination, or investigation. Upon the conclusion of any such hearing, inspection, examination or investigation the Secretary of State may make findings of fact concerning the matter or matters investigated. Such findings of facts shall be admissible in evidence in any suit or action, at law or in equity, instituted under any of the laws of this State, and shall be prima facie evidence of the truth of the matters therein found by said Secretary of State, and,

(3) To maintain by injunction or other remedy any action in any court of competent jurisdiction in this State for the purpose of enforcing this chapter, or making investigations. (1925, c. 190, s. 16; 1927, c. 149, s. 16.)

§ 78-17. Certain information and records open to inspection by public.—All information received by the Secretary of State shall be kept open to public inspection at all reasonable hours, and the Secretary of State shall supply to the public upon request copies of any papers on record with the Secretary of State at charges equaling the cost of typing same; and the Secretary of State shall have power and authority to place in a separate file, not open to the public except on his special order, any information which he deems in justice to the person filing the same should not be made public. An exemplification of the record under the hand of the Secretary of State, or of his deputy, shall be good and sufficient evidence of any record made or entered by the Secretary of State. A certificate under the hand of the Department of State or his deputy or assistant and the seal of the Department of State showing that the securities in question have not been recorded in the register of qualified securities, shall constitute prima facie evidence that such securities have not been qualified for sale pursuant to the provisions of this chapter, and shall be admissible in evidence in any proceeding, either civil or criminal, instituted under any of the laws or statutes of this State. (1925, c. 190, s. 17; 1927, c. 149, s. 17.)

Editor's Note.—It seems that the words "Department of State" in line ten of this section should read "Secretary of State." See Editor's Note under § 78-2.

§ 78-18. Appeal.—Any interested person being dissatisfied with any findings, rulings, or judgments of the Secretary of State if final and made after a formal hearing elsewhere provided for in this chapter, may, within thirty days after the making and issuance thereof, appeal to the superior court. Any interested person aggrieved by any other order or the failure of the Secretary of State to make an order under any of the provisions of this chapter shall, if a hearing is not otherwise provided for, upon written request to the Secretary of

State and within thirty days after the filing of such request, be entitled to a hearing. The Secretary of State shall rule upon the subject matter of such hearing, and any interested person may, within thirty days after the making and issuance of his ruling or order, appeal to the superior court. In all cases of appeals from the Secretary of State to the superior court, the record made before such Secretary shall thereupon be certified to the superior court of the county in which such interested person may reside, or any county adjoining thereto in the discretion of said Secretary of State and thereafter the parties may plead and such procedure may be had as in other causes within the jurisdiction of said superior court, and after the issues shall have been determined by the court or jury, as the case may be, such judgment shall be rendered by the court as the findings may require. Appeals may be taken from the decision of the superior court to the Supreme Court by either party in the same manner as is provided by law in other civil cases, but the Secretary of State may appeal without bond. Pending any such appeal, the said findings, rulings, orders and judgments of the Secretary of State shall be prima facie evidence that they are just and reasonable and that the facts found are true, and shall remain in full force and effect, if no such suit be brought within said thirty days, said findings, ruling, order or judgment shall become final and binding. (1925, c. 190, s. 18; 1927, c. 149, s. 18.)

Cross Reference.—See Editor's Note under § 78-2.

§ 78-19. Dealers and salesmen; registration.—No dealer or salesman shall carry on business in the State of North Carolina as such dealer or salesman, or sell securities, including any securities exempted under the provisions of § 78-3, unless he has been registered as dealer or salesman in the office of the Secretary of State pursuant to the provisions of this section. Every applicant for registration shall file in the office of the Secretary of State, pursuant to the provisions of this section, an application in writing, duly signed and sworn to, in such form as the Secretary of State may prescribe, giving particulars concerning the business reputation of the applicant. The Secretary of State, in his discretion, may require that the applicant shall have been a bona fide resident of the State of North Carolina for a term not to exceed two years prior to the filing of the application. The names and addresses of all persons approved for registration as dealers or salesmen shall be recorded in a register of dealers and salesmen kept in the office of the Secretary of State, which shall be open to public inspection. Every registration under this section shall expire on the thirty-first day of March in each year, but the same may be renewed. The fee for such registration and for each annual renewal thereof shall be fifty dollars in the case of dealers, and ten dollars in the case of salesmen. Registration may be refused or a registration granted may be canceled by the Secretary of State if, after reasonable notice and a hearing, the Secretary of State determines that such applicant or dealer or salesman so registered (1) has violated any provision of this chapter or any regulation made hereunder; or (2) has made a material false statement in the application for registration; or (3) has been guilty of a fraudulent act in connection with any sale of securities in the State of North Carolina, or has been or is engaged in making fictitious or pretended sales or purchases of any such securities or has been engaged in any practice or transaction or course of business relating to the purchase or sale of securities which is fraudulent or in violation of law; or (4) has demonstrated his unworthiness to transact the business of dealer or salesman. It shall be sufficient cause for refusal or cancellation of registration in the case of a partnership, corporation or unincorporated association or trust estate, if any member of the partnership, or any officer or director of the corporation, association or trust estate has been guilty of any act or omission which would be cause for refusing or cancelling the registration of an individual dealer or salesman. The word

"dealer" as used in this section shall include every person other than a salesman, who in the State of North Carolina engages, either for all or part of his time, directly or through an agent, in the business of offering for sale, selling or otherwise dealing in securities, including securities exempted under the provisions of § 78-3, or of purchasing or otherwise acquiring such securities from another person with the purpose of reselling them or of offering them for sale to the public for a commission or at a profit, or who deals in futures on market quotations of prices or values of any securities, or accepts margins on prices or values of said securities. The word "salesman," as used in this section shall include every person employed, appointed or authorized by another person to sell securities in any manner in the State of North Carolina. No person shall be registered as a salesman except upon the application of the person on whose behalf such salesman is to act. It shall be unlawful for any person required to register under the provisions of this section to sell any security to any person in the State of North Carolina without having registered, or after such registration has expired or been canceled and not renewed.

Provided, however, that employees of a company, or of a company directly controlling such company, or the general agent of a domestic corporation, securities of which are exempted under the provisions of § 78-3, may sell or solicit or negotiate for the sale or purchase of any such securities of such company in the territory served by such company or in which it operates without being considered as salesmen or dealers within the meaning of this chapter and without being required to register under its provision.

The partners of a partnership and the executive officers of a corporation or other association registered as a dealer may act as salesmen during such time as such partnership, corporation, or association is so registered without further registration as salesmen. Changes in registration occasioned by changes in the personnel of a partnership or in the principals, copartners, officers or directors of any dealer may be made from time to time by written application setting forth the facts with reference to such change.

Every registered dealer who intends to offer any security of any issue, registered or to be registered, shall notify the Secretary of State in writing of his intention so to do. The notice shall contain the name of the dealer and shall state the name of the security to be offered for sale, and whenever a dealer shall have prepared such notice and shall have forwarded the same by registered mail, postage prepaid, and properly addressed to the Secretary of State, such dealer, as to the contents of such notice and filing thereof, shall be deemed to have complied with the requirements of this paragraph. Any issuer of a security required to be registered under the provisions of this chapter, selling such securities except in exempt transactions as defined in § 78-4, shall be deemed a dealer within the meaning of this section and required to comply with all the provisions hereof. (1925, c. 190, s. 19; 1927, c. 149, s. 19.)

Cross Reference.—See Editor's Note under § 78-2.

§ 78-20. Assistants, clerks, etc., employment of.—It shall be the duty of the Secretary of State to administer and enforce the provisions of this chapter, and he may appoint such clerks and other assistants as may from time to time be needed. (1925, c. 190, s. 20; 1927, c. 149, s. 20.)

Cross Reference.—See Editor's Note under § 78-2.

§ 78-21. Fee paid into State treasury; expenses of administration.—All fees herein provided for shall be collected by the Secretary of State and shall be paid over to the State Treasurer to go into the general fund; as well as all fees, per diems, expenses, etc., of appraisers, assistants, and investigators as herein provided, and all other expenses and fees required by this chapter. (1925, c. 190, s. 21; 1927, c. 149, s. 21.)

§ 78-22. **Remedies.**—Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser and the person making such sale or contract for sale, and every director, officer or agent of or for such seller, if such director, officer or agent shall have participated or aided in any way in making such sale shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller of the securities sold or of the contract made for the full amount paid by such purchaser: Provided, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale or contract for sale; and provided further, that no purchaser otherwise entitled shall claim or have the benefit of this section who shall have refused or failed within sixty days to accept the voluntary offer of the seller to take back the security in question and to refund the full amount paid by such purchaser and court costs, together with interest on such amount for the period from the date of payment by such purchaser down to the date of repayment, such interest to be computed.

(a) In case such securities consist of interest-bearing obligations at the same rate as provided in such obligations; and

(b) In case such securities consist of other than interest-bearing obligations at the rate of six per centum per annum; less, in every case, the amount of any income from said securities that may have been received by such purchaser. (1925, c. 190, s. 22; 1927, c. 149, s. 22.)

§ 78-23. **Violation of chapter; punishment.**—(a) Whoever for the purpose of procuring the registration of any security by notification under this chapter, shall knowingly make or cause to be made any false representation of a material fact to the Secretary of State shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the State prison for not less than one year nor more than five years or fined in any sum not more than one thousand dollars (\$1,000) or both.

(b) Whoever shall sell or cause to be sold, or offer to sell or cause to be offered for sale, any security in this State, which is not exempt under any of the provisions of § 78-3, unless sold in any transaction exempt under any of the provisions of § 78-4, and which such securities so sold, or caused to be sold or so offered for sale or caused to be offered for sale shall not have been registered as provided in this chapter, shall be guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for a period of not less than one, nor more than five years, or fined in any sum not more than one thousand dollars (\$1,000), or both.

(c) Whoever shall, for the purpose of selling any security in this State, fraudulently represent to the purchaser or prospective purchaser thereof the amount of dividends, interest or earnings which such security will yield, shall be deemed guilty of a violation of the provisions of this chapter and upon conviction thereof shall be imprisoned in the State prison for not less than one year nor more than five years, or fined in any sum not more than one thousand dollars (\$1,000), or both.

(d) Whoever, for the purpose of securing the registration by qualification of any securities under this chapter, shall make any false representation concerning any material fact submitted to the Secretary of State shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars (\$1,000), or both.

(e) Whoever, for the purpose of procuring the registration by qualification of any security under this chapter, shall suppress or withhold any information from the Secretary of State which he possesses and which if submitted by him to the Secretary of State would render such security incompetent to be registered by qualification under and pursuant to the terms of this chapter, shall be

deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars (\$1,000), or both.

(f) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after having been notified by the Secretary of State that the registration of such securities has been canceled, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars (\$1,000), or both.

(g) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after being notified by the Commissioner to stop the sale of such security pending the investigation provided for in § 78-8, or pending the filing of the bond which may be required under § 78-11, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars (\$1,000), or both.

(h) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State embraced and referred to in § 78-19, without first having registered under and pursuant to the terms of said section, shall be deemed guilty of a violation of said section, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars (\$1,000), or both.

(i) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after his registration as provided in § 78-19, has been canceled by the Secretary of State as provided by § 78-19, shall be deemed guilty of a violation of said § 78-19, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars (\$1,000), or both.

(j) Whoever for the purpose of procuring the registration of any dealer or agent under this chapter, shall knowingly make or cause to be made any false representations of a material fact to the Secretary of State shall be guilty of a felony and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum of not more than one thousand dollars (\$1,000), or both.

(k) Whoever engages in this State in the making of fictitious or pretended sales or purchases, or who causes the making of fictitious or pretended sales or purchases, or who engages in the offer of fictitious or pretended sales or purchases of any securities within the meaning of this chapter, the actual delivery of which securities are not to follow such sales, shall be deemed guilty of a violation of the terms of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than five thousand dollars (\$5,000), or both.

(l) Whoever, without first having become registered under and pursuant to the terms of § 78-19, shall assist or attempt to assist, by recommendation or by personal solicitation, any salesman or agent in this State in the sale or disposition of any securities required to be registered under the provisions of this chapter to any purchaser or purchasers, except in transactions exempt under § 78-4, and who shall in consideration of such assistance or an effort to assist receive compensation in any form or gratuity from such dealer or agent, or anyone upon their behalf, or who shall render such assistance or make such effort upon the promise of such dealer or agent, express or implied, that he shall receive in consideration therefor compensation in any form or a gratuity for such assistance

or effort to assist, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars (\$1,000), or both.

(m) It is hereby expressly provided that the offenses herein created and the penalties herein imposed are to be deemed cumulative to the offenses and penalties heretofore created and now existing in the criminal code of this State, and that the conviction of any person for the violation of any offense created by this chapter shall not be deemed to have placed such person in jeopardy of trial and conviction for the violation of any offense heretofore created and now existing in the criminal code of this State. (1925, c. 190, s. 23; 1927, c. 149, s. 23.)

Cross Reference.—See Editor's Note under § 78-2.

Editor's Note.—It seems that the word "Commissioner" in subsection (g) probably means "Secretary of State."

Statute Strictly Construed.—The penal provision of this chapter, making the sale of securities in violation thereof a felony,

must be strictly construed, and the terms of the statute cannot be extended beyond the plain implication of words used. *State v. Allen*, 216 N. C. 621, 5 S. E. (2d) 844 (1939).

Applied in *State v. Pelley*, 221 N. C. 487, 20 S. E. (2d) 850 (1942).

§ 78-24. Foreign corporations to name process officer within State.—In all cases of application by a foreign corporation, partnership, association or trust company for registration of securities by qualification or as a dealer in securities, such corporation, partnership, association or trust company shall name a process officer within the State of North Carolina, approved by the Commissioner upon whom service of any process of any court in this State shall be of the same effect as if served upon said corporation, partnership, association or trust company. (1927, c. 149, s. 24.)

Editor's Note.—It seems that the word "Commissioner" in this section probably

means "Secretary of State." See Editor's Note under § 78-2.

Chapter 79.

Strays.

Sec.

79-1. Notice to owner of stray, or to register of deeds.

79-2. Owner may reclaim.

Sec.

79-3. When and how strays sold.

79-4. Failure to comply with stray law misdemeanor.

§ 79-1. Notice to owner of stray, or to register of deeds.—Any person who shall take up any stray horse, mare, colt, mule, ass or jennet, neat cattle, hog or sheep, shall within ten days after taking up such stray inform the owner, if to him known, if not, he shall inform the register of deeds of the supposed age, marks, brands and color of the stray, and that the same was taken up at his plantation or place of abode; whereupon the register of deeds shall record such information in a book kept by him for that purpose, for which service the taker-up of the stray shall pay a fee of twenty-five cents, except for hogs and sheep, for which the fee shall be ten cents. The register of deeds shall at once publish a notice of the taking up of such stray, by posting the same at the courthouse door, and if the cost does not exceed two dollars, then in some newspaper published in the county. Such notices shall be published for thirty days, and shall contain a full and complete description of the stray and of all marks or brands on the same, and when and where the same was taken up. The fees for publishing such notices shall be paid by the party taking up the stray. (1874-5, c. 258, s. 2; Code, s. 3768; Rev., s. 2833; C. S., s. 3951.)

Cross Reference.—As to license to look for strays upon the lands of another, see § 14-134.

§ 79-2. Owner may reclaim.—When any stray has been taken up, the owner may at any time before a sale reclaim such stray by proving his ownership and paying to the party capturing the same the actual costs paid the register of deeds as provided in § 79-1, together with the actual costs of keeping such stray, as fixed by the county commissioners. The board of commissioners of the several counties shall fix a scale of costs for keeping strays. (Rev., s. 2834; C. S., s. 3952.)

§ 79-3. When and how strays sold.—If the owner of any stray shall fail to claim the same within thirty days after the publication of the notice required by law, the person taking up the stray shall cause the stray to be appraised by the nearest magistrate and two freeholders, none of whom shall receive any fees for such services. Such appraisal shall give a full and accurate description of such stray and shall by the magistrate be returned to the register of deeds, and by him recorded in his book for strays; and the register of deeds shall issue an order to the sheriff directing him to sell such stray, and the sheriff shall sell such stray at public auction after ten days' public advertisement as for sales of personal property under execution; and out of the proceeds he shall pay the cost of publishing the notices as to strays, the costs of keeping and the cost of sale, and shall pay the surplus to the county treasurer for the benefit of the public school fund of the county. The county board of education shall, at any time within twelve months after such funds have been paid to the county treasurer, upon due proof of ownership, issue an order commanding the county treasurer to pay to the owner of the stray the net amount paid the county treasurer as the proceeds of the sale of the stray. (Rev., s. 2835; C. S., s. 3953.)

§ 79-4. Failure to comply with stray law misdemeanor.—If any person shall fail to comply with any of the requirements of law as to strays, he shall be guilty of a misdemeanor and upon conviction be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3306; C. S., s. 3954.)

Cross Reference.—As to fences and stock law, see § 68-1 et seq.

Chapter 80.

Trademarks, Brands, etc.

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Trademarks.

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ARTICLE 1.

Trademarks.

§ 80-1. **Adoption and filing for registry.**—It shall be lawful for any person to adopt for his protection and file for registry, as in this chapter provided, any label, trademark, term or design that has been used or is intended to be used for the purpose of designating, making known or distinguishing any goods, wares, merchandise or products of labor that have been or may be wholly or partly made, manufactured, produced, prepared, packed or put on sale by any such person, or to or upon which any work or labor has been applied or expended by any such person, or by any member of any corporation, or association or union of workingmen, that has adopted and filed for registry any such label, trademark, term or design, or announcing or indicating that the same have been made in whole or in part by any such person or corporation, or association or union of workingmen, or by any member thereof.

The word "person" as used in this article includes associations or unions of workingmen, whether incorporated or unincorporated. Any duly authorized officer or agent of any such association or union may act in its behalf in securing for the association or union the benefits and protection of this article. (1903, c. 271; Rev., s. 3012; C. S., s. 3971; 1941, c. 255, s. 1.)

Editor's Note.—The 1941 amendment inserted the words "or association or union of workingmen" in the first paragraph and added the second paragraph.

As to the theory upon which is based the law dealing with trademarks, brands, etc., see *Blackwell v. Wright*, 73 N. C. 310 (1875).

Name of Town or Locality.—It seems that the name of a town or locality cannot be exclusively appropriated as a trademark. *Tob. Co. v. McElwee*, 94 N. C. 425 (1886).

Use of Surname.—As a rule, a trademark cannot be taken in a surname, and any one named Bingham could start a school called the "Bingham School," in the absence of proof of intent to injure, or fraudulently attract the benefit of the good name and reputation acquired by a pre-

viously existing "Bingham School." And certainly there could be no confusion between a Bingham School at Asheville and a school even of the identically same name at Mebane. *N. C. Bingham School v. Gray*, 122 N. C. 699, 30 S. E. 304, 41 L. R. A. 243 (1898).

It is beyond the scope of the powers of the State legislature to establish a monopoly in a family name or to confer a patent right in its use. *Bingham School v. Gray*, 122 N. C. 699, 30 S. E. 304, 41 L. R. A. 243 (1898).

But one may, by contract, conclude himself from the use of his own name in a given business, and the agreement will be enforced by the courts. *Zagier v. Zagier*, 167 N. C. 616, 83 S. E. 913 (1914).

§ 80-2. **Property rights protected by filing for registry.**—Whenever any person shall adopt and file for registry any label, trademark, term or design pursuant to the provisions of this chapter, the property, privileges, rights, remedies and interests in and to any such label, trademark, term or design, and in and to the use of same, provided or given by this chapter to, or otherwise conferred upon or enjoyed by, the person filing the same for the registry, shall be fully and completely secured, preserved and protected as the property of those entitled to the same before any such label, trademark, term or design has been actually applied to any goods, wares, merchandise, or product of labor, and put upon the market for sale or otherwise, and before any use or appropriation of any such label, trademark, term or design has been made in connection with any such goods, wares, merchandise or product of labor, as well as after the same has been used or applied to designate, make known or distinguish any such

goods, wares, merchandise, or product of labor and they have been put upon the market. (1903, c. 271, s. 2; Rev., s. 3013; C. S., s. 3972.)

§ 80-3. Filing to be with Secretary of State; contents of affidavits; fees.—Any person who has heretofore adopted and used, or shall hereafter adopt and use any label, trademark, term or design, as in this chapter provided, may file the same for registry in the office of the Secretary of State, by leaving two copies, facsimiles or counterparts thereof, with the said Secretary, and filing therewith a statement in the form of an affidavit, subscribed and sworn to by any such person, or by any officer, agent or attorney, if a corporation or association or union of workmen, specifying the person by whom any such label, trademark, term or design is filed, and the class or character of the goods, wares, merchandise or products of labor to which the same has been or is intended to be appropriated or applied, and that the person so filing the same has the right to the use of the said label, trademark, term or design, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive, without the permission or authority of the person filing the same, and that the copies, facsimiles or counterparts filed therewith are true and correct copies, facsimiles or counterparts of the genuine label, trademark, term or design of the person filing the same; and there shall be paid for such registry a fee of five dollars to the Secretary of State for the use of the State, and the same recording fees required by law for recording certificate of organization of corporations. (1903, c. 271, s. 3; Rev., s. 3014; C. S., s. 3973; 1935, c. 60; 1941, c. 255, s. 2.)

Editor's Note.—The 1935 amendment the words "or association or union of increased the registry fee from one to workingmen." five dollars. The 1941 amendment inserted

§ 80-4. Registration; certified copies evidence; fees.—The Secretary of State, upon the filing of any such label, trademark, term or design that is not in conflict with § 80-6, shall register the same, and shall deliver to the person filing the same as many certified copies thereof, with his certificate of such registry, as any such person may request, and for every such copy and certificate there shall be paid to the Secretary of State, for the use of the State, a fee of one dollar; and any such certified copy and certificate shall be admissible in evidence and competent and sufficient proof of the adoption, filing and registry of any such label, trademark, term or design, by any such person in any action or judicial proceeding in any of the courts of this State, and of due compliance with the provisions of this chapter. (1903, c. 271, s. 4; Rev., s. 3015; C. S., s. 3974.)

§ 80-5. Transfer of trademarks.—The right to use any registered label, trademark, term or design shall be granted only by an instrument in writing, duly filed in the office of the Secretary of State. The fees for recording or filing such transfer and issuing copies thereof shall be the same as for filing such label, trademark, term or design. (Rev., s. 3016; C. S., s. 3975.)

§ 80-6. Similar trademarks refused registration.—It shall not be lawful for the Secretary of State to register for any person any label, trademark, term or design that is in the identical form of any other label, trademark, term or design theretofore filed by any other person, or that bears any such near resemblance thereto as may be calculated to deceive, or that would be liable to be mistaken therefor. (1903, c. 271, s. 5; Rev., s. 3017; C. S., s. 3976.)

§ 80-7. Fraudulent registration; penalty.—Any person who shall file or procure the filing and registry of any label, trademark, term or design in the office of the Secretary of State under the provisions of this chapter, by making any false or fraudulent representations or declarations, with fraudulent intent, shall be liable to pay any damages sustained in consequence of any such registry,

to be recovered by or in behalf of the party injured thereby. (1903, c. 271, s. 5; Rev., s. 3018; C. S., s. 3977.)

§ 80-8. Use of counterfeit trademarks unlawful.—Whenever any person has adopted and filed for registry any label, trademark, term or design, as provided by law, and the same shall have been registered pursuant to law, it shall be unlawful for any other person to manufacture, use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trademark, term or design, or have in possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor to which or on which any counterfeit or imitation of any such label, trademark, term or design is attached, affixed, printed, stamped, impressed or displayed, or to sell or dispose of, or offer to sell or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor contained in any box, case, can or package to which or on which any such counterfeit or imitation is attached, affixed, printed, stamped, impressed or displayed. (1903, c. 271, s. 6; Rev., s. 3019; C. S., s. 3978.)

Cross Reference.—For relief against unlawful use, see note to § 80-9.

§ 80-9. Unauthorized use unlawful; use under license.—Whenever any person has adopted and registered any label, trademark, term or design, as provided by law, it shall be unlawful for any other person to make any use, sale, offer for sale or display of the genuine label, trademark, term or design of any such person filing the same, or to have any such genuine label, trademark, term or design in possession with intent that the same shall be used, sold, offered for sale, or displayed, or that the same shall be applied, attached or displayed in any manner whatever to or on any goods, wares or merchandise, or to sell, offer to sell, or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares or merchandise in any box, case, can or package to or on which any such genuine label, trademark, term or design of any such person is attached, affixed, or displayed, or to make any use whatever of any such genuine label, trademark, term or design, without first obtaining in every such case the license of the person adopting, filing and registering the same; and any such license may be revoked and terminated at any time upon notice, and thereafter any use thereof shall be unlawful. (1903, c. 271, s. 7; Rev., s. 3020; C. S., s. 3979.)

Cross Reference.—For relief against unauthorized use, see § 80-10 and note.

§ 80-10. Remedies; damages; destruction of counterfeits.—Any person who has registered any label, trademark, term or design under the provisions of this chapter shall have a right of action against any person for the unauthorized use of such label, trademark, term or design, and the courts shall by appropriate remedies prevent the unauthorized or unlawful use, manufacture or display of any label, trademark, term or design, or the imitation or counterfeit thereof, or the sale, disposal or display of any articles of property on which any counterfeit or imitation of any registered label, trademark, term or design, or on which any genuine label, trademark, term or design may be used or displayed without proper authority; and shall further secure and protect all persons in all rights of property and interest which they may have in any label, trademark, term or design registered under this chapter; and the court shall award to the plaintiff any and all damages resulting from any such wrongful use of any such label, trademark, term or design; and any counterfeit or imitation of any labels, trademarks, terms or designs, and any die, engraving, mould or mechanical device or the manufacture of the same in the possession or under the control of the defendant, shall be delivered up to an officer of the court, to be

destroyed, and any such genuine labels, trademarks, terms or designs in the possession or under the control of any such defendant shall be delivered to the plaintiff: Provided, however, no restraining order or injunction granted to any association or union of workmen to prevent violations of this article shall have the effect of impounding or preventing the free flow into the channels of commerce of any goods, wares, merchandise or products already manufactured or in the process of manufacture to which any label, trademark, term or design has been affixed at the time of the institution of the action in which the injunctive relief is sought, unless the owner or manufacturer of said goods, wares, merchandise or products has permitted the affixing of such label, trademark, term or design with the actual knowledge that it was being used or affixed in violation of the provisions of this article. (1903, c. 271, s. 8; Rev., s. 3021; C. S., s. 3980; 1941, c. 255, s. 3.)

Editor's Note.—The 1941 amendment added the proviso at the end of this section.

When Relief Granted.—Before the owner of a trademark can call upon the courts for relief, he must show not only that he has a clear legal right to the trademark, but that there has been a plain violation of it; and where a violation is alleged, the true inquiry is, whether the mark of the defendant is so assimilated to that of the plaintiff as to deceive purchasers. And it will make no difference whether the party designed to mislead the public or whether the symbol adopted was calculated to de-

ceive. *Blackwell v. Wright*, 73 N. C. 310 (1875).

If it appears that the trademark alleged to be an imitation, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colorable, and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated. *Blackwell v. Wright*, 73 N. C. 310 (1875).

§ 80-11. Concurrent action for penalty.—In addition to any other rights, remedies or penalties provided by this chapter, and as concurrent therewith, any person who shall violate any of the provisions of this chapter shall be liable to a penalty of two hundred dollars, to be recovered by any person who has filed any such label, trademark, term or design. (1903, c. 271, s. 9; Rev., s. 3022; C. S., s. 3981.)

§ 80-12. Use of private marks or labels to defraud; punishment.—If any person shall knowingly and willfully forge or counterfeit, or cause or procure to be forged or counterfeited, the private marks, tokens, stamps or labels of any mechanic, manufacturer or other person, being a resident of the United States, with intent to deceive and defraud the purchasers, mechanics, or manufacturers of any goods, wares or merchandise whatsoever, upon conviction thereof he shall be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment of not less than thirty days or more than five years, or both fine and imprisonment, at the discretion of the court. (1870-1, c. 253, s. 1; Code, s. 1038; Rev., s. 3852; C. S., s. 3982.)

§ 80-13. Selling goods with forged marks or labels, misdemeanor.—If any person shall vend any goods, wares or merchandise having thereon any forged or counterfeited marks, tokens, stamps or labels purporting to be the marks, tokens, stamps or labels of any person being a resident of the United States, knowing the same at the time of the purchase thereof by him to be forged or counterfeited, he shall be guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both fine and imprisonment, at the discretion of the court. (1870-1, c. 253, s. 2; Code, s. 1039; Rev., s. 3850; C. S., s. 3983.)

§ 80-14. Misbranding sacks to defraud, misdemeanor.—If any person shall knowingly use the mark or brand of any other person on any sack, or shall knowingly impress on any sack the mark or brand of another person,

with intent to defraud or for the purpose of enhancing the value of his own property, the person so offending shall be guilty of a misdemeanor. (1874-5, c. 225; Code, s. 1040; Rev., s. 3851; C. S., s. 3984; 1943, c. 543.)

Editor's Note.—The 1943 amendment convicted of larceny" formerly appearing struck out the words "and punished as if at the end of this section.

ARTICLE 2.

Timber Marks.

§ 80-15. **Timber dealers may adopt.**—Any person dealing in timber in any form shall be known as a timber dealer and as such may adopt a trademark, in the manner and with the effect in this article provided. (1903, c. 261, s. 1; Rev., s. 3023; C. S., s. 3985.)

§ 80-16. **How adopted, registered and published.**—Every such dealer desiring to adopt a trademark may do so by the execution of a writing in form and effect as follows:

Notice is hereby given that I (or we, etc., as the case may be) have adopted the following trademark, to be used in my (or our, etc.) business as timber dealer (or dealers), to wit: (Here insert the words, letters, figures, etc., constituting the trademark, or if it be any device other than words, letters or figures, insert a facsimile thereof).

Dated this day of, 19.... A..... B.....

Such writing shall be acknowledged or proved for record in the same manner as deeds are acknowledged or proved, and shall be registered in the office of the register of deeds of the county in which the principal office or place of business of such timber dealer may be, in a book to be kept for that purpose marked Registry of Timber Marks, also in office of Secretary of State, and a copy thereof shall be published at least once in each week for four successive weeks in some newspaper printed in such county, or if there be no such newspaper printed therein, then in some newspaper of general circulation in such county. (1889, c. 142; 1903, c. 261, s. 2; Rev., s. 3024; C. S., s. 3986.)

§ 80-17. **Property in and use of trademarks.**—Every trademark so adopted shall, from the date thereof, be the exclusive property of the person adopting the same. The proprietor of such trademark shall, in using the same, cause it to be plainly stamped, branded or otherwise impressed upon each piece of timber upon which the same is placed. (1889, c. 142; 1903, c. 261, ss. 3, 4; Rev., s. 3025; C. S., s. 3987.)

§ 80-18. **Effect of branding timber purchased.**—When timber is purchased by the proprietor of any such trademark, and the said trademark is placed thereon as hereinbefore provided, such timber shall thenceforth be deemed the property of such purchaser, without any other or further delivery thereof, and such timber shall thereafter be at the risk of the purchaser, unless otherwise provided by contract in writing between the parties. (1889, c. 142; 1903, c. 261, s. 6; Rev., s. 3026; C. S., s. 3988.)

§ 80-19. **Trademark on timber evidence of ownership.**—In any action, suit or contest in which the title to any timber, upon which any trademark has been placed as aforesaid, shall come in question, it shall be presumed that such timber was the property of the proprietor of such trademark, in the absence of satisfactory proof to the contrary. (1903, c. 261, s. 7; Rev., s. 3027; C. S., s. 3989.)

§ 80-20. **Fraudulent use of timber trademark, misdemeanor.**—If any person shall use or attempt to use any timber trademark without the written consent of the proprietor thereof, or falsely and fraudulently place any trade-

mark on timber not the property of the owner of such trademark without his written consent, or intentionally and without lawful authority remove, deface or destroy any timber trademark or the imprint thereof on any timber or intentionally put any such timber in such a position or place so remote from the stream from which it was taken or on which it was afloat as to render it inconvenient or unnecessarily expensive to replace the same in such stream, he shall be guilty of a misdemeanor. (1903, c. 261, ss. 3-5; Rev., s. 3854; C. S., s. 3990.)

§ 80-21. Larceny of branded timber.—If any person shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark is stamped, branded or otherwise impressed, or shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark has been intentionally and without lawful authority removed, defaced or destroyed, he shall be deemed guilty of larceny thereof and punished as in other cases of larceny. (1903, c. 261, s. 5; Rev., s. 3853; C. S., s. 3991.)

§ 80-22. Altering timber trademark crime.—If any person shall willfully change, alter, erase or destroy any registered timber mark or brand put or cut upon any logs, timber, lumber or boards, except by the consent of the owner thereof, with intent to steal the said logs or timber, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both. (1889, c. 142, s. 3; 1903, c. 41; Rev., s. 3855; C. S., s. 3992; 1943, c. 543.)

Editor's Note.—The 1943 amendment struck out the words "if the same shall have been done with a felonious intent, such person shall be guilty of larceny and punished as for that offense."

§ 80-23. Possession of branded logs without consent, misdemeanor.—If any person shall knowingly and willfully take up or have in his possession any log, timber, lumber or board upon which a registered timber mark or brand has been put or cut, except by the consent of the owner thereof, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both. (1889, c. 142, s. 4; 1903, c. 42; Rev., s. 3856; C. S., s. 3993.)

ARTICLE 3.

Mineral Waters and Beverages.

§ 80-24. Description of name, labels, or marks filed and published.—Any person, partnership or corporation engaged in manufacturing, bottling, selling or dealing in mineral, soda or aerated waters, beers, lager beer, milk or other beverages, in kegs, boxes, trays, crates, bottles, syphons, barrels, casks, or other vessels, with his name or other marks or devices printed, impressed, or otherwise produced thereon, or upon labels pasted thereon, shall file with the clerk of the superior court of the county in which his principal office or place of business (or in case of a foreign corporation, its principal office or place of business or agency) is located, a description of the names, marks, or devices so used by him, and cause such description to be printed twice a week for two successive weeks in some daily newspaper published in said county, if there be a daily newspaper published therein, and if not, then in some newspaper published in said county once a week for two successive weeks. The description of the names, marks or devices, before being filed as aforesaid, shall be signed by the person filing the same, or in case of a partnership, by a partner, or in case of a corporation, by one of its officers or managers, and shall be acknowledged by the person signing the same as his act, or as the act of said partnership or corporation, before an officer competent to take acknowledgment of deeds. The publication hereby required need only be a brief description, sufficient for identification, of

such names or marks, and need not contain a certified copy of the acknowledgment. The provisions of this article shall apply to all vessels enumerated above upon which said names or marks shall appear as aforesaid, whether or not any of the same shall be in existence at the time of said filing and publication. (1907, c. 901, s. 1; C. S., s. 3994.)

§ 80-25. Clerk to record description.—The several clerks of the superior courts mentioned in the preceding section shall record in some book of record in their custody all such descriptions filed with them, and also copies of the said advertisement in the newspaper, certified to by the publishers thereof, and shall furnish copies thereof, duly certified by them in the usual manner, to any person who may apply therefor, and shall receive for the recording of such copies a fee of fifty cents. Such certified copies shall be evidence that the provisions of the preceding section have been complied with, and shall be prima facie evidence of the title of the person, named therein, to the vessels upon which his name, marks, labels or devices appear as described in said description. (1907, c. 901, s. 2; C. S., s. 3995.)

§ 80-26. Refilling vessels and defacing marks forbidden; punishment.—After any person has filed and published his description of such names, marks or devices, in accordance with the preceding provisions of this article, it shall be unlawful for any persons to fill in any way the vessels upon which such names or other marks are printed, impressed or otherwise produced, with any water or beverage enumerated in this article, or to deface, remove or conceal such names or other marks, thereon, with intent to convert the same to his use, or to have on sale, offer for sale, traffic in, handle in the course of business, transport, or to take or collect from ash or garbage receptacles or from public or private premises, or to keep in stock, store or dispose of or deal or traffic in same, or any parts thereof, without the written consent of the person whose name or other marks are upon such vessels, or to willfully break, destroy or otherwise injure any of the articles mentioned in this section. Any person who shall do any of the acts declared to be unlawful by this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished for the first offense by imprisonment of not less than ten days or more than one year, or by a fine of three dollars for each of such kegs, casks or barrels, and one dollar for each of such boxes, trays, crates, bottles, syphons, or any other vessels so unlawfully used; and for the second and subsequent offense by imprisonment for not less than twenty days or more than one year, or by a fine of not less than two dollars or more than five dollars for each vessel unlawfully used, or by both such fine and imprisonment, at the discretion of the court before whom such offense is tried: Provided, this section shall not apply to such vessels as the bottler charges his customers for at the time of sale of the goods. (1907, c. 901, s. 3; C. S., s. 3996.)

§ 80-27. Possession of vessels as evidence of offense.—If any person shall be found to be in possession of any of the vessels mentioned above in this article, or any parts thereof, and the persons whose names, marks or devices have been placed thereon, as above provided, have complied with the provisions of this article, and the persons so found in possession thereof shall be charged with any of the offenses mentioned in the preceding section, then such possession shall be prima facie evidence that such person is guilty of the offenses so charged: Provided, this section shall not apply to bottlers who receive such vessels in the course of business and mixed and exchanged in shipment, when such bottler within a reasonable time notifies the owners thereof of the location thereof. (1907, c. 901, s. 4; C. S., s. 3998.)

§ 80-28. Search warrants.—If the owner of any vessel mentioned in § 80-24 who has complied with the provisions thereof, or the officer, agent or

employee of such owner, shall make an affidavit before a justice of the peace asserting that he has reason to believe and does believe that any person is in actual or constructive possession of, or is making use of, any article above mentioned or any part thereof, or in any way declared to be unlawful by § 80-26, the justice may issue his search warrant to any sheriff, constable or other officer of the law to whom such warrant may be directed, and cause the premises designated in the warrant to be searched; and if article above mentioned or any part thereof shall be found upon the premises so designated, the officer executing such search warrant shall thereupon report the same, under his oath, to the justice, who shall thereupon, upon said report and upon the oath of any person or persons charging any violations of § 80-26, issue his warrant for the arrest of the person against whom the charge is made, and cause him, together with such articles, to be brought before him for trial. (1907, c. 901, s. 5; C. S., s. 3999.)

§ 80-29. Concurrent jurisdiction of superior courts and justices of the peace.—The justices of the peace in the counties of this State shall have concurrent jurisdiction with the superior courts of their respective counties in the case of persons arrested for violation of the above provisions of this article, and such justices of the peace shall proceed to hear and determine such cases when the parties arrested are brought before them, in all cases where the punishment fixed in this article is such as to give the justices jurisdiction under the Constitution and laws of this State. And if such person shall be found to be guilty of the violation of any of the provisions of this article, the court trying such person and imposing the punishment herein prescribed shall also award possession to the owner of all the property involved in such violation. (1907, c. 901, s. 6; C. S., s. 4000.)

§ 80-30. Accepting deposit not deemed sale.—The requiring, taking or accepting of any deposit for any purpose upon any vessel above enumerated shall not be deemed to constitute a sale of such property, either optional, conditional or otherwise, in any proceedings under this article. (1907, c. 901, s. 7; C. S., s. 4001.)

§ 80-31. When refiling description not required.—Any person, partnership, or corporation that has heretofore filed and published a description of his name, marks or devices for the purposes mentioned in § 80-1, in accordance with the law existing at the time of such filing and publication, shall not be required to again file such description, but shall be entitled to all the benefits of this article as fully as if he had complied with all the provisions thereof. (1907, c. 901, s. 8; C. S., s. 4002.)

§ 80-32. Application of the article.—The provisions of this article do not apply to any person using the vessels enumerated above for the beverages placed therein by the owners, or who after consumption of the contents is in possession of the same, while awaiting the return to the owners, nor shall the provisions of this article apply to any garbage man collecting the same in the regular course of his business: Provided, this article shall not apply to beer and mineral water bottles shipped into this State from other states. (1907, c. 901, s. 9; C. S., s. 4003.)

ARTICLE 4.

Farm Names.

§ 80-33. Registration of farm names authorized.—Any owner of a farm in the State of North Carolina may have the name of his farm, together with a description of his lands to which said name applies, recorded in a register kept for that purpose in the office of the register of deeds of the county in which the farm is located, and the register of deeds shall furnish to such landowner

a proper certificate setting forth the name and description of the lands. (1915, c. 108, s. 1; C. S., s. 4004.)

Local Modification.—Sampson, Stokes, Surry: C. S., § 4011.

§ 80-34. After registry, similar name not registered.—When any name has been recorded as the name of any farm in such county, the name, or one so nearly like it as to produce confusion, shall not be recorded as the name of any other farm in the same county. (1915, c. 108, s. 1; C. S., s. 4005.)

§ 80-35. Distinctive name required.—No name shall be registered as the name of a farm where such proposed name or one so nearly like it as to produce confusion has been so used in connection with another farm in the same county as to become generally known prior to March 5, 1915, unless the name used has also prior to March 5, 1915, become well known as the name of the farm proposed to be registered; and in this event two or more farms in the same county may be registered with the same name with some prefix or suffix added to distinguish them. (1915, c. 108, s. 2; C. S., s. 4006.)

§ 80-36. Application for registry; publication and hearing.—Before a name shall be registered the clerk shall have publication made at least once a week for four weeks in some secular newspaper published in the county, if one is so published, and if one is not so published, then one having a general circulation in the county, giving the name of the applicant, the proposed name of registration and a sufficient description to identify the farm and the time of the return; and if the owner or clerk knows of another farm in the county of the same or very similar name, a summons shall be served on the owner thereof at least ten days before the return day. On the return day any person, firm or corporation may file claim to the name, and the clerk may pass upon the claim and award the name to any party, with the right to appeal by the aggrieved party to the superior court within ten days, as in other cases, and on such appeal the judge shall decide the matters unless a jury be demanded by some party. (1915, c. 108, s. 2; C. S., s. 4007.)

§ 80-37. Fees for registration.—Any person having the name of his farm recorded as provided in this article shall first pay to the register of deeds a fee of one dollar, which fee shall be paid to the county treasurer as other fees are to be paid to the county treasurer by such register of deeds: Provided, that in counties where the fee system obtains, the fees herein mentioned shall go to the register of deeds of such counties. (1915, c. 108, s. 3; C. S., s. 4008.)

§ 80-38. When transfer of farm carries name.—When any owner of a farm, the name of which has been recorded as provided in this article, transfers by deed or otherwise the whole of such farm, such transfer may include the registered name thereof; but if the owner shall transfer only a portion of such farm, then, in that event, the registered name thereof shall not be transferred to the purchaser unless so stated in the deed or conveyance. (1915, c. 108, s. 4; C. S., s. 4009.)

§ 80-39. Cancellation of registry; fee.—When any owner of a registered farm desires to cancel the registered name thereof, he shall state on the margin of the record of the register of such name the following: "This name is canceled and I hereby release all rights thereunder," which shall be signed by the person canceling such name, and attested by the register of deeds. For such latter service the register of deeds shall charge a fee of twenty-five cents, which shall be paid to the county treasurer as other fees are paid to the county treasurer by him. (1915, c. 108, s. 5; C. S., s. 4010.)

ARTICLE 5.

Stamping of Gold and Silver Articles.

§ 80-40. **Marking gold articles regulated.**—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of gold or any alloy of gold, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark indicating or designed to indicate that the gold, or alloy or gold, therein is of a greater degree of fineness than its actual fineness, unless the actual fineness, in the case of flatware and watchcases, is not less by more than three one-thousandths parts, and in the case of all other articles is not less by more than one-half karat than the fineness indicated, according to the standards and subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of gold or alloy in the articles, according to the required standards, the part of the gold or alloy taken for the test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of the articles. In addition to the foregoing tests and standards, the actual fineness of the entire quantity of gold and of its alloys contained in any article mentioned in this section (except watchcases), including all solder or alloy of inferior metal used for brazing or uniting the parts (all such gold, alloys, and solder being assayed as one piece), shall not be less by more than one karat than the fineness indicated by the mark used as above indicated. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 1; C. S., s. 4012.)

§ 80-41. **Marking silver articles regulated.**—It shall be unlawful to make for sale or sell or offer to sell or dispose of or have in possession with intent to sell or dispose of—

1. Any article of merchandise made in whole or in part of silver or any alloy of silver, and having marked, stamped, branded or engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words “sterling silver” or “sterling” or any colorable imitation thereof, unless nine hundred and twenty-five one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standard.

2. Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having marked, stamped, branded, engraved or imprinted thereon, or upon any card, tag or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words “coin” or “coin silver,” or any colorable imitation thereof, unless nine hundred one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standards.

3. Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark or word (other than the word “sterling” or the word “coin”) indicating, or designed to indicate, that the silver or alloy of silver in the article is of a greater degree of fineness than its actual fineness, unless the actual fineness is not less by more than four one-

thousandths parts than the actual fineness indicated by the use of such mark or word, subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of the articles mentioned in this section, according to the foregoing standards, the part taken for test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior metal used for brazing or uniting the parts of such article. In addition to the foregoing test and standards, the actual fineness of the entire quantity of metal purporting to be silver contained in any article mentioned in this section, including all solder or alloy of inferior fineness used for brazing or uniting the parts (all such silver, alloy or solder being assayed as one piece), shall not be less by more than ten one-thousandths parts than the fineness indicated according to the foregoing standards, by the mark employed as above indicated. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 2; C. S., s. 4013.)

§ 80-42. Marking articles of gold plate regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto a plate, plating, covering or sheet of gold, or of any alloy of gold, which article is known in the market as “rolled gold plate,” “gold plate,” “gold-filled,” or “gold electroplate,” or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any word or mark usually employed to indicate the fineness of gold, unless such word be accompanied by other words plainly indicating that such article or some part thereof is made of rolled gold plate, or gold plate, or gold electroplate, or is gold-filled, as the case may be. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 3; C. S., s. 4014.)

§ 80-43. Marking articles of silver plate regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto, a plate, plating, covering or sheet of silver or of any alloy of silver, which article is known in the market as “silver plate” or “silver electroplate,” or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the word “sterling” or the word “coin,” either alone or in conjunction with any other words or marks. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 4; C. S., s. 4015.)

§ 80-44. Violation of article misdemeanor.—Every person, firm, corporation or association guilty of a violation of any one of the preceding sections of this article, and every officer, manager, director or managing agent of any such person, firm, corporation or association directly participating in such violation or consenting thereto, shall be guilty of a misdemeanor and punished by fine or imprisonment, or both, at the discretion of the court: Provided, that if the person charged with violation of this article shall prove that the article concerning which the charge was made was manufactured prior to the thirteenth day of June, one thousand nine hundred and seven, then the charge shall be dismissed. (1907, c. 331, s. 5; C. S., s. 4016.)

ARTICLE 6.

Cattle Brands.

§ 80-45. Owners of stock to register brand or marks.—Every person who has any horses, cattle, hogs or sheep may have an earmark or brand dif-

ferent from the earmark or brand of all other persons, which he shall record with the clerk of the board of commissioners of the county where his horses, cattle, hogs or sheep are; and he may brand all horses eighteen months old and upwards with the said brand, and earmark all his hogs and sheep six months old and upwards with the said earmark; and earmark or brand all his cattle twelve months old and upwards; and if any dispute shall arise about any earmark or brand, the same shall be decided by the record thereof. (R. C., c. 17, s. 1; Code, s. 2317; Rev., s. 3028; C. S., s. 4017.)

ARTICLE 7.

Recording of Cattle Brands and Marks with Commissioner of Agriculture.

§ 80-46. **"Stock growers" and "livestock" defined.**—Every person, firm, association or corporation, who owns, raises, buys or sells cattle in this State, is deemed a stock grower, and all cattle are deemed livestock, within the meaning of this article. (1935, c. 232, s. 1.)

§ 80-47. **Stock growers limited to single mark or brand; registration not required; law compulsory upon registration.**—Every stock grower in this State must use one, and only one, mark or brand for said stock grower's cattle, which mark or brand shall be placed in some conspicuous place on said cattle, which place must be designated in the application for the recording of said mark or brand hereinafter provided for in this article: Provided, however, nothing in this section nor in any subsequent section of this article shall be construed to be compulsory upon any stock grower in this State to apply for or register his mark or brand of cattle; but when a stock grower does so, then this article and all provisions thereof shall be binding and compulsory upon said stock grower. (1935, c. 232, s. 2.)

§ 80-48. **Commissioner of Agriculture named recorder.**—The Commissioner of Agriculture of the State of North Carolina is hereby declared to be the State recorder of marks and brands of cattle growers in this State. (1935, c. 232, s. 3.)

§ 80-49. **Recording with Commissioner.**—All brands or marks shall be recorded with the State recorder. (1935, c. 232, s. 4.)

§ 80-50. **Application; effect of recording; fee; no duplication allowed.**—Any stock grower in the State of North Carolina, who desires to avail himself of the provisions of this article, shall make and sign an application, furnished by the State recorder, setting forth a facsimile and description of the brand or mark which said stock grower desires to use, and shall file the same with the State recorder, who shall record the same in a book kept by him for that purpose, and from and after the filing of the same, the stock grower filing the same shall have exclusive right to use said brand or mark within the State, and shall pay the State recorder a fee of one dollar; provided, that the State recorder shall not file or record such mark or brand if the same has been heretofore recorded by him in favor of some other grower. (1935, c. 232, s. 5.)

§ 80-51. **Certified copy of mark or brand; registration; fees and disposition thereof.**—Upon the recording of any such brand or mark with the State recorder, as herein provided, the owner thereof may procure from the State recorder a certified copy thereof, paying therefor the sum of fifty cents, and may cause the same to be recorded in the office of the register of deeds in the county where said stock grower resides, and shall pay said register of deeds a fee of fifty cents for recording same. It shall be unlawful for any register of deeds to record any such mark or brand, unless the same is certified to him by the State recorder. Application blanks and a book for recording said marks and

brands shall be furnished each register of deeds of the county applying for same, and shall be paid for by the State recorder, if he has sufficient funds derived from the recording fees, and if not, then by the county so applying for same. All fees received by the State recorder shall be used in the administration of this article, and any surplus paid into the general fund of the Agriculture Department. In order to put the provisions of this article in force the Commissioner of Agriculture is hereby authorized to use any fund in his department not otherwise appropriated. (1935, c. 232, s. 6.)

§ 80-52. **Certified copy prima facie evidence of ownership.**—In all civil or criminal suits in any court in this State a duly certified copy, under the seal of the Department of Agriculture, of any brand or mark, duly recorded under the provisions of this article, shall be prima facie evidence of the ownership of the animal of said cattle grower. (1935, c. 232, s. 7.)

§ 80-53. **Records to be kept by those engaged in slaughtering.**—Any person, firm or corporation engaged in the business of slaughtering cattle shall keep at its place of business a book in which must be kept the name or names of the persons from whom any marked or branded cattle are purchased and the date of purchase and his address, and the mark or brand of such cattle. Said book must be kept ready at all times for the inspection of any person who desires to examine the same. (1935, c. 232, s. 8.)

§ 80-54. **Purchaser of branded cattle to keep record of purchases.**—Any person purchasing any marked or branded cattle, the mark or brand of which has been duly recorded under the provisions of this article, shall keep the name and address of the person from whom said cattle are purchased, a description of the mark or brand and the date of the purchase, and exhibit same to any person desiring to examine same. (1935, c. 232, s. 9.)

§ 80-55. **Defacing marks or brands made misdemeanor.**—No stock grower or other person in this State must change, conceal, deface, disfigure or obliterate any brand or mark previously branded, impressed or marked on any head of cattle, or put his or any other brand or mark upon or over any part of any brand or mark previously branded or marked upon any head of cattle, and no person shall make or use any counterfeit of any mark or brand of any other person. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. (1935, c. 232, s. 10.)

§ 80-56. **Violation of article made misdemeanor.**—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1935, c. 232, s. 11.)

Chapter 81.

Weights and Measures.

Article 1.

Uniform Weights and Measures.

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ARTICLE 1.*Uniform Weights and Measures.*

§ 81-1. Office of Superintendent of Weights and Measures.—In order to protect the purchasers or sellers of any commodity and to provide one standard of weight and of measure of length and surface throughout the State, which must be in conformity with the standard of measure of length, surface, weight and capacity established by Congress, the office of Superintendent of Weights and Measures for the State of North Carolina is hereby established as hereinafter provided. (1927, c. 261, s. 1; 1945, c. 280, s. 1.)

Editor's Note.—The 1945 amendment inserted the words "or sellers" and "weight and of" near the beginning of the section.

§ 81-2. Administration of article.—The provisions of this article shall be administered by the State Department of Agriculture through a suitable person to be selected by the Commissioner of Agriculture and known as the Superintendent of Weights and Measures. For the purpose of administering and giving effect to the provisions of this article, the rules and codes of specifications and tolerances as adopted by the National Conference of Weights and Measures and recommended by the United States Bureau of Standards and approved by the North Carolina Department of Agriculture are hereby adopted; however, the Department of Agriculture is empowered to make such further rules and regulations as may be necessary to make effective the purposes and provisions of this article, and to fix and prescribe reasonable charges and fees for examining, testing, adjusting and certifying the correct, or incorrect, equipment used in the buying or selling of any commodity or thing, or any equipment used for hire or award, or in the computation of any charge for services rendered on the basis of weight or measure, or in the determination of weight or measure, when a charge is made for such determination. Such rules and regulations and fees and charges shall be published thirty days before such rules, regulations, fees and

charges become effective. (1927, c. 261, s. 2; 1931, c. 150; 1943, c. 762, s. 1; 1949, c. 984.)

Editor's Note.—The 1931 amendment inserted in the second sentence the provision as to rules adopted by the National Conference of Weights and Measures, the

1943 amendment inserted therein the words "and approved by the North Carolina Department of Agriculture," and the 1949 amendment rewrote the sentence.

§ 81-2.1. Board of Agriculture authorized to establish standards of weights and measures for commodities having none.—The Board of Agriculture is authorized, directed and empowered to establish by order (after public notice as may be determined by it), standards of weights and measures on any commodity in any instance where no standard has been established by the Congress of the United States, or by the laws of the State of North Carolina, provided, however, that when a standard is established by Congress, or by the laws of the State of North Carolina, such standard shall supersede the standard or standards established by the Board of Agriculture. Provided that this section does not authorize the Board of Agriculture to establish a standard log rule measure. (1945, c. 280, s. 1; 1949, c. 984.)

Editor's Note.—The 1949 amendment inserted the comma after the phrase in parentheses and struck out in the next line

the word "and" formerly appearing after the word "commodity." It also changed "act" to "section" in the proviso.

§ 81-3. Employment of Superintendent of Weights and Measures.—The Commissioner of Agriculture shall have authority to employ a Superintendent of Weights and Measures and necessary assistants, local inspectors and such other employees as may be necessary in carrying out the provisions of this article, and fix and regulate their duties.

The person named as Superintendent of Weights and Measures shall give bond to the State of North Carolina in the sum of ten thousand dollars to guarantee the faithful performance of his duties, the expense of said bond to be paid by the State and said bond to be approved as other bonds for the State officers. The Superintendent of Weights and Measures shall, to safeguard the interests of the buyer and seller, require bond from other employees authorized under the first paragraph of this section in the amounts of not less than one thousand dollars for each employee designated as a local inspector or sealer of weights and measures. (1927, c. 261, ss. 3, 4; 1949, c. 984.)

Editor's Note.—The 1949 amendment inserted the words "and said bond" in the first sentence of the second paragraph.

§ 81-4. Salaries and expenses.—All salaries and necessary expenses shall be paid as now provided for the other departments and agencies of the State government. (1927, c. 261, s. 5; 1931, c. 150; 1949, c. 984.)

Editor's Note.—Prior to the 1931 amendment this section provided for the payment of salaries, etc., from the fees collected un-

der this article. The 1949 amendment substituted "paid" for "provided."

§ 81-5. Standard of work for local standard keepers.—When any town or county wishes to appoint a local standard keeper or inspector or sealer of weights and measures, the appointment and regulation of his work must be in keeping with the rules and regulations of the State Department of Agriculture and his work subject to supervision of the State Superintendent of Weights and Measures. (1927, c. 261, s. 6; 1949, c. 984.)

Editor's Note.—The 1949 amendment inserted the comma after the word "measures."

§ 81-6. Receipts for fees; approved standards to be marked.—The State Superintendent of Weights and Measures, or his deputies, or inspectors on his direction, shall, after examining any standards of weights or measures or

other equipment used for determining the weight or measure of anything, issue to the owner of such measuring device or equipment a receipt for any fees collected and, when such measuring device or equipment is found to be accurate, stamp upon, or tag, the measuring instrument with the letters "N.C." and two figures representing the year in which the inspection was made. (1927, c. 261, s. 7; 1949, c. 984.)

Editor's Note.—The 1949 amendment substituted "equipment" for "apparatus."

§ 81-7. Standard equipment.—There shall be issued to each deputy inspector, or local sealer of weights and measures, such standard equipment as may be necessary. (1927, c. 261, s. 8.)

§ 81-8. Standards of weights and measures.—The weights and measures received from the United States under joint resolution of Congress, approved June fourteenth, one thousand eight hundred and thirty-six, and July twenty-seventh, one thousand eight hundred and sixty-six, and such new weights and measures as shall be received from the United States as standards of weights and measures in addition thereto, or in renewal thereof, and such as shall be supplied by the State in conformity therewith and certified by the National Bureau of Standards shall be the State standards of weights and measures, and in addition thereto there shall be supplied from time to time such copies of these as may be deemed necessary. The Superintendent of Weights and Measures shall take charge of the standards adopted by this article as the standards of the State and cause them to be kept in a fireproof building belonging to the State, from which they shall not be removed except for repairs or for certification, and he shall take all other necessary precautions for their safekeeping. He shall maintain the State standards in good order and shall submit them at least once in ten years to the National Bureau of Standards for certification. He shall keep complete record of the standards, balances and other apparatus belonging to the State and take a receipt for same from his successor in office. He shall annually, on the first day of July, make to the Commissioner of Agriculture a report of all work done in his office. (1927, c. 261, s. 9; 1943, c. 543; 1949, c. 984.)

Editor's Note.—The 1943 amendment substituted "July" for "December" in the last sentence of this section. And the 1949 amendment substituted "one thousand

eight hundred and thirty-six" for "one thousand eight hundred and twenty-six" in the first sentence.

§ 81-8.1. Authority to prescribe standards of weight or measurement for sale of milk or milk products.—The Board of Agriculture is hereby authorized and empowered to adopt and promulgate, after due notice and hearing, rules and regulations prescribing standards or units of weight or measurement by which milk, cream or other fluids containing milk or milk products may be sold at retail in bottles or other capped or sealed containers, and the sale thereof by any other standards or units of weight or measurement shall be unlawful. (1949, c. 982.)

§ 81-9. Supervision of weights and measures and weighing or measuring devices.—The State Superintendent of Weights and Measures shall have and keep general supervision of the weights and measures and weighing or measuring devices offered for sale, sold, or in use in the State. He, or his deputies or inspectors at his direction, shall, upon written request of any citizen, firm, or corporation, or educational institution in the State, test or calibrate weights, measures and weighing or measuring devices used as standards in the State. (1927, c. 261, s. 10; 1949, c. 984.)

Editor's Note.—The 1949 amendment struck out "a" formerly appearing before "general" in the first sentence. It also

struck out the comma formerly appearing after "deputies" in the second sentence.

§ 81-10. **Authority of deputy or local inspector.**—Each deputy or local inspector shall have the power, and it shall be his duty, under the direction of the State Superintendent of Weights and Measures, to inspect, test, try and ascertain if they are correct all weights and measures and weighing and measuring devices kept, offered, or exposed for sale, sold, or used or employed within the State by any proprietor, agent, lessee, or employee in proving the size, quantity, extent, area, or measurement of quantities, things produced, or articles for distribution or consumption, purchased or offered or submitted by any person or persons for sale, hire, or award, and he shall have the power, and shall, from time to time, weigh or measure and inspect packages or amounts of commodities of whatsoever kind kept for the purpose of sale, offered, or exposed for sale, or sold, or in the process of delivery, in order to determine whether the same contain the amount represented, or whether they be kept, offered or exposed for sale, or sold in a manner in accordance with law. He may, for the purpose above mentioned and in the general performance of his duties, enter and go into, or open, and without formal warrant, any stand, place, building, or premises, or stop any vendor, peddler, junk dealer, coal wagon, ice wagon, delivery wagon, or any person whomsoever and require him, if necessary, to proceed to some place which the sealer may specify for the purpose of making the proper test. (1927, c. 261, s. 11.)

§ 81-11. **Condemnation and destruction of incorrect weights, measures or devices.**—The deputy or local inspector shall condemn, seize, and may destroy incorrect weights and measures or weighing and measuring devices, which in his best judgment are not susceptible of satisfactory repair, but such as are incorrect and yet in his best judgment may be repaired, he shall mark or tag as “Condemned for Repairs” in a manner prescribed by the State Superintendent of Weights and Measures. The owners or users of any weights, measures or weighing or measuring devices of which such disposition is made shall have the same repaired and corrected within ten days and they may neither use nor dispose of same in any way, but shall hold the same at the disposal of the sealer. Any weights, measures, or weighing or measuring devices which have been condemned for repairs and have not been repaired as required shall be confiscated by the sealer. (1927, c. 261, s. 12.)

§ 81-12. **Seizure of false weights and measures.**—The Superintendent of Weights and Measures, his deputies and inspectors are hereby made special policemen and are authorized and empowered to arrest without formal warrant, any violator of the statutes in relation to weights and measures and to seize as use for evidence without formal warrant any false or unsealed weights, measures, or weighing or measuring devices or package or amount of commodity found to be used, retained, or offered or exposed for sale or sold in violation of law. (1927, c. 261, s. 13.)

§ 81-13. **Obstruction to officers misdemeanor.**—Any person who shall hinder or obstruct in any way the Superintendent of Weights and Measures, his deputies or inspectors, in the performance of his official duties shall be guilty of a misdemeanor and, upon conviction in any court of competent jurisdiction, shall be punished by a fine of not less than ten dollars or more than two hundred dollars, or by imprisonment in the county jail for not more than three months, or by both fine and imprisonment. (1927, c. 261, s. 14.)

§ 81-14. **Impersonation of Superintendent of Weights and Measures or deputies misdemeanor.**—Any person who shall impersonate in any way the Superintendent of Weights and Measures, his deputies or inspectors, by the use of his seal or counterfeit of his seal or otherwise, shall be guilty of a misdemeanor and upon conviction therefor in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars or more than

five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. (1927, c. 261, s. 15.)

§ 81-14.1. Weighing livestock sold at public livestock market; weight certificates.—Whenever livestock is offered or exposed for sale, or sold by weight at a public livestock market, the livestock shall be weighed by a public weighmaster and each individual sale shall be accompanied with a weight certificate in duplicate on which shall be expressed in ink or other indelible substance, the name and address of seller, the kind, number and weight of livestock being offered for sale, or sold, the time of day and date of weighing and the name of weighmaster. The information expressed on said certificate shall be announced or otherwise made known immediately preceding the sale, if said sale be by auction. (1943, c. 762, s. 1.)

§ 81-14.2. Commodities to be sold by weight, measure or numerical count.—It shall be unlawful to sell except for immediate consumption by the purchaser, on the premises of the seller, liquid commodities in any other manner than by weight or liquid measures, or commodities not liquid in any other manner than by measure of length, by weight, or by numerical count. When a commodity is sold by numerical count in excess of one unit, the units which constitute said numerical count shall be uniform in size and/or weight, and be so exposed as to be readily observed by the purchaser: Provided, however, that nothing in this section shall be construed to prevent the sale of fruits, vegetables, and other dry commodities in standard containers defined by acts of the United States Congress known as "Standard Container Acts," and the rules and regulations promulgated in accordance therewith; or of fruits and vegetables sold by the head, or bunch, or of any other commodity which is especially provided for by some other section of this chapter. (1945, c. 280, s. 1; 1949, c. 973.)

Editor's Note.—The 1949 amendment ^{ises} to read "consumption by the purchaser, on the premises of the seller." rewrote the first sentence and changed the former words "consumption on the prem-

§ 81-14.3. Unlawful for package to mislead purchaser.—It shall be unlawful to keep for the purpose of sale, offer or expose for sale, or sell, any commodity in package form when said package is so made, or formed, or filled, or wrapped, or exposed, or marked, or labeled as to mislead, or deceive the purchaser as to the quantity of its contents. (1945, c. 280, s. 1.)

§ 81-14.4. Standard weight packages of flour, meal, grits and hominy.—All flour and meal packed for sale, offered or exposed for sale, or sold in this State shall be in one of the following standard weight packages and no other, namely: five pounds, ten pounds, twenty-five pounds, fifty pounds, one hundred pounds, and multiples of one hundred pounds. However, non-standard weight packages may be packed for sale, offered or exposed for sale, or sold in this State, weighing three pounds or less, if said nonstandard weight packages shall be plainly and conspicuously marked showing net contents in avoirdupois weight: Provided, that nothing in this section shall be construed to prevent the retail sale of any amount of flour or meal direct to the consumer from bulk, upon order and weight at time of delivery to the consumer.

The term "flour" as used herein shall be construed to mean any finely ground product of wheat, or other grain, corn, peas, beans, seeds or other substance, with or without added ingredients, intended for use as food for man.

The term "meal" as used herein shall be construed to mean any product of grain, corn, peas, beans, seed or other substance coarsely ground, with or without added ingredients, either bolted, or unbolted, including grits and hominy, intended for use as food for man. (1945, c. 280, s. 1; 1949, c. 984.)

Editor's Note.—The 1949 amendment substituted the word "used" for "said" in line one of the second paragraph.

§ 81-14.5. **Weight and measure terms defined.** — (a) Whenever the term “pound” is used in connection with weight, it shall be understood to be the avoirdupois pound as declared by act of the United States Congress, except in those cases where it is common practice to use the “troy” pound or “apothecaries” pound, and the “ounce” is one-sixteenth part of an avoirdupois pound.

(b) The term “ton” shall be understood to mean a unit of two thousand (2000) pounds, avoirdupois weight.

(c) Whenever the term “gallon” is used in connection with liquid measure, it shall be understood to mean a unit of two hundred and thirty-one (231) cubic inches of which the liquid quart, liquid pint, and gill are respectively, the quarter, the one eighth and the one-thirty-second parts.

(d) The term “bushel” when used in connection with dry measure and standard containers shall be understood to mean a unit of two thousand one hundred and fifty and forty-two one hundredths (2150.42) cubic inches, of which the dry quart and dry pint, respectively, are the one-thirty-second and one-sixty-fourth parts.

(e) The term “barrel” when used in connection with beer, ale, porter, and other similar fermented liquor, shall be understood to mean a unit of thirty-one liquid gallons, and fractional parts of a barrel shall be understood to mean like fractional parts of thirty-one gallons.

(f) Whenever wood is solicited, bought or sold in this State on the basis of ricked or stacked measurement, as is customarily the case in transactions involving such forest products as, for example, pulp wood and fuel wood, the unit of said measurement shall be the cord and no other; except that until June first, one thousand nine hundred and forty-six, same may be purchased on the basis of a unit of one hundred and sixty cubic feet or of the cord of one hundred and twenty-eight cubic feet. The term “cord” when used in connection with such purchases of wood, shall be understood to mean a quantity of wood consisting of any number of sticks, bolts or pieces laid parallel and together so as to form a rick or stack occupying a space four feet wide, four feet high and eight feet long, or such other dimensions that will, when multiplied together equal one hundred and twenty-eight cubic feet by volume, construed as being seventy per cent solid and thirty per cent air space or ninety solid cubic feet. (1945, c. 280, s. 1.)

§ 81-14.6. **Sale of cement blocks, cinder blocks and other concrete masonry units.**—In order to protect the purchasers of concrete block, cinder block, and other concrete masonry units and to provide for a minimum load bearing strength, on and after July 1st, 1947, all concrete block, cinder block, and other concrete masonry units offered for sale or sold in this State shall have a load bearing strength of not less than 700 pounds per square inch of gross bearing area, or the minimum load bearing strength approved by the National Underwriters Laboratory or by the American Society of Testing Materials, whichever is less. The manufacturer shall furnish proof, acceptable to the Board of Agriculture, that the concrete block, cinder block, or other concrete masonry units being offered for sale or sold complies with the minimum load bearing strength required by this section; and each and every sale shall be accompanied with a bill of sale or invoice on which shall be printed or stamped in ink or other indelible substance, a statement guaranteeing that the products covered by said bill of sale or invoice meet the minimum load bearing strength as required by this section signed by a duly authorized official or agent of the manufacturer; provided, however, that the provisions of this section shall not prohibit the sale or offer for sale of cement block, cinder block, or other concrete masonry units, known as “seconds” or “rejects,” due to size, shape, or less than minimum load bearing requirement, if and when said sale is accompanied with a bill of sale or invoice on which is printed or stamped in ink or other indelible substance in bold letters

a statement that the cement block, cinder block, or other concrete masonry units so billed or invoiced are inferior in quality and do not comply with minimum load bearing requirement signed by a duly authorized official or agent of the manufacturer. (1947, c. 788.)

§ 81-14.7. **Approval of heating units, etc., for curing tobacco.**—All heating units and/or curing assemblies offered for sale or sold in this State, intended for use in curing the so-called flue cured tobacco, shall bear a label or seal of approval, authorized by the Board of Agriculture, and be accompanied with a statement, including drawings and instructions, signed by the manufacturer thereof, specifying how said heating unit shall be installed, operated, and/or used, so as to reduce to a minimum the fire hazard involved. Such expense as incurred in obtaining the label or seal of approval referred to in this section shall be borne by the manufacturer or distributor of the heating unit involved. (1947, c. 787.)

§ 81-14.8. **Sale of coal, coke and charcoal by weight.**—(a) All coal, coke or charcoal sold in this State shall be sold by weight only. The standard unit of weight shall be the avoirdupois pound, and a ton shall be two thousand (2000) pounds.

(b) All coal, coke or charcoal sold or offered for sale in this State, or which is being transported on any public street or highway in North Carolina, shall be weighed on scales suitable for such weighing, which have been tested and sealed by a State Inspector of Weights and Measures. It shall not be unlawful to transport such coal, coke or charcoal to the nearest such scale for the purpose of having same weighed, but no sale or delivery of same shall take place until the load shall have been weighed.

(c) Each and every sale or delivery of coal, coke or charcoal to the consumer shall be accompanied by a weight certificate on which shall be expressed in ink or other indelible substance the name and address of the seller or dealer, name and address of purchaser or receiver, the kind and size of coal being delivered and the gross tare and net weights, the date of weighing, the signature of the weighmaster, a place for signature of receiver, the name of delivery man, and the number or license number of delivery vehicle. The weight certificate shall be made with an original and two (2) carbon copies, one (1) going to the purchaser or receiver, one to be held by the delivery man, and the third (3rd) to be held by the weighmaster: Provided, however, that when coal, coke or charcoal is delivered in this State in railway carload lots, the railway bill of lading may be used in lieu of the weight certificate required by this section. (1949, c. 860.)

§ 81-14.9. **Establishment of standard loaves of bread; "loaf" defined.**—When loaves of bread are offered for sale or sold in this State, each loaf shall be of one of the following weights and lengths and no other, to-wit: 1 pound, 11½ inches maximum length, 5 inches maximum width at bottom; 1½ pounds, 15 inches maximum length, 5 inches maximum width at bottom; 2 pounds, 15 inches maximum length, 5 inches maximum width at bottom; 2½ pounds, 15 inches maximum length, 5 inches maximum width at bottom. The term "loaf" as used in this section shall be construed to mean a loaf which is baked in a pan of rectangular shape, either with straight up or flared side, either with or without cover, and shall be known hereafter as the standard loaf. (1949, c. 1005.)

§ 81-15. **Weights of goods sold in packages to be stated on package.**—It shall be unlawful to keep for the purpose of sale, or expose for sale, or sell any commodity in package form unless the net quantity of the contents are plainly or conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, that reasonable variations or

tolerances shall be permitted and that these reasonable variations or tolerances, and also exemptions as to small packages shall be established by rules and regulations made by and published with other rules and regulations approved by the Department of Agriculture.

The words "in package form," as used in this section, shall be construed to include a commodity in a package, carton, case, can, box, bundle, barrel, bottle, phial, or other receptacle, on a spool or similar holder, in a container or band, or in a bolt or roll or in a ball, coil or skein or in coverings or wrappings of any kind, put up by the manufacturer, or when put up prior to the order of the commodity, by the vendor for either or both wholesale or retail, whether sealed or unsealed, closed or open. The words "plainly and conspicuously marked" as used in this section shall be construed to mean that the principal label shall indicate the net weight contents by legend as plain and conspicuous as any other legend thereon and as likely to be read as any other legend, and shall not be obscured by crowding or by color or by other legend. (1927, c. 261, s. 16; 1945, c. 280, s. 1.)

Editor's Note.—The 1945 amendment added the second paragraph.

§ 81-15.1. Statement to be furnished seller of pulp wood by purchaser.—Upon delivery of pulp wood to a purchaser, from a seller in this State, the purchaser shall furnish the seller with a statement, showing the kind and amount of wood, the price paid, and the amount of wood refused, if any. (1945, c. 280, s. 3.)

§ 81-16: Repealed by Session Laws 1945, c. 280, s. 2.

§ 81-17. Net weight basis of sales by weight.—Whenever any commodity is sold on a basis of weight, it shall be unlawful to employ any other weight in such sale than the net weight of the commodity and all contracts concerning goods sold on a basis of weight shall be understood and construed accordingly. Whenever the weight of a commodity is mentioned in this article, it shall be understood and construed to mean the net weight of the commodity. (1927, c. 261, s. 18.)

Cited in *State v. Presnell*, 226 N. C. 160, 36 S. E. (2d) 927 (1946).

§ 81-18. Acts and omissions declared misdemeanor.—Any person who, by himself, or his servant or agent, or as the servant or agent of any other person, shall offer, or expose for sale, sell, use in the buying or selling of any commodity or thing or for hire or award, or in the computation of any charge for services rendered on the basis of weight or measure, or in the determination of weight or measure, when a charge is made for such determination, or retain in his possession a false weight or measure or weighing or measuring device or any weight or measure or weighing or measuring device which has not been sealed by the State Superintendent, or his deputy, or inspectors, or by a sealer or deputy sealer of weights and measures within one year, or shall dispose of any condemned weight, measure, or weighing or measuring device contrary to law, or remove the tag placed thereon by the State Superintendent, or his deputy, or inspectors, or who shall sell or offer or expose for sale less than the quantity he represents on any commodity, thing or service, or shall take or attempt to take more than the quantity he represents, when as the buyer, he furnishes the weight, measure, or weighing or measuring device by means of which the amount of any commodity, thing, or service is determined; or who shall keep for the purpose of sale, offer or expose for sale, or sell any commodity in a manner contrary to law; or who shall use in retail trade, except in the preparation of packages put up in advance of sale, a weighing or measuring device which is not so positioned that its indications may be accurately read and the weighing or

measuring operation observed from some position which may reasonably be assumed by a customer; or who shall violate any provision, rule, regulation, code or order made and/or adopted as provided for by this article for which a specific penalty has not been provided; or who shall sell or offer for sale, or use or have in his possession for the purpose of selling or using any device or instrument to be used to, or calculated to, falsify any weight or measure, shall be guilty of a misdemeanor, and shall be punished by fine of not less than ten dollars or more than two hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment, upon a first conviction in any court of competent jurisdiction; and upon a second or subsequent conviction in any court of competent jurisdiction he shall be punished by a fine of not less than fifty dollars or more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. (1927, c. 261, s. 19; 1945, c. 280, s. 1; 1949, c. 984.)

Editor's Note.—The 1945 amendment inserted the provision relating to use of weighing or measuring device not so positioned that its indications and operation may be observed by a customer.

words "any provisions of this article" and inserted in lieu thereof the words "any provision, rule, regulation, code or order made and/or adopted as provided for by this article."

The 1949 amendment struck out the

§ 81-19. "Person" construed.—The word "person" as used in this article shall be construed to impart both the plural and singular as the case demands and shall include corporations, companies, societies and associations. (1927, c. 261, s. 20.)

§ 81-20. "Weights, measures, weighing or measuring devices" construed.—The words "weights, measures, or (and) weighing or (and) measuring devices" as used in this article, shall be construed to include all weights, scales, beams, measures of every kind, instruments, mechanical devices for weighing or measuring any other appliances and accessories connected with any or all such instruments. The words "sale or sell" as used in this article shall be construed to include barter and exchange. (1927, c. 261, s. 21.)

§ 81-21: Repealed by Session Laws 1945, c. 280, s. 2.

§ 81-22. Certain measures regulated.—Whenever any commodity now named in § 81-23 shall be quoted or sold by the bushel, the bushel shall consist of the number of pounds stated in said section; and whenever quoted or sold in subdivisions of the bushel, the number of pounds shall consist of the fractional part of the number of pounds as set forth therein for the bushel; and when sold by the barrel shall consist of the number of pounds constituting 3.281 bushels. (1933, c. 523, s. 3; 1949, c. 984.)

Editor's Note.—The 1949 amendment substituted "§ 81-23" for "§ 81-24" in line two.

ARTICLE 2.

Establishment and Use of Standards.

§ 81-23. Standard weights and measures, exception; penalty.—The standard weight of the following seeds and other articles named shall be as stated in this section, viz:

Alfalfa shall be 60 lbs. per bu.; apples, dried, shall be 24 lbs. per bu.; apple seed shall be 40 lbs. per bu.; barley shall be 48 lbs. per bu.; beans, castor, shall be 46 lbs. per bu.; beans, dry, shall be 60 lbs. per bu.; beans, green in pod, shall be 30 lbs. per bu.; beans, soy, shall be 60 lbs. per bu.; beef, net, shall be 200 lbs. per bbl.; beets shall be 50 lbs. per bu.; blackberries shall be 48 lbs. per bu.; blackberries, dried, shall be 28 lbs. per bu.; bran shall be 20 lbs. per bu.; broomcorn shall be 44 lbs. per bu.; buckwheat shall be 50 lbs. per bu.;

cabbage shall be 50 lbs. per bu.; canary seed shall be 60 lbs. per bu.; carrots shall be 50 lbs. per bu.; cherries, with stems, shall be 56 lbs. per bu.; cherries, without stems, shall be 64 lbs. per bu.; clover seed, red and white, shall be 60 lbs. per bu.; clover, burr, shall be 8 lbs. per bu.; clover, German, shall be 60 lbs. per bu.; clover, Japan, Lespedeza, shall be, in hull 25 lbs. per bu.; corn, shelled, shall be 56 lbs. per bu.; corn, Kaffir, shall be 50 lbs. per bu.; corn, pop, shall be 70 lbs. per bu.; cotton seed shall be 30 lbs. per bu.; cotton seed, Sea Island, shall be 44 lbs. per bu.; cucumbers shall be 48 lbs. per bu.; fish shall be 100 lbs. per $\frac{1}{2}$ bbl.; flax seed shall be 56 lbs. per bu.; grapes, with stems, shall be 48 lbs. per bu.; grapes, without stems, shall be 60 lbs. per bu.; gooseberries shall be 48 lbs. per bu.; grass seed, Bermuda, shall be 14 lbs. per bu.; grass seed, blue, shall be 14 lbs. per bu.; grass seed, Hungarian, shall be 48 lbs. per bu.; grass seed, Johnson, shall be 25 lbs. per bu.; grass seed, Italian rye, shall be 20 lbs. per bu.; grass seed, orchard, shall be 14 lbs. per bu.; grass seed, tall meadow and tall fescue, 24 lbs. per bu.; grass seed, all meadow and fescue except tall, 14 lbs. per bu.; grass seed, perennial rye, shall be 14 lbs. per bu.; grass seed, timothy, shall be 45 lbs. per bu.; grass seed, velvet, shall be 7 lbs. per bu.; grass, red top, shall be 14 lbs. per bu.; hemp seed shall be 44 lbs. per bu.; hominy shall be 62 lbs. per bu.; horseradish shall be 50 lbs. per bu.; liquids shall be 42 gals. per bbl.; meal, corn, whether bolted or unbolted, 48 lbs. per bu.; melon, cantaloupe, shall be 50 lbs. per bu.; millet shall be 50 lbs. per bu.; mustard shall be 58 lbs. per bu.; nuts, chestnuts, shall be 50 lbs. per bu.; nuts, hickory, without hulls, shall be 50 lbs. per bu.; nuts, walnuts without hulls, shall be 50 lbs. per bu.; oats, seed, shall be 32 lbs. per bu.; onions, button sets, shall be 32 lbs. per bu.; onions, top buttons, shall be 28 lbs. per bu.; onions, matured, shall be 57 lbs. per bu.; osage orange seed shall be 33 lbs. per bu.; peaches, matured, shall be 50 lbs. per bu.; peaches, dried, shall be 25 lbs. per bu.; peanuts shall be 22 lbs. per bu.; peach seed shall be 50 lbs. per bu.; peanuts, Spanish, shall be 30 lbs. per bu.; parsnips shall be 50 lbs. per bu.; pears, matured, shall be 56 lbs. per bu.; pears, dried, shall be 26 lbs. per bu.; peas, dry, shall be 60 lbs. per bu.; peas, green, shall be, in hull 30 lbs. per bu.; pieplant shall be 50 lbs. per bu.; plums shall be 64 lbs. per bu.; pork, net, shall be 200 lbs. per bbl.; potatoes, Irish, shall be 56 lbs. per bu.; potatoes, sweet, green, shall be 56 lbs. per bu.; and the dry weight 47 lbs. per bu.; quinces, matured, shall be 48 lbs. per bu.; raspberries shall be 48 lbs. per bu.; rice, rough, shall be 44 lbs. per bu.; rye seed shall be 56 lbs. per bu.; sage shall be 4 lbs. per bu.; salads, mustard, spinach, turnips, kale 10 lbs. per bu.; salt shall be 50 lbs. per bu.; sorghum seed shall be 50 lbs. per bu.; sorghum molasses shall be 12 lbs. per gal.; strawberries shall be 48 lbs. per bu.; sunflower seed shall be 24 lbs. per bu.; teosinte shall be 59 lbs. per bu.; tomatoes shall be 56 lbs. per bu.; turnips shall be 50 lbs. per bu.; wheat shall be 60 lbs. per bu.; cement shall be 80 lbs. per bu.; charcoal shall be 22 lbs. per bu.; coal, stone, shall be 80 lbs. per bu.; coke shall be 40 lbs. per bu.; hair, plastering, shall be 8 lbs. per bu.; land plaster shall be 100 lbs. per bu.; lime, unslaked, shall be 80 lbs. per bu.; lime, slaked, shall be 40 lbs. per bu.

It shall be unlawful to purchase or sell, or barter or exchange, any article named in this section on any other basis than as stated herein: Provided, however, that any and/or all such articles may be sold by weight, avoirdupois standard.

If any person shall take any greater weight than is specified for any of the items named herein, he shall forfeit and pay the sum of twenty dollars for each separate case to any person who may sue for same. (Code, ss. 3849, 3850; 1885, c. 26; 1905, c. 126; Rev., s. 3066; 1909, c. 555, s. 1; c. 835; 1915, c. 230, s. 1; 1917, c. 34; Ex. Sess. 1921, c. 87; 1931, c. 76; 1937, c. 354.)

Editor's Note.—The 1931 amendment changed the weights relating to sweet potatoes. The 1937 amendment changed the clauses relating to corn in ear and sorghum molasses. It also rewrote the next to the last paragraph.

§ **81-23.1. Standard rule for measurement of logs.**—The standard rule for determining the number of board feet in a tree or log shall be the so-called “International $\frac{1}{4}$ inch Log Rule.” None of the provisions of this section shall apply to contracts entered into prior to the ratification of this section, nor to the measure of damages in any action in tort. This section shall not prevent the buyer and the seller from agreeing that some other log rule shall be used to determine the number of board feet in trees or logs covered by the contract between them. (1947, c. 400, s. 1.)

Editor’s Note.—The act inserting this section was ratified on March 20, 1947, and provided that it should be effective on and after January 1, 1948. For brief discussion of section, see 25 N. C. Law Rev. 428.

§ **81-24:** Repealed by Session Laws 1945, c. 280, s. 2.

§ **81-25. Area of acre.**—The measure of an acre of land shall be equal to a rectangle of sixteen poles or perches in length and ten in breadth, and shall contain one hundred and sixty square perches or poles, or four thousand eight hundred and forty square yards, six hundred and forty such acres being contained in a square mile. (33 Edw. I, c. 6; R. C., c. 117, s. 7; Code, s. 3843; Rev., s. 3065; C. S., s. 8062.)

ARTICLE 3.

County Standard.

§§ **81-26 to 81-35:** Repealed by Session Laws 1943, c. 543.

ARTICLE 4.

Public Weighmasters.

§ **81-36. Public weighmaster defined; to be licensed.**—Any person, either for himself or as a servant or agent of any other person, firm, or corporation, or who is elected by popular vote, who shall weigh, or measure, or count, or who shall ascertain from, or record the indications or readings of, a weighing, or measuring, or recording, device or apparatus for any other person, firm, or corporation, and declare the weight, or measure, or count, or reading or recording to be the true weight, or measure, or count, or reading, or recording of any commodity, thing, article, or product upon which the purchase, or sale, or exchange, is based, and make a charge for, or collect pay, a fee, or any other compensation for such act, shall issue a certificate of weight, or measure, or count, in accordance with the provisions of this article, shall be licensed and shall be known as a public weighmaster in the State of North Carolina. (1939, c. 285, s. 1; 1945, c. 1067.)

Editor’s Note.—The 1945 amendment struck out the word “and” formerly appearing after the word “act” near the end of the section and substituted a comma therefor. For comment on section, see 17 N. C. Law Rev. 338.

§ **81-36.1. Administration of article.**—The provisions of this article shall be administered by the State Department of Agriculture through the State Superintendent of Weights and Measures. (1945, c. 1067.)

§ **81-37. Application for license permit.**—Any person desiring to be a public weighmaster in this State shall apply for and obtain license permit from the State of North Carolina through the State Superintendent of Weights and Measures by filing formal application under oath as follows:

“I,, a citizen of the United States, residing at county of, have familiarized myself with the law and with full knowledge of the provisions contained therein relative to licensing of public

weighmaster, do hereby file application for license permit to be issued accordingly.

I certify that I am of sound mind and am physically fit to perform the duties imposed upon a public weighmaster and that I will, if licensed, abide by and enforce all laws, rules and regulations relating to the Public Weighmaster Act to the best of my knowledge and ability. (1939, c. 285, s. 2; 1949, c. 983, s. 1.)

Editor's Note.—The 1949 amendment struck out the latter part of the original inserted the words "under oath" in reference to the filing of application, and form of application.

§ 81-38. Forms of certificates of weight, etc., to be approved by State Superintendent of Weights and Measures.—It shall be the duty of every public weighmaster licensed by this article to issue a certificate of weight, measure, count, reading, or recording on forms approved by the State Superintendent of Weights and Measures, and to enforce the provisions of this article, together with rules and regulations relating thereto. Said public weighmaster shall not receive compensation from the State for the duties so performed. (1939, c. 285, s. 3.)

§ 81-39. Official seal of public weighmasters.—It shall be the duty of every public weighmaster so licensed by this article, to obtain from the State Department of Weights and Measures an official seal, which seal shall have inscribed thereon the following words: "North Carolina Public Weighmaster" and such other design and/or legend as the State Superintendent of Weights and Measures may deem appropriate. The seal shall be stamped or impressed upon each and every weight, measure, numerical count, reading or recording certificate issued by such public weighmaster, and when so applied the certificate shall be recognized and accepted as a declaration of the official, true, and accurate and undisputed weight, measure, count, reading or recording of the commodity, product, or article weighed, or measured, or counted within the tolerance allowed by the "Uniform Weights and Measures Act" of this State: Provided, however, that the weighers of tobacco in "leaf tobacco warehouses" may use, in lieu of said seal, a signature, which signature shall also appear, in ink or other indelible substance on the weighmaster's formal application, and again, posted in a conspicuous and accessible place in the tobacco warehouse where he is acting as weighmaster. (1939, c. 285, s. 4; 1941, c. 317, s. 1.)

Editor's Note.—The 1941 amendment added the proviso at the end of the section.

§ 81-40. Violations of provisions by weighmasters made misdemeanor.—Any public weighmaster who shall refuse to issue a certificate as prescribed by this article, or who shall issue a certificate giving a false weight, or measure, or count, or reading, or recording, or who shall misrepresent the weight, or measure, or count, or reading or recording of the quantity of any commodity, produce or article to any person, firm or corporation, or who shall otherwise violate any of the provisions of this article shall be guilty of misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500.00), or by imprisonment for not more than three months, or by both such fine and imprisonment in the discretion of the court, and, in addition thereto, his license shall be revoked and he shall forfeit his seal which, when so forfeited, shall be turned over to the State Superintendent of Weights and Measures or his agents. (1939, c. 285, s. 5.)

§ 81-41. Requesting weighmaster to falsify weights; impersonation of weighmaster; alteration of certificate, etc.—Any person, firm, or corporation who shall request a public weighmaster to weigh, measure, count, read, or record any commodity, product or article falsely or incorrectly, or who shall request a false or inaccurate certificate of weight, measure, count, reading

or recording, or any person issuing a certificate of weight, or measure, or count, or reading, or recording within the meaning of this article, who is not a public weighmaster as provided for by this article, or who shall act as, or for, or in any way impersonate, a public weighmaster, or who shall erase, change, or alter any certificate issued by a public weighmaster, or who shall make incorrect the certificate by increasing or decreasing the weight or measure or count of the commodity, product or article certified to for the purpose of deception, or who shall violate any provision of this article for which a special penalty has not been provided, shall be guilty of misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500.00), or by imprisonment for not more than three months, or by both such fine and imprisonment in the discretion of the court. (1939, c. 285, s. 6.)

§ 81-42. Certificates of weighmasters presumed accurate and correct.—When a public weighmaster certificate is used in the sale, or purchase, or barter, or exchange of any commodity, produce, or article, the certified weight, or measure, or count or reading or recording shall be deemed to be the true, accurate and undisputed weight, or measure, or count, or reading or recording at time said commodity, produce, or article is put into the natural channels of trade, which is, at the time of sale or purchase or barter or exchange: Provided, however, that reasonable variations, or tolerances shall be permitted as established by rules and regulations as provided for by Uniform Weights and Measures Act. (1939, c. 285, s. 7; 1941, c. 317, s. 2.)

Editor's Note.—The 1941 amendment is no written contract or agreement to the struck out from the end of the section the contrary.”
words “And provided, further, that there

§ 81-43. Duty of custodian of product during time intervening between weighing and issuance of certificate.—If any commodity, product or article is to be offered for sale, or sold and is weighed or measured or counted by any public weighmaster and a certificate issued prior to sale, or acceptance of such commodity, product or article by the purchaser, his agent, or consignee or, if any commodity, product or article is offered for sale, sold, and/or delivered pending the weighing or measuring or counting of such commodity, product, or article by a public weighmaster and the issuance of a certificate, the person, firm or corporation in whose custody said commodity, product or article is, shall keep, protect and prevent any increase or decrease in weight, measure or count, in the interim so that the declaration of weight, or measure, or count shall be true in accordance with § 81-42. The term “interim” as used in this section shall be construed to mean the time intervening between the weighing and issuance of certificate and the sale or purchase; and the time intervening between the sale or purchase and the presentation of such commodity, product, or article to the public weighmaster for weighing, or measuring or counting, and the issuance of certificate. Any loss sustained in the weight or measure or count of any commodity, produce, or article while in custody shall be borne by the person, firm or corporation in whose custody said commodity, produce, or article is. (1939, c. 285, s. 8.)

§ 81-43.1. Weighing tobacco in sales warehouses.—All leaf tobacco offered for sale in a leaf tobacco warehouse in this State shall be weighed by a public weighmaster, shall be accompanied by a public weighmaster certificate, and shall be and remain in custody of the warehouse operator from and after the time it is weighed by the public weighmaster until it is sold or the bid is rejected by the owner thereof. (1945, c. 1067.)

§ 81-44. Complaints to weighmaster or State Superintendent of Weights and Measures.—When doubt or difference arises as to the correct-

ness of the weight, or measure, or count, or reading, or recording of any amount or part of any commodity, product, or article for which a certificate of weight, measure, count, reading or recording, has been issued by a public weighmaster, the owner, agent or consignee shall make complaint before moving said commodity, produce, or article from city, town or community where weight certificate was issued, to the public weighmaster issuing said certificate or to the State Superintendent of Weights and Measures setting forth cause or causes for such doubt and/or difference, and have said amount, or part of the amount, or any commodity, product, or article reweighed, or remeasured, or recounted by the weighmaster issuing the certificate or by the State Superintendent of Weights and Measures or his agents: Provided, the commodity, produce or article is kept and protected as is required during the interim period provided for in § 81-43. If, on reweighing, remeasuring or recounting, a difference in original weight, or measure or count, is sustained the difference thus sustained shall be that, and that only, which is in excess of tolerance allowed by § 81-42, and any desired adjustment as a result of such difference shall be made accordingly, and the cost of reweighing or remeasuring or recounting shall be borne by the public weighmaster responsible for the issuance of such faulty certificate; otherwise, the cost shall be borne by the complainant. (1939, c. 285, s. 9; 1941, c. 317, s. 3.)

Editor's Note.—The 1941 amendment inserted the provision referring to §§ 81-42 and 81-43 and made other changes.

§ 81-45. Approval by State Superintendent of Weights and Measures of devices used.—It shall be unlawful for any public weighmaster to use any weights or measures, or weighing or measuring or reading or recording device, which has not been tested and/or approved by the State Superintendent of Weights and Measures, or his assistant or deputy or inspector in accordance with the "Uniform Weights and Measures Act" and/or the rules and regulations governing same. (1939, c. 285, s. 10.)

§ 81-46. Annual license for public weighmasters.—Public weighmasters shall be licensed for a period of one year beginning on the first day of July and ending on the thirtieth day of June, next, and a fee of five dollars (\$5.00) shall be paid by each person so licensed to the State Superintendent of Weights and Measures at time of filing application, as set forth in § 81-37, which fee shall be deposited with the State Treasurer of North Carolina by the said State Superintendent of Weights and Measures, and shall be kept in a separate and distinct fund designated as a special uniform weights and measures fund by said Treasurer, and shall be disbursed by him under the terms of the Executive Budget Act: Provided, that a similar fee, as provided in this section, shall be required of all renewals of license as a public weighmaster, which fee shall also be turned into the Treasurer of the State by the State Superintendent of Weights and Measures, to be expended in the manner herein set out. (1939, c. 285, s. 11; 1943, c. 543.)

Editor's Note.—The 1943 amendment struck out the words "from the date of issuance thereof," formerly appearing near the beginning of the section, and inserted in lieu thereof the words "beginning on the first day of July and ending on the thirtieth day of June, next."

§ 81-47. Use of fees collected.—All monies collected by this article shall be used exclusively for the enforcement of this and the Uniform Weights and Measures Act. (1939, c. 285, s. 12.)

§ 81-48. Seal obtained from State Superintendent of Weights and Measures.—Each public weighmaster licensed under this article shall obtain from the State Superintendent of Weights and Measures the seal, as provided

for by this article, and pay the sum of two dollars and fifty cents (\$2.50), which sum shall be for the use of said seal, and no additional charges shall be made as long as the public weighmaster is licensed in accordance with the provisions of this article. Monies collected under this section shall be deposited with the State Treasurer of North Carolina and expended for the purposes of this article under the terms of the Executive Budget Act. The State Superintendent of Weights and Measures shall issue to the public weighmaster the said seal upon receipt of said sum. All seals as issued to the public weighmaster shall be paid for out of the special uniform weights and measures fund. (1939, c. 285, s. 13.)

§ 81-49. Seal declared property of State.—The seal herein provided for shall be the property of the State of North Carolina and shall be forfeited and returned to the State Superintendent of Weights and Measures upon termination of the performance of duties herein described as being the duties of a public weighmaster. Failure or refusal of a person licensed as a public weighmaster under this article to return, turn over, or surrender the official seal furnished by the State Superintendent of Weights and Measures upon expiration of term of license or for malfeasance in office, shall be a misdemeanor and any person convicted thereof shall forfeit the amount paid for use of such seal and shall be punished by a fine of not less than ten dollars (\$10.00) nor more than two hundred dollars (\$200.00), or by imprisonment for not more than three months, or both such fine and imprisonment, in the discretion of the court. (1939, c. 285, s. 14.)

§ 81-50. Cotton weighing.—If any weigher or purchaser of cotton shall make any deduction from the weight of any bag, bale, or package of lint cotton, for or on account of the draft, turn, or break of the scales, steelyards, or other implement used in weighing the same, or for any other cause except as herein allowed, the person so offending shall be guilty of a misdemeanor, and fined three hundred dollars or imprisoned, in the discretion of the court: Provided, however, that deductions may be made by the weigher for water, dirt, or other foreign substances on such bag, bale or package of cotton, or for other just cause; but, if such deductions are made, the nature of such deductions shall be indicated upon the principal weight ticket which shall also show the gross weight of the cotton, the amount deducted as tare, and the net weight of said cotton. (1874-5, c. 58, ss. 1, 3; Code, s. 1007; Rev., s. 3816; C. S., s. 5085; 1943, c. 762, s. 2.)

Editor's Note.—The 1943 amendment rewrote the proviso.

§ 81-51: Repealed by Session Laws 1943, c. 543.

ARTICLE 5.

Scale Mechanics.

§ 81-52. Purpose of article.—The purpose and intent of this article shall be:

(a) To protect the owners and/or users of scales and weighing devices in their needs or requirements for scale repair and service.

(b) To define the name "scale mechanic," provide for scale mechanic registration, and to provide for financial underwriting of services rendered. (1941, c. 237, s. 1; 1947, c. 380.)

Editor's Note.—Session Laws 1947, c. 380, rewrote former §§ 81-52 through 81-58 to appear as set forth herein. The title of the act purports to amend "sections 52-58 inclusive of the General Statutes" which is an obvious misnumbering and was

clearly intended to refer to §§ 81-52 through 81-58. It will be noted that there is no section numbered 81-56.

For comment on the 1941 act, see 19 N. C. Law Rev. 447.

§ 81-53. **Definitions.**—The definition of certain terms used in this article shall be as follows:

(a) The term “scale mechanic” is defined as meaning any person who, for hire or award, renders service involving adjustment, installation, repair, or maintenance of a scale or weighing device, either used or intended to be used in determining weight value, or values, by either physical act, instruction, or supervision.

(b) The term “adjustment” is defined as meaning an act involving the tightening or loosening, or lengthening or shortening, or movement, of any part of a scale or weighing device, or the coordination of mechanical action of parts with or upon each other, so as to make the scale or weighing device give correct indications of applied weight values within legal tolerance, and the correctness of indications shall be determined by test provided for under definition of the term “service” as defined in this article.

(c) The term “installation” is defined as meaning an act involving the erection, or building, or assembling of parts, or the placing or setting up of a scale or weighing device so as to give correct indications of applied weight values within legal tolerance when used for the purpose intended, and the correctness of indications shall be determined by test provided for under definition of the term “service” as defined in this article.

(d) The term “repair” is defined as meaning an act involving the replacement or mending of a broken or nonadjustable part or parts and the restoration of a scale or weighing device to such working condition as to give correct indications of applied weight values within legal tolerance when used for the purpose intended, and the correctness of indications shall be determined by test provided for under the term “service” as defined in this article.

(e) The term “maintenance” is defined as meaning an act pursuant to the retention of a scale or weighing device in such working condition as to give correct applied weight value indications within legal tolerance when used as intended, which may involve either or both adjustment or repair before or after inaccuracy develops in fact, and the correctness of indications shall be determined by test provided for under the term “service” as defined in this article.

(f) The term “service” is defined as meaning activity involving adjustment, installation, repair, or maintenance or a combination of two or more of these activities with respect to a scale or weighing device, and, in addition thereto, a test for determination of the accuracy of weight value indication. Said determination is to be accomplished by applying a series of loads of standard weight on a platter or platform up to capacity on a scale of 30 pounds capacity, and up to $\frac{1}{4}$ scale capacity, applied to the respective corners, on a scale having a capacity in excess of 30 pounds. (1941, c. 237, s. 2; 1947, c. 380.)

§ 81-54. **Prerequisites for scale mechanic.**—It shall be unlawful for any scale mechanic to render service as a scale mechanic until after he or she has complied with the following requirements:

(a) Obtain from the office of State Superintendent of Weights and Measures a copy of Scale Mechanic Act, a copy of regulations pertinent to said act, and an application form for registration.

(b) Obtain a bond in the sum of one thousand dollars (\$1,000.00) issued by a corporate surety company licensed to do business in North Carolina.

(c) File bond with clerk of superior court of the county in which such applicant resides, unless he or she be a resident of some other state, in which event such bond shall be filed with clerk of superior court in Wake County, North Carolina.

(d) Obtain receipt in duplicate for such bond filed with clerk of superior court and mail or deliver one copy of such receipt together with the application form for registration, completely filled out, to office of State Superintendent of Weights and Measures, Raleigh, North Carolina.

(e) Obtain a registration card or certificate from State Superintendent of Weights and Measures and a model form of service certificate.

The provisions of this section shall not apply to a full time employee who renders service only on a scale or weighing device, or on scales or weighing device, owned solely by his or her employer unless additional pay or compensation is received for such service. (1941, c. 237, s. 3; 1947, c. 380.)

§ 81-55. Registration; certificate of registration; annual renewal.—The State Superintendent of Weights and Measures shall register any person who has complied with the requirements stipulated under this article by making a record of receipt of application and of bond, and the issuing of a certificate or card of registration to applicant, whereupon the applicant becomes a registered scale mechanic and shall be known thereafter as such. Such registration shall be in effect from date of registration until July 1st next and shall be renewed on the 1st day of July of each year thereafter. (1941, c. 237, ss. 4, 5; 1943, c. 543; 1947, c. 380.)

§ 81-56.1. Service certificate.—Whenever any service is rendered on any scale or weighing device used or intended to be used in this State by a scale mechanic, a certificate shall be issued by such scale mechanic who rendered said service, which shall be known as a "service certificate." The size and form of said service certificate will be determined by the State Superintendent of Weights and Measures. Inclusive of other pertinent information or statements, the said certificate shall bear a statement expressed in ink or other indelible substance naming the kind of service rendered, whether adjustment, installation, repair, or maintenance, and stating that a service test as defined under the term "service" has been made, and that the service rendered is guaranteed to be as represented. The service certificate shall be made out in triplicate, with original going to the owner of such scale or weighing device or his agent, and a duplicate shall be sent to office of State Superintendent of Weights and Measures if service is upon a scale or weighing device which has been condemned by a weights and measures inspector, and the triplicate copy shall be retained by the scale mechanic issuing such certificate. (1947, c. 380.)

§ 81-56.2. Bond.—The bond required by this article shall underwrite the guarantee of a refund or compensation, covering any claim by owner of scale or weighing device for damage or injury, which claim is sustained by the court, resulting in misrepresentation of service rendered, or failure to comply with all the provisions of this article, by the scale mechanic, regardless of his or her intent; provided, however, that the aggregate liability of the surety to all claimants sustained by the court shall in no event exceed the amount of said bond. (1947, c. 380.)

§ 81-56.3. Scale removal.—When a scale or weighing device is removed from the premises where located by a scale mechanic, the scale mechanic or his servant or agent shall issue a receipt for said scale or weighing device, on which shall be written in ink or other indelible substance the name and address of the owner, the name and address of receiving agent, date of receipt, anticipated date of return, name or make of scale, and such other information pertinent to its identification. The form of receipt shall be approved by the State Superintendent of Weights and Measures. (1947, c. 380.)

§ 81-56.4. Condemned scale.—It shall be unlawful for any owner of a scale or weighing device which has been condemned by a weights and measures inspector to either use or dispose of same in any manner but shall hold same at the disposal of the State Superintendent of Weights and Measures, his deputy, or inspector; provided, however, said scale or weighing device may be removed from the premises for scales service only. (1947, c. 380.)

§ 81-56.5. Secondhand scale.—It shall be unlawful for any person to sell, or offer for sale, or put into use, a secondhand or rebuilt or reconditioned scale or weighing device unless said scale shall have been tested and approved by the Superintendent of Weights and Measures, or his deputy, or inspector, or shall be accompanied by a service certificate as provided for in this article. Said service certificate shall be retained by the purchaser or user of said scale until an inspector of weights and measures has tested and approved such secondhand scale. The said certificate shall serve as proof of the accuracy of scale at the time scale was purchased or put into service. A secondhand or rebuilt or reconditioned scale or weighing device as referred to in this section shall be considered as being a scale or weighing device in the channels of trade which does not belong to the previous user. (1947, c. 380.)

§ 81-56.6. Scale location.—It shall be unlawful for any scale or weighing device to be installed, set up, put into service, or used on a foundation or support that aids in giving false indication of weight values applied to platter, platform, or other load receiving element. (1947, c. 380.)

§ 81-57. Exemption.—The provisions of this article shall not prohibit the user of a scale or weighing device from employing some person other than a scale mechanic to render service as defined by this article upon his or her scale or weighing device, nor apply to the person so employed, who does not solicit such employment, provided that said user shall not be relieved of his or her responsibility or liability concerning the accuracy of the scale or weighing device after service has been rendered. (1947, c. 380.)

§ 81-57.1. Rules and regulations.—Such rules and regulations as are necessary to carry out the purpose and intent of this article shall be made and published by the State Superintendent of Weights and Measures, by and with the advice of his advisory board. (1941, c. 237, s. 6; 1947, c. 380.)

§ 81-58. Penalty.—Any person who violates any of the provisions of this article, or who for hire or award renders service as a scale mechanic on a scale or weighing device without registering as a scale mechanic or who shall fail to issue a service certificate or who shall issue a service certificate bearing false statements regarding service rendered, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) or by imprisonment for not more than three months or by both fine and imprisonment upon conviction in any court of competent jurisdiction; and in addition, if the defendant be a scale mechanic, he or she shall forfeit any charges or remuneration for service rendered, if service be involved, and he or she and/or the bonding company shall, at the discretion of the court, reimburse or compensate the owner of the scale or weighing device in question for such damage, or injury, sustained; and upon a subsequent conviction in any court of competent jurisdiction, the penalty shall be the same as for first conviction and in addition, at the discretion of the court, if defendant be a scale mechanic, his or her privilege to act as or in the capacity of a scale mechanic may be revoked for a specified length of time, his or her registration card or certificate seized and turned over to the State Superintendent of Weights and Measures with instructions concerning reinstatement or renewal. (1941, c. 237, s. 7; 1947, c. 380; 1949, c. 983, s. 2.)

Editor's Note.—The 1949 amendment inserted the words "or who shall fail to issue a service certificate or who shall issue a service certificate bearing false statements regarding service rendered."

ARTICLE 6.

Surveyors.

§ 81-59. **Standard surveyor's chain; tests.**—The standard measure for a surveyor's chain shall be twenty-two standard yards, a standard half or two-pole chain shall be eleven standard yards, a standard quarter or one-pole chain shall be five and one-half standard yards; but every person using a surveyor's chain, half-chain, or quarter-chain for measuring land shall every two years test the same in the manner hereinafter provided. (1889, c. 409; 1899, c. 665; Rev., s. 3075; C. S., s. 8074.)

Cross Reference.—As to official survey base, see §§ 102-1 to 102-11.

§ 81-60. **Using untested chain misdemeanor.**—If any person shall use any chain for measuring land without having the same first measured and sealed by the State Superintendent of Weights and Measures, his deputy or inspector, or shall use the same for a longer period than two years without bringing it to the State Superintendent of Weights and Measures, his deputy or inspector, and having the same measured and sealed by him, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars. (1889, c. 409, s. 2; Rev., s. 3684; C. S., s. 8075; 1943, c. 543.)

Editor's Note.—The 1943 amendment of Weights and Measures, his deputy or inserted the words "State Superintendent inspector."

§ 81-61. **Tests for magnetic variation and for chain.**—Every surveyor operating in any of the counties of this State with magnetic instruments, whether in a public or private capacity, shall, between the first day of January and thirty-first day of December in each and every year, carefully test his needle upon the official meridian monuments in the county in which he resides or the nearest county in which such monuments have been erected, by adjusting his instrument over the intersection of the lines cut into the top of one of the meridian monuments so established and sighting to the intersection of the lines cut into the top of the other meridian monument, noting the variation of the magnetic from the true meridian and the direction thereof, and shall test the chain or other instrument of linear measure upon the distance from center to center as indicated by intersecting lines of the two beams, tablets, or other official monuments set at or near the county courthouse for this purpose, noting the error of such instrument as compared with the standard of the monuments. (1899, c. 665, s. 1; 1901, c. 642; Rev., s. 3076; C. S., s. 8076.)

§ 81-62. **Magnetic variation to be recorded with survey.**—On every official record of a survey of lands made after the first day in July, nineteen hundred and one, in any county in which meridian monuments have been erected, there shall be entered by the surveyor making such survey a record as to the date of testing the magnetic instrument used, and the amount of declination or variation of the magnetic needle indicated at such test. (Rev., s. 3076; C. S., s. 8077.)

§ 81-63. **Surveys in another county; data as to variation recorded.**—Before making surveys in any county other than the one in which the magnetic instrument and instruments for linear measure to be used have already been tested, said surveyor shall procure in writing from the register of deeds of the county in which said monuments have been established, nearest to the point where the survey is to be made, a statement giving the declination of the magnetic needle for the year in which it was last determined, and the rate and direction of the variation of said magnetic needle since that time, and this data shall be recorded as a part of the record of his survey. But no surveyor shall be required to go outside of the county in which he resides for the purpose of testing the instruments herein named. (1899, c. 665, s. 1; Rev., s. 3077; C. S., s. 8078.)

§ 81-64. **Tests returned to register; records kept.** — Such tests and the correction, if any, resulting therefrom shall be returned by the surveyor in writing and under oath to the register of deeds for the county in which such meridian is situate within ten days from the taking of the observations, setting forth the name of the surveyor, his residence, the character of the instrument tested, the date of the observations, the declination east or west of the magnetic needle from the true meridian, together with a fee of ten cents for filing and registering the same; and such return shall be filed and registered by the register of deeds in a book properly ruled and lettered, to be furnished by the board of commissioners of the county, to be used for such purpose exclusively and entitled "The Meridian Record." (1899, c. 665, s. 1; Rev., s. 3078; C. S., s. 8079.)

§ 81-65. **Meridian monuments protected by county commissioners.** — It shall be the duty of the board of county commissioners to maintain and protect the meridian monuments and tablets or monuments for the testing of chains or other instruments of linear measure established by the State, or national surveys co-operating with the county authorities, in good order and condition as the official standards of the county. (1899, c. 665, s. 2; Rev., s. 3079; C. S., s. 8080.)

§ 81-66. **Defacing meridian monuments misdemeanor.** — If any person shall in any manner injure, deface, remove, or destroy any meridian monument or tablets, or any part thereof, or shall fail, neglect, or refuse to do and perform any act, matter, or thing by law required of him to be done in connection with such monuments or tablets, he shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine or be imprisoned, or both, at the discretion of the court. (1893, c. 282, s. 4; 1899, c. 665, s. 3; Rev., s. 3743; C. S., s. 8081).

ARTICLE 7.

Standard Weight Packages of Grits, Meal and Flour.

§§ 81-67 to 81-70: Repealed by Session Laws 1945, c. 280, s. 2.

§§ 81-71, 81-72: Repealed by Session Laws 1943, c. 543.

Chapter 82.

Wrecks.

| Sec. | Sec. |
|--|--|
| 82-1. Number and boundaries of wreck districts. | 82-10. Sale of unclaimed property. |
| 82-2. Commissioners of wrecks; appointment, residence and term of office. | 82-11. Proceeds of sale to be paid to clerk of superior court. |
| 82-3. Commissioners to give bond. | 82-12. Disposition of proceeds of sale by clerk. |
| 82-4. Commissioners to take oath of office. | 82-13. Proof of ownership of property sold. |
| 82-5. Duty of commissioners. | 82-14. Stranded property to be reported; failure to report misdemeanor. |
| 82-6. Salvage to be paid, or its payment secured, before release of goods. | 82-15. Expenses to be deducted from proceeds of sales. |
| 82-7. Adjustment of salvage when the parties cannot agree. | 82-16. Violation of chapter a misdemeanor. |
| 82-8. Sale of wrecked property for salvage; compensation of commissioner. | 82-17. Commissioner violating chapter liable for double damages and guilty of a misdemeanor. |
| 82-9. Compensation of commissioner when there is no sale. | 82-18. Interfering with commissioner in the discharge of his duties. |

§ 82-1. **Number and boundaries of wreck districts.**—The counties of Currituck, Dare, Hyde, Carteret, Onslow, Brunswick, and New Hanover are hereby divided into the following wreck districts, namely:

Currituck.—The first to extend from the Virginia State line to Judy's Cove; the second to extend from Judy's Cove to Josephus Baum's fish house; the third to extend from Josephus Baum's fish house to the county line of Dare.

Dare.—The first to extend from the county line of Currituck to the north point of Oregon Inlet; the second to extend from the north point of Oregon Inlet to the south point of New Inlet; the third to extend from the south point of New Inlet to the patrol house between Gull Shoal and Little Kennakeet life-saving stations; the fourth to extend from the last named patrol house to the patrol house between Big Kennakeet and Cape Hatteras life-saving stations; the fifth to extend from the last named patrol house to Creed's Hill life-saving stations; the sixth to extend from Creed's Hill life-saving stations to the county line of Hyde County.

Hyde.—The county of Hyde shall constitute one wreck district, which shall extend from the Dare County line to the Carteret County line.

Carteret.—The first from the Hyde County line to Core Banks life-saving station; the second from Core Banks life-saving station to Old Topsail Inlet; the third from Old Topsail Inlet to the Onslow County line.

Onslow.—The first from Bogue Inlet to New River Inlet; the second from New River Inlet to the New Hanover County line.

New Hanover and Brunswick.—To extend from the Onslow County line to the South Carolina State line. (1899, c. 79, ss. 1-9; 1903, c. 85; 1905, c. 199; Rev., s. 5439; 1915, c. 42; C. S., s. 8082.)

Easement to Reach Wreck.—The case of *Hitfield v. Baum*, 35 N. C. 394 (1852), lays down the rule that there is an easement or right of way reserved by necessity for any

person to enter over the land of another for the purpose of reaching and carrying away the cargo of a wrecked vessel.

§ 82-2. **Commissioners of wrecks; appointment, residence and term of office.**—The Governor, whenever it may be necessary, shall appoint a commissioner of wrecks for each of the districts designated in § 82-1. Each commissioner shall reside in the district for which he is appointed, unless separated by navigable waters, in which case the distance shall not exceed three miles.

The restrictions as to residence shall not apply to Hyde County. No person who holds any office of profit or trust under the laws of the United States or the State of North Carolina, nor any person who is a pilot, shall hold the office of commissioner of wrecks. The term of office shall be for two years. (1899, c. 79, ss. 10, 12, 13; 1903, c. 85; Rev., s. 5440; 1907, c. 398; C. S., s. 8083.)

§ 82-3. Commissioners to give bond.—Every person appointed a commissioner of wrecks shall enter into a bond, with good and sufficient surety, in the sum of two thousand dollars, payable to the State of North Carolina and conditioned for the faithful performance of his duties. This bond shall be approved by the board of county commissioners and deposited in the office of the clerk of the superior court. (1899, c. 79, s. 10; Rev., s. 305; C. S., s. 8084.)

§ 82-4. Commissioners to take oath of office.—Every person appointed a commissioner of wrecks, before entering upon the duties of his office, shall go before some officer duly authorized to administer oaths and take an oath to perform faithfully the duties of his office, and the oaths to support the Constitution of the State and of the United States. (1899, c. 79, s. 11; Rev., s. 5441; C. S., s. 8085.)

§ 82-5. Duty of commissioners.—Upon the earliest intelligence given that any ship or vessel is stranded, it shall be the duty of the commissioner in whose district the same is stranded, or his duly authorized agent, to repair at once to such wrecked ship or vessel, and upon the permission of its master to summon immediately a sufficient number of men who, acting under the direction of the commissioner or his agent, shall at once proceed to save the cargo and material of such wrecked vessel. As soon as any such stranded property is saved it shall be immediately placed under guard, one guard to be selected by the commissioner or owner representing the same, and one other guard to be selected by the salvors. Such goods or stranded property shall be kept under strict guard until sold or the salvors are paid as provided in this chapter. (1899, c. 79, s. 14; 1901, c. 178; Rev., s. 5442; C. S., s. 8086.)

Editor's Note.—In the early case of *Etheridge v. Jones*, 30 N. C. 100 (1847), it was held that the commissioners did not have exclusive control of a wrecked

vessel and the master or owner could take control of and dispose of it without any responsibility to the commissioners.

§ 82-6. Salvage to be paid, or its payment secured, before release of goods.—Every person who assists in saving such cargo or material shall, within thirty days after saving the same, be paid a reasonable reward by the owner or master of the stranded vessel, or by the merchant whose vessel or goods are saved. In default of payment of a reasonable compensation the goods or other property so saved shall remain in the joint custody of the commissioner and salvors until all such charges are paid, or until the payment thereof is secured to the satisfaction of the parties saving such goods or other property. (1899, c. 79, ss. 14, 15; Rev., s. 5443; C. S., s. 8087.)

§ 82-7. Adjustment of salvage when the parties cannot agree.—If the parties shall disagree touching the amount of reward or salvage to be paid to the persons employed, the commander, owner, or commissioner who represents the property saved shall choose one disinterested person, and the salvors shall nominate one other, who shall adjust and ascertain the same. If the persons thus chosen cannot agree, they shall choose one other indifferent person as umpire to decide between them: Provided, that the amount to be paid the salvors shall be determined and agreed upon before sale is made of such property. (1899, c. 79, s. 16; Rev., s. 5444; C. S., s. 8088.)

§ 82-8. Sale of wrecked property for salvage; compensation of commissioner.—If the owner of the vessel, or the property which has been

saved, shall fail for thirty days after the salvage has been ascertained, either by agreement or as provided for in § 82-7, to pay such salvage, it shall be the duty of the commissioner of wrecks in charge of such stranded or wrecked vessel or other property to sell the same at public sale, after first advertising such sale in the same manner as is required for sales of personal property under execution. Each commissioner shall provide himself with books and shall record in them all such sales by him made. He shall receive for selling any such wrecked or stranded property five per centum on the amount of sales, and in addition thereto he shall receive his actual expenses incurred in going to and returning from the place of the wreck, or where the property is stranded, to be paid out of the gross amount of such sales. At any public sale of stranded property, the salvors may select one person and the commissioner one other, who shall keep an accurate account of the sales, make the collections, settle with the commissioner his fees, and pay to the salvors the amount agreed on or awarded by the referees. (1899, c. 79, s. 17; 1901, c. 178; 1905, c. 66; Rev., s. 5445; C. S., s. 8089.)

§ 82-9. Compensation of commissioner when there is no sale.—If any owner or merchant shall remove any such goods or other stranded property from the custody of any commissioner without a sale, then such commissioner shall receive, in addition to his actual expenses incurred for the purposes mentioned in § 82-8, two and one-half per centum on the amount of the value of such property, which amount shall be ascertained in the same manner as is provided for ascertaining the amount of the reward to be paid salvors in those cases where such reward cannot be determined by agreement. No commissioner shall receive any salvage or other reward except the commission prescribed in this chapter. (1899, c. 79, ss. 17, 18; 1905, c. 66; Rev., s. 5446; C. S., s. 8090.)

§ 82-10. Sale of unclaimed property.—Whenever any vessel, cargo, or material of any ship or vessel or any other property shall be cast ashore or taken up at sea and brought to shore, and no person is present to claim the same as owner, it shall be the duty of the commissioner of the district where the same is brought or cast ashore to take charge of such property and to proceed to advertise and sell it at public sale, first giving twenty days' notice of such sale at three public places. On making any such sale the commissioner shall, out of the gross proceeds thereof, retain a commission of five per centum as his compensation and the amount awarded to the salvors pursuant to the provisions of this chapter. (1899, c. 79, ss. 19, 20; Rev., s. 5447; C. S., s. 8091.)

§ 82-11. Proceeds of sale to be paid to clerk of superior court.—When any commissioner shall undertake to sell any property where no person is or has been present to claim the same, it shall be his duty to notify the clerk of the superior court of his county of such sale. After any such sale is made, the commissioner shall forward to such clerk the proceeds of the sale, after deducting his commission of five per centum and paying the salvors the amount awarded to them as provided in this chapter. (1899, c. 79, s. 21; Rev., s. 5448; C. S., s. 8092.)

§ 82-12. Disposition of proceeds of sale by clerk.—It shall be the duty of the clerk of the superior court to make a record and keep an account of all moneys received by him from any commissioner of wrecks, and he shall advertise in some weekly newspaper published in North Carolina the amount so received, giving a true description of the marks, numbers, and kinds of goods or other stranded property, for which the same was sold. Each commissioner shall give the clerk of the superior court all necessary information for the proper enforcement of this section in each return made by him to the clerk. The clerk shall advertise for the space of sixty days, and if no person shall come to claim the money within a year and a day from the date of advertisement, then the clerk holding such money shall transmit the same, after deducting

one per centum for his trouble and also after deducting the cost of advertising, to the Treasurer of the State for the benefit of the public school funds. (1899, c. 79, s. 22; Rev., s. 5449; C. S., s. 8093.)

§ 82-13. **Proof of ownership of property sold.**—If any person shall claim to be the owner of any property sold as provided in § 82-10 and shall present his claim to the clerk holding the money arising from the sale of such property, it shall be the duty of such person to prove his title to the satisfaction of the clerk. If any person making a claim to such property be unknown to the clerk, then the clerk shall submit such claim to the consideration of three disinterested persons, one of whom shall be chosen by the claimant, and the decision of such referees shall always be final. (1899, c. 79, s. 23; Rev., s. 5450; C. S., s. 8094.)

§ 82-14. **Stranded property to be reported; failure to report misdemeanor.**—If any person shall find any wrecked or stranded property on or near the seashore, no person being present to claim the same, he shall as soon as possible give information thereof to the nearest commissioner of wrecks, who shall advertise and sell the same as provided in this chapter. If such finder shall refuse to report the goods so found, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars, or imprisoned not more than thirty days. (1899, c. 79, s. 24; Rev., ss. 3548, 5451; C. S., s. 8095.)

§ 82-15. **Expenses to be deducted from proceeds of sales.**—All necessary expenses shall be deducted from the gross proceeds of any sales made under this chapter. Such necessary expenses shall include only the cost of advertising, guarding, and surveying, when a survey is called. (1899, c. 79, s. 19; Rev., s. 5452; C. S., s. 8096.)

§ 82-16. **Violation of chapter a misdemeanor.**—If any person shall violate any of the provisions of this chapter he shall be guilty of a misdemeanor. (1899, c. 79, s. 26; Rev., s. 3562; C. S., s. 8097.)

§ 82-17. **Commissioner violating chapter liable for double damages and guilty of a misdemeanor.**—If any commissioner of wrecks shall by fraud or willful neglect violate any of the provisions of this chapter, or abuse the trust reposed in him, he shall forfeit and pay double the amount of damages to the party aggrieved. He shall also be guilty of a misdemeanor, and upon conviction shall forfeit his office and shall thereafter be incapable of acting as commissioner. (1899, c. 79, s. 25; Rev. s., 3563; C. S., s. 8098.)

§ 82-18. **Interfering with commissioner in the discharge of his duties.**—If any person shall willfully and unlawfully resist, delay, or obstruct any commissioner of wrecks in discharging or attempting to discharge his duties as such commissioner, he shall be guilty of a misdemeanor. (1905, c. 66, s. 2; Rev., s. 3564; C. S., s. 8099.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 30, 1950

I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

HARRY McMULLAN,
Attorney General of North Carolina

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