

THE GENERAL STATUTES OF NORTH CAROLINA

1957 CUMULATIVE SUPPLEMENT

To Recompiled Volume

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

UNDER THE DIRECTION OF
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Volume 2C

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Preface

This Cumulative Supplement to recompiled volume 2C contains the general laws of a permanent nature enacted at the 1951, 1953, 1955, 1956 and 1957 Sessions of the General Assembly, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. The index, appearing in volume 4B of the Cumulative Supplement, is confined mainly to new laws and such amendatory laws as are not reflected in the original index.

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

Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1951, 1953, 1955, 1956 and 1957 Sessions of the General Assembly affecting Chapters 83-105 of the General Statutes.

Annotations:

Sources of the annotations:

- North Carolina Reports volumes 230 (p. 577)-246 (p. 546).
- Federal Reporter 2nd Series volumes 175-244.
- Federal Supplement volumes 84-151.
- United States Reports volumes 338-353.
- Supreme Court Reporter volumes 70-77.
- North Carolina Law Review volumes 28-31 (p. 523).

The General Statutes of North Carolina 1957 Cumulative Supplement

VOLUME 2C

Chapter 83.

Architects.

Sec.	Sec.
83-1. Definitions.	83-12. Practice without certificate unlawful.
83-2. North Carolina Board of Architecture; creation; membership; vacancies.	

§ 83-1. **Definitions.**—When used in this chapter, unless the context otherwise requires:

(a) "Architect" means a person who is technically qualified and licensed under the laws of this State to practice architecture.

(b) The practice of architecture consists of rendering or offering to render service by consultations, investigations, evaluations, preliminary studies, plans, specifications, contract documents and a coordination of all factors concerning the design and supervision of construction of buildings or any other service in connection with the designing or supervision of construction of buildings located within the boundaries of the State, regardless of whether such services are performed in connection with one or all of these duties, or whether they are performed in person or as the directing head of an office or organization performing them.

(c) The term "Board" as used in this chapter shall mean the North Carolina Board of Architecture, as established under this chapter. (1951, c. 270, s. 9; C. S., s. 4985; 1941, c. 369, s. 3; 1951, c. 1130, s. 1; 1957, c. 794, ss. 1, 2.)

Editor's Note.—

The 1951 amendment rewrote this section.

The 1957 amendment deleted the words "to clients" formerly appearing after the

words "render service" near the beginning of subsection (b). It also substituted "North Carolina Board of Architecture" for "State Board of Architectural Examination and Registration" in subsection (c).

§ 83-2. **North Carolina Board of Architecture; creation; membership; vacancies.**—There shall be a North Carolina Board of Architecture, consisting of five members, to be appointed by the Governor in the following manner, to wit: Within thirty days after the ninth day of March, one thousand nine hundred and fifteen, the Governor shall appoint five persons who are reputable architects residing in the State of North Carolina, who have been engaged in the practice of architecture at least ten years. The five persons so appointed by the Governor shall constitute the North Carolina Board of Architecture, and they shall be appointed for one, two, three, four, and five years, respectively. Thereafter, in each year, the Governor in like manner shall appoint one licensed architect to fill the vacancy caused by the expiration of the term of office, the term of such new members to be for five years. If vacancy shall occur in the Board for any cause, the same shall be filled by the appointment of the Governor. (1915, c. 270, s. 1; C. S., s. 4986; 1957, c. 794, s. 3.)

Editor's Note.—The 1957 amendment changed the name of the Board from "State Board of Architectural Examination and Registration" to "North Carolina Board of Architecture."

§ 83-3. **Oath of members.**—Each member of the North Carolina Board of Architecture shall, before entering upon the discharge of the duties of his office, take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said Board, and to uphold the Constitution of North Carolina and the Constitution of the United States. (1915, c. 270, s. 2; C. S., s. 4987; 1957, c. 794, s. 4.)

Editor's Note. — The 1957 amendment substituted "North Carolina Board of Architecture" for "State Board of Architectural Examination and Registration."

§ 83-5. **Seal of Board.**—The Board shall adopt a seal for its own use. The seal shall have the words "North Carolina Board of Architecture," and the secretary shall have charge, care, and custody thereof. (1915, c. 270, s. 5; C. S., s. 4989; 1957, c. 794, s. 5.)

Editor's Note.—The 1957 amendment substituted "North Carolina Board of Architecture" for "Board of Architectural Examination and Registration, State of North Carolina."

§ 83-6. **Meeting of Board; quorum.**—The Board shall meet once a year for the purpose of electing officers and transacting such other business as may properly come before it. Due notice of such annual meeting, and the time and place thereof, shall be given to each member by letter, sent to his last post-office address at least ten days before the meetings, and thirty days' notice of such annual meeting shall be given in some newspaper published in the city of Raleigh, at least once a week for four weeks preceding such meeting. Three members of the Board shall constitute a quorum. (1915, c. 270, s. 1; C. S., s. 4990; 1957, c. 794, s. 6.)

Editor's Note. — The 1957 amendment deleted the words "in July of each succeeding year" formerly appearing after the word "year" in the first sentence.

§ 83-8. **Examination and certificate of applicant.**—Any person hereafter desiring to be registered and admitted to the practice of architecture in the State shall make a written application for examination to the North Carolina Board of Architecture, on a form prescribed by the Board, giving his name, age (which shall not be less than twenty-one years), his residence, and such evidence of his qualification and proficiency as may be prescribed by said Board, which application shall be accompanied by a fee in such amount as may be established by the Board, not however, in excess of twenty-five dollars (\$25.00) for residents of this State and fifty dollars (\$50.00) for nonresidents. If said application is satisfactory to the Board, then the applicant shall be entitled to an examination to determine his qualifications. If the result of the examination of any applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to practice architecture in North Carolina. Any person failing to pass such examination may be re-examined at any regular meeting of the Board at a fee to be established by the Board, such fee not to exceed twenty-five dollars (\$25.00). (1915, c. 270, s. 3; 1919, c. 336, s. 1; C. S., s. 4992; 1957, c. 794, s. 7.)

Editor's Note. — The 1957 amendment struck out the words "Board of Architectural Examination and Registration" and substituted in lieu thereof the words "North Carolina Board of Architecture." It also made changes in the fees.

§ 83-9. **Refusal, revocation, or suspension of certificates.** — Said Board may, in accordance with the provisions of chapter 150 of the General Statutes, refuse to grant certificate to any person convicted of a felony, or who, in the opinion of the Board, has been guilty of gross, unprofessional conduct, or who is addicted to habits of such character as to render him unfit to practice architecture. The North Carolina Board of Architecture may suspend for a period or revoke the certificate of admission to practice, and forbid practice by any architect on grounds of dishonest practice, unprofessional conduct, or incompetence.

The procedure for such action shall be in accordance with the provision of chapter 150 of the General Statutes. (1915, c. 270, s. 5; 1919, c. 336, s. 3; C. S., s. 4993; 1953, c. 1041, s. 1; 1957, c. 794, s. 8.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, inserted the references to chapter 150 of the General Statutes, and made other changes.

The 1957 amendment substituted "North Carolina Board of Architecture" for "Board of Architectural Examination and Registration."

§ 83-10. Examination fees; expenses of Board.—All examination fees shall be paid in advance to the treasurer of said North Carolina Board of Architecture. The State of North Carolina shall not be liable for the compensation of any members or officers of said Board. All expenses incurred by said Board in the necessary discharge of their duties shall be paid out of funds derived from examination fees herein provided for, and shall be paid by the treasurer upon warrant drawn by the secretary and approved by the president. The said Board shall have the power to determine what are necessary expenses and to fix the salaries of the respective officers. (1915, c. 270, s. 6; C. S., s. 4994; 1957, c. 794, s. 9.)

Editor's Note.—The 1957 amendment substituted "North Carolina Board of Architecture" for "Board of Architectural Examination and Registration."

§ 83-11. Annual renewal of certificate; fee.—Every architect continuing his practice in the State shall, on or before the first day of July in each year, obtain from the North Carolina Board of Architecture a renewal of his certificate for the ensuing year upon the payment of a fee in such amount as may be fixed by the Board, not however, in excess of twenty-five dollars (\$25.00); and upon failure to do so shall have his certificate of admission to practice, revoked, but such certificate may be renewed at any time within one year upon the payment of the prescribed renewal fee and an additional five dollars (\$5.00) for late renewal. (1919, c. 336, s. 2; C. S., s. 4995; 1951, c. 1130, s. 2; 1957, c. 794, s. 10.)

Editor's Note.—Prior to the 1951 amendment the annual renewal fee was \$5.00 and the fee for renewal after revocation was \$10.00.

The 1957 amendment substituted "North Carolina Board of Architecture" for "Board of Architectural Examination and Registration" and made changes in the fees.

The 1957 amendment substituted "North

§ 83-12. Practice without certificate unlawful.—In order to safeguard life, health and property, it shall be unlawful for any person to practice architecture in this State as defined in this chapter, except as hereinafter set forth, or use the title "Architect" or display or use any words, letters, figures, title, sign, card, advertisement, or other device to indicate that such person practices or offers to practice architecture, or is an architect or is qualified to perform the work of an architect, unless such person shall have secured from the Board a certificate of admission to practice architecture in the manner herein provided, and shall thereafter comply with the provisions of the laws of North Carolina governing the registration and licensing of architects.

Nothing in this chapter shall prevent any person who is qualified under the law as a "registered engineer" from performing such architectural work as is incidental to engineering projects or utilities.

Nothing in this chapter shall be construed to prevent any individual from making plans or data for buildings for himself; nothing in this chapter shall prevent any person from selling or furnishing plans for the construction of residence or farm or commercial buildings of a value not exceeding twenty thousand dollars (\$20,000.00); provided that such persons preparing plans and specifications for buildings of any kind shall identify such plans and specifications by placing thereon the name and address of the author.

Any person not registered under this chapter, who shall in any way hold himself out to the public as an architect, or practice architecture as herein defined, or

seek to avoid the provisions of this chapter by the use of any other designation than the title of "Architect", shall be guilty of a misdemeanor and shall upon conviction be sentenced to pay a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00) or suffer imprisonment for a period not exceeding three months or both so fined and imprisoned, each day of such unlawful practice to constitute a distinct and separate offense. (1915, c. 270, s. 4; C. S., s. 4996; 1941, c. 369, ss. 1, 2; 1951, c. 1130, s. 3; 1957, c. 794, s. 11.)

Editor's Note.—

The 1951 amendment rewrote this section.

The 1957 amendment substituted "individual" for "person" in line one of the third paragraph.

Right of Unregistered Person to Recover for Work on Plans. — Plaintiff, a builder-designer, but not a licensed architect, who made preliminary studies, consulted with defendants and made changes

on plans calling for the construction of a residence originally intended to cost about \$18,000, could recover on a quantum meruit basis for the work he performed on the plans up to the time the residence designed did not exceed in value \$20,000, but he was not entitled to recover for any work performed after the plans called for a residence of a value in excess of \$20,000. *Tillman v. Talbert*, 244 N. C. 270, 93 S. E. (2d) 101 (1956).

§ 83-15. Copy to registered architects.—A notice and copy of this chapter shall be mailed by the secretary of the North Carolina Board of Architecture to each architect in and out of the State to whom a certificate has been issued under this chapter. (1919, c. 336, s. 3; C. S., s. 4993; 1957, c. 794, s. 12.)

Editor's Note.—The 1957 amendment substituted "North Carolina Board of Ar-

chitecture" for "State Board of Architectural Examination and Registration."

Chapter 84.

Attorneys at Law.

Article 1.

Sec.

Qualifications of Attorney: Unauthorized Practice of Law.

84-5. Prohibition as to practice of law by corporation.

Sec.

84-4. Persons other than members of State Bar prohibited from practicing law.

ARTICLE 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-2. Persons disqualified.

Local Modification.—

Anson: 1951, c. 7.

§ 84-4. Persons other than members of State Bar prohibited from practicing law.—It shall be unlawful for any person or association of persons, except members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding in any court in this State or before any judicial body or the North Carolina Industrial Commission, Utilities Commission, or the Employment Security Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except members of the Bar, for or without a fee or consideration, to give

legal advice or counsel, perform for or furnish to another legal services, or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit any person from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney at law. The provisions of this section shall be in addition to and not in lieu of any other provisions of chapter 84. (1931, c. 157, s. 1; 1937, c. 155, s. 1; 1955, c. 526, s. 1.)

Editor's Note.—

The 1955 amendment rewrote this section.

Right to Enjoin Unlawful Practice of Law.—A cemetery lot owner could not enjoin a cemetery corporation from prac-

ticing law without a license—a criminal offense, since he had an adequate remedy at law by having the corporation indicted and convicted by the State. *Mills v. Carolina Cemetery Park Corp.*, 242 N. C. 20, 86 S. E. (2d) 893 (1955).

§ 84-5. Prohibition as to practice of law by corporation.—It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State, or before any judicial body or the North Carolina Industrial Commission, Utilities Commission, or the Employment Security Commission, or hold itself out to the public or advertise as being entitled to practice law; and no corporation shall organize corporations, or draw agreements, or other legal documents, or draw wills, or practice law, or give legal advise, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular. The provisions of this section shall be in addition to and not in lieu of any other provisions of chapter 84. Provided, that nothing in this section shall be construed to prohibit a banking corporation authorized and licensed to act in a fiduciary capacity from performing any clerical, accounting, financial or business acts required of it in the performance of its duties as a fiduciary or from performing ministerial and clerical acts in the preparation and filing of such tax returns as are so required, or from discussing the business and financial aspects of fiduciary relationships. (1931, c. 157, s. 2; 1937, c. 155, s. 2; 1955, c. 526, s. 2.)

Editor's Note.—

The 1955 amendment rewrote this section.

ARTICLE 2.

Relation to Client.

§ 84-11. Authority filed or produced if requested.

Right to Question Authority of Attorney.—While an attorney who claims to enter an appearance for any party to an action may be required to produce and file a power or authority as provided in this section, once an attorney has entered an ap-

pearance and has been recognized by the court as the attorney in the cause, the opposite party may not call in question his authority. *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227 (1950).

ARTICLE 3.

Arguments.

§ 84-14. Court's control of argument.

Counsel May Argue Both Law and Fact.—

Counsel have the right to argue the whole case as well of law as of fact. *Brown v. Vestal*, 231 N. C. 56, 55 S. E. (2d) 797 (1949).

The right of counsel to state in his argument to the jury what he conceives the law of the case to be has been upheld in numerous decisions. *State v. Bovender*, 233 N. C. 683, 65 S. E. (2d) 323 (1951)

Reading Reported Cases Discussing In-

applicable Principles of Law.—Broad and comprehensive as the provisions of this section are, they do not permit counsel to read to the jury decisions discussing prin-

ciples of law which are irrelevant to the case and have no application to the facts in evidence. *State v. Crisp*, 244 N. C. 407, 94 S. E. (2d) 402 (1956).

ARTICLE 4.

North Carolina State Bar.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.

Editor's Note.—

For an article on "The Organized Bar in North Carolina", see 30 N. C. Law Rev. 337.

The purpose of the statute creating the North Carolina State Bar is to enable the bar to render more effective service in

improving the administration of justice, particularly in dealing with the problem of admission to the bar, and of disciplining and disbarring attorneys at law. *Baker v. Varser*, 240 N. C. 260, 82 S. E. (2d) 90 (1954).

§ 84-17. Government.

All councilors elected from any additional judicial districts will be elected for a term of three years, except as may be hereinafter provided in G. S. 84-18 and G. S. 84-19. (1933, c. 210, s. 3; 1937, c. 51, s. 1; 1955, c. 651, s. 1.)

Editor's Note.—The 1955 amendment changed "shall" to "will" in the second paragraph and added the exception clause

thereto. As the first paragraph was not changed it is not set out.

§ 84-18. Election of councilors.—Within thirty days after this article shall have gone into effect the judge of each judicial district shall, by notice posted at the front door of each courthouse within his district and by such other means as he shall think desirable, call a meeting of the attorneys residing within his district, and any others who may declare in writing their desire to be affiliated with that district, as hereinabove provided, for the purpose of organizing the bar of the district. the said meeting to be held at a place deemed by the judge to be convenient. on a day fixed. not less than twenty nor more than thirty days from posting of notice. At that meeting such attorneys as attend shall constitute a quorum, and shall forthwith form such organization herein referred to as the "district bar," as they may deem advisable, of which organization all active members of the North Carolina State Bar entitled to vote in that district shall be members. The district bar shall be the subdivision of the North Carolina State Bar for that judicial district, and shall adopt such rules, regulations and bylaws not inconsistent with this article as it shall see fit, a copy of which shall be transmitted to the secretary-treasurer of the North Carolina State Bar when organized; and copies of any amendments of such rules, regulations, and bylaws shall likewise be sent to said secretary-treasurer. The district bar shall elect a councilor to represent that district and all elections of councilors, for regular terms, shall be held as provided by rules, regulations and bylaws adopted at the district bar. In case of a vacancy in the office or position of councilor by death, resignation or otherwise, the president of the district bar shall appoint a member of his district bar who shall serve as councilor for said unexpired term and until the next meeting of the district bar for the election of a councilor for that district. In case the judge of any judicial district, by reason of physical disability or otherwise, shall fail to call the meeting aforesaid within thirty days after this article shall have gone into effect, the same may be called within thirty days thereafter by any two attorneys residing in said district, by written notice signed by them and delivered to the clerk of the court of each county in the district to be posted at the front door of each courthouse as aforesaid, the said meeting to be held on a day fixed not less than twenty nor more than thirty days after the posting of said notice; and thereupon the same pro-

ceedings shall take place as though the meeting had been called by the judge as aforesaid. Any clerk to whom any such notice shall be delivered to be posted shall immediately post the same and shall write upon the said notice the exact date and time when the same is so posted. In case more than one notice shall be posted hereunder by different groups of attorneys, that posted first in point of time shall prevail and be deemed to be the notice provided for under this article. Pending the organization of the council as hereinafter provided, notification of the election of each councilor shall be sent within five days after such election by the secretary of the district bar to the clerk of the Supreme Court of North Carolina; but after the organization of the council such notices shall be sent to its secretary-treasurer. In case neither the judge nor any two members shall call a meeting as aforesaid, a councilor for the said district, residing therein, shall be named at a meeting of such members of the council as shall have been elected in accordance herewith, to serve until such district bar shall be organized under the provisions of this article (except as to the time for calling meetings), either on the call of the judge of the district court or of two members of the bar, and shall have elected a councilor to serve for the unexpired term of the councilor so named. (1933, c. 210, s. 4; 1953, c. 1310, s. 1.)

Editor's Note.—The 1953 amendment line eighteen, and inserted the fifth sentence. rewrote the fourth sentence beginning in sentence.

§ 84-19. Change of judicial districts.

Provided that procedures for organization of the district bars shall be in accordance with G. S. 84-18 and that beginning July 1, 1955, it is provided that new councilors for the first, tenth and fifteenth districts shall be elected for a term of one year; those from the sixth, thirteenth, eighteenth and twenty-seventh districts for a period of two years; and those from the eighth, ninth, twelfth and twenty-fourth districts for a period of three years; provided that in subsequent elections for the said district the terms shall be for three years. Such term shall run from the election of said councilors following organization of the district bars subsequent to April 20, 1955. The terms of councilors residing in the second, third, fourth, fifth, seventh, eleventh, fourteenth, sixteenth, seventeenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fifth, twenty-sixth, twenty-eighth, twenty-ninth, and thirtieth districts shall continue under the terms and conditions as when elected or appointed and their successors for said district shall be elected for a term of three years from the date of the expiration of the said terms, provided that if at the time of the organization of the district bar the term of the councilor who is a resident of the said district having expired or a vacancy existing by death, resignation or otherwise, then at the organization of said district bar provision may be made for the election or appointment of a councilor to represent the said district.

As soon as may be practicable following the organization of the several district bars where the composition of such districts shall have had a change in the counties comprising said district, the officers of the district being divided or rearranged shall for the purpose of preservation, forward the records of the expiring district bar to the council of the North Carolina State Bar who shall preserve the same in the offices of the North Carolina State Bar. (1933, c. 210, s. 5; 1955, c. 651, s. 2.)

Editor's Note.—The 1955 amendment section. As the first paragraph was not added the above two paragraphs to this changed it is not set out.

§ 84-20. Compensation of councilors.—The members of the council and members of committees when actually engaged in the performance of their duties, including committees sitting upon disbarment proceedings, shall receive as compensation, not exceeding ten (\$10.00) dollars per day for the time spent in attending meetings, and shall receive actual expenses of travel and subsistence while engaged in his duties provided that for transportation by use of private

automobile the expense of travel shall not exceed seven cents per mile. The council shall determine per diem, subsistence and mileage to be paid. Such allowance as may be fixed by the council shall be paid by the secretary-treasurer of the North Carolina State Bar upon certified statements presented by each member. (1933, c. 210, s. 6; 1935, c. 34; 1953, c. 1310, s. 2.)

Editor's Note.—

The 1953 amendment rewrote the latter part of the first sentence.

§ 84-23. Powers of council.

North Carolina Bar, Inc., Has Jurisdiction Over Unethical Conduct of Counsel.

—While the court has the inherent power to act whenever it is made to appear that the conduct of counsel in a cause pending in court is improper or unethical, ques-

tions of propriety and ethics are ordinarily for the consideration of the North Carolina Bar, Inc., which is now vested with jurisdiction over such matters. *McMichael v. Proctor*, 243 N. C. 479, 91 S. E. (2d) 231 (1956).

§ 84-24. Admission to practice.—The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the Supreme Court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this article.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of seven members of the Bar, elected by the council of the North Carolina State Bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The secretary of the North Carolina State Bar shall be the secretary of the Board, and serve without additional pay. The Board of Law Examiners shall elect a member of said Board as chairman thereof, who shall hold office for such period as said Board may determine.

The examination shall be held in such manner and at such times as the Board of Law Examiners may determine.

The Board of Law Examiners, subject to the approval of the council, shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in § 84-21 in relation to the certificate of organization and the rules and regulations of the council.

Whenever the council shall order the restoration of license to any person as authorized by § 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to such person, noting thereon that the same is issued in compliance with an order of the council of the North Carolina State Bar, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance.

Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G. S. 84-21 or as may be promulgated by the Supreme Court. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6; 1947, c. 77; 1951, c. 991, s. 1; 1953, c. 1012.)

Editor's Note.—

The 1951 amendment rewrote the fourth

paragraph and the 1953 amendment added the last paragraph.

A person does not have a natural or constitutional right to practice law; it is a privilege or franchise to be earned by hard study and compliance with the qualifications for admission to practice law prescribed by law. By virtue of its police power a state is authorized to establish qualifications for admission to practice law in its jurisdiction. *Baker v. Varser*, 240 N. C. 260, 82 S. E. (2d) 90 (1954).

Applicant Has Burden of Showing Compliance with Residence Requirement.—The burden of showing that he has the qualifications to comply with requirements of Rule Five of the Rules Governing Admission to Practice of Law in North Carolina,

adopted under authority of this article, and specifying the resident requirement, rests upon the applicant, and if the proof offered by him fails to satisfy the Board of Law Examiners that he has the qualifications required by the rule, it is their duty to deny his application to take the examination for admission. *Baker v. Varser*, 240 N. C. 260, 82 S. E. (2d) 90 (1954).

The findings of fact made by the Board of Law Examiners supported by the evidence are conclusive upon a reviewing court, and are not within the scope of reviewing powers. *Baker v. Varser*, 240 N. C. 260, 82 S. E. (2d) 90 (1954).

§ 84-25. **Fees of applicants.**—All applicants before the Board of Law Examiners shall pay such fees as prescribed under the rules of said Board as may be promulgated under G. S. 84-21 and G. S. 84-24. (1935, c. 33, s. 1; 1955, c. 651, s. 3.)

Editor's Note.—The 1955 amendment rewrote this section.

§ 84-26. **Pay of Board of Law Examiners.**—Each member of the Board of Law Examiners shall receive the sum of fifty dollars for his services in connection with each examination and shall receive his actual expenses of travel and subsistence while engaged in duties assigned to him, provided that for transportation by the use of private automobile the expense of travel shall not exceed seven cents per mile. (1935, c. 33, s. 2; 1937, c. 35; 1953, c. 1310, s. 3.)

Editor's Note.—

The 1953 amendment increased the mileage from five to seven cents per mile.

§ 84-32. **Records and judgments and their effect; restoration of licenses.**—In the case of persons charged with an offense cognizable by the council or any committee thereof, a complete record of the proceedings and evidence taken before the council or any committee thereof shall be made and preserved in the office of the secretary-treasurer, but the council may, upon sufficient cause shown and with the consent of the person so charged, cause the same to be expunged and destroyed. Final judgments of suspension or disbarment shall be entered upon the judgment docket of the superior court of the county wherein the accused resides, and also upon the minutes of the Supreme Court of North Carolina; and such judgment shall be effective throughout the State.

Whenever an attorney desires to voluntarily surrender his license to the council and the council consents to accept the same, he shall make such request and surrender in writing directed to the council and the council shall enter an order containing the conditions of acceptance of said license and a copy of such order shall be filed with the clerk of the Supreme Court and with the clerk of the superior court of the county of residence or prior residence of the licensee; provided, however, that the council may refuse to accept surrender of license in any case.

Whenever any attorney has been deprived of his license, the council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration. (1933, c. 210, s. 15; 1935, c. 74, s. 2; 1953, c. 1310, s. 4.)

Editor's Note.—

The 1953 amendment inserted the second paragraph.

§ 84-34. **Membership fees and list of members.**—Every active member of the North Carolina State Bar shall on or before the first day of January, nineteen hundred and thirty-four, pay to the secretary-treasurer, without demand therefor, in respect of the calendar year nineteen hundred and thirty-three, a membership fee of three dollars, and shall thereafter, prior to the first day of July of each year, beginning with and including the year nineteen hundred and thirty-four, pay to the secretary-treasurer, in respect of the calendar year in which such payment is herein directed to be made, an annual membership fee of three dollars, and shall thereafter, prior to the first day of July of each year, beginning with the calendar year one thousand nine hundred and thirty-nine, pay to the secretary-treasurer, in respect to the calendar year in which such payment is herein directed to be made, an annual membership fee of five dollars; and shall thereafter, prior to the first day of July, beginning with the calendar year 1955, pay to the secretary-treasurer, in respect to the calendar year in which such payment is herein directed to be made, an annual membership fee of ten dollars (\$10.00); and in every case the member so paying shall notify the secretary-treasurer of his correct post-office address. The said membership fee shall be regarded as a service charge for the maintenance of the several services prescribed in this article, and shall be in addition to all fees now required in connection with admissions to practice, and in addition to all license taxes now or hereafter required by law. The said fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this article shall have gone into effect until the first day of July of the second calendar year (a "calendar year" for the purposes of this article being treated as the period from January first to December thirty-first) following that in which he shall have been licensed; but this proviso shall not apply to attorneys from other states admitted on certificate. The said fees shall be disbursed by the secretary-treasurer on the order of the council. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the council, publish an account of the financial transactions of the council, in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and post-office addresses forwarded to him and from any other available sources of information a list of members of the North Carolina State Bar and furnish to the clerk of the superior court in each county, not later than the first day of October in each year, a list showing the name and address of each attorney for that county who has not complied with the provisions of this article. The name of each of the active members who shall be in arrears in the payment of membership fees for one or more calendar years shall be furnished to the presiding judge at the next term of the superior court after the first day of October of each year, by the clerk of the superior court of each county wherein said member or members reside, and the court shall thereupon take such action as is necessary and proper. The names and addresses of such attorneys so certified shall be kept available to the public. The Commissioner of Revenue is hereby directed to supply the secretary-treasurer, from his record of license tax payments, with any information for which the secretary-treasurer may call in order to enable him to comply with this requirement.

The said list submitted to the several clerks of the superior court shall also be submitted to the council of the North Carolina State Bar at its October meeting of each year and it shall take such action thereon as is necessary and proper. (1933, c. 210, s. 17; 1939, c. 21, ss. 2, 3; 1953, c. 1310, s. 5; 1955, c. 651, s. 4.)

Editor's Note.—

The 1953 amendment added the second paragraph and the 1955 amendment in-

serted in the first sentence of the first paragraph the provision making the annual membership fee ten dollars.

Chapter 85.

Auctions and Auctioneers.

Article 2.

Auction Sales of Articles Containing Hidden Value.

Sec.

85-27. Counties may tax.

ARTICLE 2.

Auction Sales of Articles Containing Hidden Value.

§ 85-27. **Counties may tax.**—Counties may levy and collect an annual license tax on the business taxed under this article not in excess of one hundred dollars (\$100.00). (1953, c. 468.)

Chapter 86.

Barbers.

Sec.

86-11.1. [Repealed.]

86-21. Refusal, revocation or suspension of
certificates or permits.

§ 86-7. **Office; seal; officers and secretary; bond.**—The Board shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. Said Board shall elect its own officers, and in addition thereto, may elect or appoint a full time executive secretary who may or may not be a member of the Board, and whose salary shall be fixed by the Governor with the approval of the Advisory Budget Commission. Said full-time secretary, before entering upon the duties of his office, shall execute to the State of North Carolina a satisfactory bond with a duly licensed bonding company in this State as surety or other acceptable surety, such bond to be in the penal sum of not less than ten thousand dollars (\$10,000.00) and conditioned upon the faithful performance of the duties of his office and the true and correct accounting of all funds received by him. Said full-time secretary shall turn over to the State Treasurer to be credited to the State Board of Barber Examiners all funds collected or received by him under this chapter, such funds to be held and expended under the supervision of the Director of the Budget, exclusively for the enforcement and administration of the provisions of this chapter, subject to the limitations hereof. Provided, however, that nothing herein shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from fees collected under the provisions of this chapter and received by the said State Treasurer in the manner aforesaid. (1929, c. 119, s. 7; 1941, c. 375, s. 4; 1943, c. 53, s. 1; 1945, c. 830, s. 2; 1957, c. 813, s. 1.)

Editor's Note.—

The 1957 amendment rewrote the second sentence.

§ 86-8. **Salary and expenses; employees; audit; annual report to Governor.**—Each member of the Board of Barber Examiners shall receive a salary to be fixed by the Governor with the approval of the Advisory Budget Commission, payable in equal monthly installments, and shall be reimbursed for his actual expenses, and shall receive 7¢ per mile for the distance traveled in

performance of his duties, which said salary and expenses, and all other salaries and expenses, in connection with the administration of this chapter, shall be paid upon warrant drawn on the State Treasurer, solely from the funds derived from the fees collected and received under this chapter. The Board shall employ such agents, assistants and attorneys as it may deem necessary. Each member of the Board of Barber Examiners, and each of its agents and assistants who collect any moneys or fees in the discharge of their duties, shall execute to the State of North Carolina a bond in the sum of one thousand dollars (\$1,000.00) conditioned upon the faithful performance of his duties of office, and the true accounting for all funds collected. There shall be annually made by the State Auditing Department, a complete audit and examination of the receipts and disbursements, and the State Board of Barber Examiners shall report annually to the Governor, a full statement of its receipts and expenditures, and also a full statement of its work during the year, together with such recommendations as it may deem expedient. (1929, c. 119, s. 8; 1943, c. 53, s. 2; 1945, c. 830, s. 3; 1957, c. 813, s. 2.)

Editor's Note.—

The 1957 amendment rewrote the first sentence.

§ 86-11.1: Repealed by Session Laws 1951, c. 821, s. 3.

§ 86-15. **Fees.**—The fee to be paid by applicant for examination to determine his fitness to receive a certificate of registration, as a registered apprentice, shall be fifteen dollars (\$15.00), and such fee must accompany his application. The annual license fee of an apprentice shall be five dollars (\$5.00). The fee to be paid by an applicant for an examination to determine his fitness to receive a certificate of registration as a registered barber shall be fifteen dollars (\$15.00), and such fee must accompany his application. The annual license fee of a registered barber shall be five dollars (\$5.00). All licenses, both for apprentices and for registered barbers, shall be renewed as of the thirtieth day of June of each and every year, and such renewals for apprentices shall be three dollars (\$3.00), and for registered barbers five dollars (\$5.00). The fee for restoration of an expired certificate for registered barbers shall be seven dollars (\$7.00), and restoration of expired certificate of an apprentice shall be seven dollars (\$7.00). The fee to be paid for all barber shop permits, established, and under the inspection of the State Board of Barber Examiners as of July first, one thousand nine hundred and forty-five, shall be five dollars (\$5.00), and the initial fee to be paid by barber shops thereafter established, [shall be five dollars (\$5.00) for the first year], or portion thereof, and the annual renewal fee for each barber shop permit shall be five dollars (\$5.00). The fee to be paid for barber school permits operating on, or before July first, one thousand nine hundred and forty-five, shall be twenty-five dollars (\$25.00). The initial fee to be paid by each barber school thereafter established, shall be fifty dollars (\$50.00), and the annual renewal fee for each barber school permit shall be twenty-five dollars (\$25.00). Each barber shop permit and each barber school permit shall be renewed as of the thirtieth day of June, each and every year, and shall not be transferable from one person to another, and such barber shop and barber school permit shall be conspicuously posted within each shop or school, or any place or establishment: Provided, further, that all fees received under this chapter shall be used exclusively for the enforcement of this chapter as provided by law. (1929, c. 119, s. 14; 1937, c. 138, s. 4; 1945, c. 830, s. 4; 1951, c. 821, s. 1; 1957, c. 813, s. 3.)

Editor's Note.—

The 1951 amendment increased the fee in the first sentence from five to fifteen dollars. The amendatory act also provided that the section be further amended by striking out the words and figures appearing in

brackets in line seventeen and inserting in lieu thereof the following: "Any person or persons, firm or corporation, before establishing or opening a barber shop that has not heretofore been established by the person or persons, shall make application to

the State Board of Barber Examiners, on forms to be furnished by said board, for a permit to operate a barber shop, as provided by section 1, Chapter 86, General Statutes, and no shop shall open for business until inspected and approved by the State Board of Barber Examiners, its agents or assistants to determine whether or not said shop meets sanitary requirements, as provided by § 86-17 of the General Statutes, the fee to be paid for inspec-

tion of barber shop, as provided above, shall be ten dollars (\$10.00)."

The latter part of the amendatory act is so ambiguous that no attempt has been made to incorporate the quoted matter in this section.

The 1957 amendment increased the fees in line four from three to five dollars, in line thirteen from four to seven dollars, in lines sixteen, eighteen and nineteen from two to five dollars.

§ 86-21. Refusal, revocation or suspension of certificates or permits.—The Board may neither refuse to issue nor refuse to renew, nor suspend, or revoke any certificate of registration, barber shop permits, or barber school permits, however, for any of these causes, except in accordance with the provisions of chapter 150 of the General Statutes. (1929, c. 119, s. 20; 1939, c. 218, s. 1; 1945, c. 830, s. 7; 1953, c. 1041, s. 2.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, added the reference to chapter 150 of the General Statutes and made other changes.

§ 86-22. Misdemeanors.

12. The violation of § 86-15 as appearing in the recompiled volume. (1929, c. 119, s. 21; 1933, c. 95, s. 1; 1937, c. 138, s. 6; 1941, c. 375, ss. 9, 10; 1951, c. 821, s. 2.)

Editor's Note.—

The 1951 amendment added subsection 12 at the end of this section. As the rest of

the section was not changed by the amendment it is not set out.

**Chapter 87.
Contractors.**

Article 1.

General Contractors.

Sec.
87-11. Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing thereon; reissuance of certificate.

Article 2.

Plumbing and Heating Contractors.

87-18. Organization meeting; officers; seal; rules; employment of personnel.
87-21. Definitions; contractors licensed by Board; examination; posting license, etc.
87-26. Corporations; partnerships; persons doing business under trade name.

Article 3.

Tile Contractors.

87-35. Power of Board to revoke or suspend licenses; charges; procedure.

Article 5.

Refrigeration Contractors.

87-52. Board of Examiners; appointment; term of office.

Sec.

87-53. Removal, qualifications and compensation of members; allowance for expenses.
87-54. Organization meeting; officers; seal; rules.
87-55. Regular and special meetings; quorum.
87-56. Record of proceedings and register of applicants; reports.
87-57. License required of persons, firms or corporations engaged in the refrigeration trade.
87-58. Definitions; contractors licensed by Board; towns excepted; examinations.
87-59. Revocation or suspension of license for cause.
87-60. Re-issuance of revoked licenses; replacing lost or destroyed licenses.
87-61. Violations made misdemeanor; employees of licensees excepted.
87-62. Only one person in partnership or corporation need have license.
87-63. License fees payable in advance; application of.
87-64. Examination and license fees; annual renewal.

ARTICLE 1.

General Contractors.

§ 87-1. "General contractor" defined; exemptions.—For the purpose of this article, a "general contractor" is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building, highway, sewer main, grading or any improvement or structure where the cost of the undertaking is twenty thousand dollars (\$20,000.00) or more and anyone who shall bid upon or engage in constructing any undertakings or improvements above mentioned in the State of North Carolina costing twenty thousand dollars (\$20,000.00) or more shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina.

This section shall not apply to persons or firms or corporations furnishing or erecting industrial equipment, power plant equipment, radial brick chimneys, and monuments. (1925, c. 318, s. 1; 1931, c. 62, s. 1; 1937, c. 429, s. 1; 1949, c. 936; 1953, c. 810.)

Editor's Note.— amount mentioned in the first paragraph
The 1953 amendment increased the from \$15,000.00 to \$20,000.00.

§ 87-4. First meeting of Board; officers; secretary-treasurer and assistants.

The secretary-treasurer need not be a member of the Board, and the Board is hereby authorized to employ a full-time secretary-treasurer, and such other assistants and make such other expenditures as may be necessary to the proper carrying out of the provisions of this article. (1925, c. 318, s. 4; 1941, c. 257, s. 4; 1947, c. 611; 1951, c. 453.)

Editor's Note.— formerly appearing in the second paragraph. As the first paragraph was not changed by the amendment it is not set out.
The 1951 amendment deleted the provision as to salary of the secretary-treasurer

§ 87-7. Records of Board; disposition of funds.—The secretary-treasurer shall keep a record of the proceedings of the said Board and shall receive and account for all moneys derived from the operation of this article. Any funds remaining in the hands of the secretary-treasurer to the credit of the Board after the expenses of the Board for the current year have been paid shall be paid over to the Greater University of North Carolina for the use of the School of Engineering through the North Carolina Engineering Foundation. The Board has the right, however, to retain at least ten per cent of the total expense it incurs for a year's operation to meet any emergency that may arise. (1925, c. 318, s. 7; 1953, c. 805, s. 1.)

Editor's Note.—The 1953 amendment substituted the words "the School of Engineering through the North Carolina Engineering Foundation" for the words "its engineering department" formerly appearing at the end of the second sentence.

§ 87-10. Application for license; examination; certificate; renewal.—Anyone hereafter desiring to be licensed as a general contractor in this State shall make and file with the Board, thirty days prior to any regular or special meeting thereof, a written application on such form as may then be by the Board prescribed for examination by the Board, which application shall be accompanied by the sum of eighty dollars (\$80.00) if the application is for an unlimited license, or sixty dollars (\$60.00) if the application is for an intermediate license, or forty dollars (\$40.00) if the application is for a limited license; the holder of an unlimited license shall be entitled to engage in the business of general contracting in North Carolina unlimited as to the value of any single project, the holder of an intermediate license shall be entitled to engage in the practice of general contracting in North Carolina but shall not be entitled to engage therein with respect to any single project of a value in excess of three hundred thousand dollars (\$300,000.00), the holder of a limited license shall be entitled to engage

in the practice of general contracting in North Carolina but the holder shall not be entitled to engage therein with respect to any single project of a value in excess of seventy-five thousand dollars (\$75,000.00) and the license certificate shall be classified as hereinafter set forth. Before being entitled to an examination an applicant must show to the satisfaction of the Board from the application and proofs furnished that the applicant is possessed of a good character and is otherwise qualified as to competency, ability and integrity, and that the applicant has not committed or done any act, which, if committed or done by any licensed contractor would be grounds under the provisions hereinafter set forth for the suspension or revocation of contractor's license, or that the applicant has not committed or done any act involving dishonesty, fraud, or deceit, or that the applicant has never been refused a license as a general contractor nor had such license revoked, either in this State or in another state, for reasons that should preclude the granting of the license applied for, and that the applicant has never been convicted of a felony: Provided, no applicant shall be refused the right to an examination, except in accordance with the provisions of chapter 150 of the General Statutes.

Anyone failing to pass this examination may be re-examined at any regular meeting of the Board without additional fee. Certificate of license shall expire on the first day of December following the issuance or renewal and shall become invalid on that day unless renewed, subject to the approval of the Board. Renewals may be effected any time during the month of January without re-examination, by the payment of a fee to the secretary of the Board of sixty dollars (\$60.00) for unlimited license, forty dollars (\$40.00) for intermediate license and twenty dollars (\$20.00) for limited license: Provided, the classification herein provided for shall not apply to contracts of the State Highway and Public Works Commission. (1925, c. 318, s. 9; 1931, c. 62, s. 2; 1937, c. 328; c. 429, s. 3; 1941, c. 257, s. 1; 1953, c. 805, s. 2; 1953, c. 1041, s. 3.)

Editor's Note.—

The first 1953 amendment increased the fees in the first and last paragraphs. The second 1953 amendment, effective July 1, 1953, rewrote the proviso at the end of

the first paragraph, adding the reference to chapter 150 of the General Statutes. As the second and third paragraphs were not affected by the amendments they are not set out.

§ 87-11. Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing thereon; reissuance of certificate.—The Board shall have the power to revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining a license, or gross negligence, incompetency or misconduct in the practice of his profession, or willful violation of any provisions of this article. Any person may prefer charges of such fraud, deceit, negligence or misconduct against any general contractor licensed hereunder; such charges shall be in writing and sworn to by the complainant and submitted to the Board. Such charges, unless dismissed without hearing by the Board as unfounded or trivial, shall be heard and determined by the Board in accordance with the provisions of chapter 150 of the General Statutes.

The Board may reissue a license to any person, firm or corporation whose license has been revoked: Provided, three or more members of the Board vote in favor of such reissuance for reasons the Board may deem sufficient.

The Board shall immediately notify the Secretary of State of its finding in the case of the revocation of a license or of the reissuance of a revoked license.

A certificate of license to replace any certificate lost, destroyed or mutilated may be issued subject to the rules and regulations of the Board. (1925, c. 318, s. 10; 1937, c. 429, s. 4; 1953, c. 1041, s. 4.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, rewrote the latter part of the first

paragraph, and added thereto the reference to chapter 150 of the General Statutes.

§ 87-14. **Regulations as to issue of building permits.**— Any person, firm or corporation, upon making application to the building inspector or such other authority of any incorporated city, town or village in North Carolina charged with the duty of issuing building or other permits for the construction of any building, highway, sewer, grading or any improvement or structure where the cost thereof is to be twenty thousand dollars (\$20,000.00) or more, shall, before he be entitled to the issuance of such permit, furnish satisfactory proof to such inspector or authority that he is duly licensed under the terms of this article to carry out or superintend the same, and that he has paid the license tax required by the Revenue Act of the State of North Carolina then in force so as to be qualified to bid upon or contract for the work for which the permit has been applied; and shall be unlawful for such building inspector or other authority to issue or allow the issuance of such building permit unless and until the applicant has furnished evidence that he is either exempt from the provisions of this article or is duly licensed under this article to carry out or superintend the work for which permit has been applied; and further, that the applicant has paid the license tax required by the State Revenue Act then in force so as to be qualified to bid upon or contract for the work covered by the permit; and such building inspector, or other such authority, violating the terms of this section shall be guilty of a misdemeanor and subject to a fine of not more than fifty dollars (\$50.00). (1925, c. 318, s. 13; 1931, c. 62, s. 4; 1937, c. 429, s. 7; 1949, c. 934; 1953, c. 809.)

Editor's Note.— amount in line six from \$15,000.00 to
The 1953 amendment increased the \$20,000.00.

ARTICLE 2.

Plumbing and Heating Contractors.

§ 87-16. **Board of Examiners; appointment; term of office.**

Cited in *Muse v. Morrison*, 234 N. C. 195, 66 S. E. (2d) 783 (1951).

§ 87-18. **Organization meeting; officers; seal; rules; employment of personnel.**—The Board shall within thirty days after its appointment meet in the city of Raleigh and organize, and shall elect a chairman and secretary and treasurer, each to serve for one year. Thereafter said officers shall be elected annually. The secretary and treasurer shall give bond approved by the Board for the faithful performance of his duties, in such sum as the Board may, from time to time determine. The Board shall have a common seal, shall formulate rules to govern its actions, and is hereby authorized to employ such personnel as it may deem necessary to carry out the provisions of this article. (1931, c. 52, s. 3; 1939, c. 224, s. 2; 1953, c. 254, s. 1.)

Editor's Note.— sion of the last sentence as to employment
The 1953 amendment added the provi- of personnel.

§ 87-21. **Definitions; contractors licensed by Board; examination; posting license, etc.**—(a) **Definitions.**—For the purpose of this article:

(1) The word "plumbing" is hereby defined to be the system of pipes, fixtures, apparatus and appurtenances, installed upon the premises, or in a building, to supply water thereto and to convey sewage or other waste therefrom.

(2) The phrase "heating, group number one" shall be deemed and held to be the heating system of a building, which requires the use of high or low pressure steam, vapor or hot water, including all piping, ducts, and mechanical equipment appurtenant thereto, within, adjacent to or connected with a building, for comfort heating.

(3) The phrase "heating, group number two" shall be deemed and held to be the air conditioning system of a building, which provides conditioned air for

comfort cooling by the lowering of temperature, requiring, a total of more than 15 motor horse power or a total of more than 15 tons of mechanical refrigeration, in single or multiple units, and air distribution ducts.

(4) The word "heating" shall be deemed and held to refer to heating group number one or heating group number two, or both.

(5) Any person, firm or corporation, who for a valuable consideration, installs, alters or restores, or offers to install, alter or restore, either plumbing, heating group number one, or heating group number two, or any combination thereof, as defined in this article, shall be deemed and held to be engaged in the business of plumbing or heating contracting.

(6) The word "contractor" is hereby defined to be a person, firm or corporation engaged in the business of plumbing or heating contracting.

(b) Eligibility and Examination of Applicants; Necessity for License.—In order to protect the public health, comfort and safety, the Board shall prescribe the standard of efficiency to be required of an applicant for license, and shall give an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating cost, fundamentals of installation and design, fire hazards and related subjects as same pertain to either plumbing or heating; and as a result of such examination, the Board shall issue a certificate of license in plumbing, heating group number one, or heating group number two, or any combination thereof, to applicants who pass the required examination, and a license shall be obtained, in accordance with the provisions of this article, before any person, firm or corporation shall engage in, or offer to engage in, the business of either plumbing or heating contracting, or any combination thereof. It is the purpose and intent of this section that the Board shall provide an examination for plumbing, heating group number one, or heating group number two, and it is authorized to issue a certificate of license limited to either plumbing or heating group number one, or heating group number two, or any combination thereof. Each application for examination shall be accompanied by a check, post office money order, or cash, in the amount of the annual license fee required by this article. Regular examinations shall be given in the months of April and October of each year, and additional examinations may be given at such other times as the Board may deem wise and necessary. Any person may demand in writing a special examination, and upon payment by the applicant of the cost of holding such examination and the deposit of the amount of the annual license fee, the Board in its discretion will fix a time and place for such examination. A person who fails to pass any examination shall not be re-examined until the next regular examination.

(c) To Whom Article Applies.—The requirements of this article shall apply only to persons, firms or corporations who engage in, or attempt to engage in, the business of plumbing or heating contracting, or any combination thereof, in cities or towns having a population of more than 3500 in accordance with the last official United States census. The provisions of this article shall not apply to those who make minor repairs or minor replacements to an already installed system of plumbing or heating.

(d) License Granted without Examination.—Persons who have an established place of business in cities or towns which attain a population of more than 3500, as indicated by the last official United States census, and who produce satisfactory evidence that they are engaged in the business of plumbing or heating contracting, and who have paid the required State revenue tax for the census year in which the municipality attained a population of more than 3500, shall be granted a certificate of license in the classification in which they are qualified, without examination, upon application to the Board and payment of the license fee.

(e) Posting License; License Number on Contracts, etc.—The current license issued in accordance with the provisions of this article shall be posted in the

business location of the licensee, and its number shall appear on all proposals or contracts and requests for permits issued by municipalities. (1931, c. 52, s. 6; 1939, c. 224, s. 3; 1951, c. 953, ss. 1, 2; 1953, c. 254, s. 2.)

Editor's Note.—

The 1953 amendment rewrote this section as changed by the 1951 amendment.

§ 87-23. **Revocation or suspension of license for cause.**—The Board shall have power to revoke or suspend the license of any plumbing or heating contractor, or both, who is guilty of any fraud or deceit in obtaining a license, or who fails to comply with any provision or requirement of this article, or for gross negligence, incompetency, or misconduct, in the practice of or in carrying on the business of either a plumbing or heating contractor, or both, as defined in this article. Any person may prefer charges of such fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this article, against any plumbing or heating contractor, or both, who is licensed under the provisions of this article. All of such charges shall be in writing and verified by the complainant, and such charges shall be heard and determined by the Board in accordance with the provisions of chapter 150 of the General Statutes. (1931, c. 52, s. 8; 1939, c. 224, s. 5; 1953, c. 1041, s. 5.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, rewrote this section and added the

reference to chapter 150 of the General Statutes.

§ 87-26. **Corporations; partnerships; persons doing business under trade name.**—(a) A license may be issued in the name of a corporation, provided, one or more officers, or full time employee or employees, or both, empowered to act for the corporation, are licensed in accordance with the provisions of this article; and provided such officers or employee or employees shall execute contracts to the extent of their license qualifications in the name of the said corporation and exercise general supervision over the work done thereunder.

(b) A license may be issued in the name of a partnership provided one or more general partners, or full time employee or employees empowered to act for the partnership, are licensed in accordance with the provisions of this article, and provided such general partners or employee or employees shall execute contracts to the extent of their license qualifications in the name of the said partnership, and exercise general supervision over the work done thereunder.

(c) A license may be issued in an assumed or designated trade name, provided the owner of the business conducted thereunder, or full time employee or employees empowered to act for the owner, are licensed in accordance with the provisions of this article; and such owner or employee or employees shall execute contracts to the extent of their license qualifications, in the said trade name, and exercise general supervision over the work done thereunder.

(d) A certificate of license may be issued in accordance with the provisions of this article upon payment of the annual license fee by such corporation, partnership, or owner of the business conducted under an assumed or designated trade name, as the case may be, and the names and qualifications of individual licensee or licensees connected therewith shall be indicated on the aforesaid license. (1931, c. 52, s. 12; 1939, c. 224, s. 8; 1957, c. 815.)

Editor's Note.—

The 1957 amendment, effective January 1, 1958, rewrote this section.

§ 87-27. **License fees payable in advance; application of.**—All license fees shall be paid in advance to the secretary and treasurer of the Board and by him held as a fund for the use of the Board. The compensation and expenses of the members of the Board as herein provided, the salaries of its employees, and all expenses incurred in the discharge of its duties under this article

shall be paid out of such fund, upon the warrant of the chairman and secretary and treasurer: Provided, upon the payment of the necessary expenses of the Board as herein set out, and the retention by it of twenty-five per centum of the balance of funds collected hereunder, the residue, if any, shall be paid to the State Treasurer. (1931, c. 52, s. 13; 1933, c. 57; 1939, c. 224, s. 9; 1953, c. 254, s. 3.)

Editor's Note.—

Cited in *Muse v. Morrison*, 234 N. C.

The 1953 amendment substituted "chairman" for "president" in line six.

195, 66 S. E. (2d) 783 (1951).

ARTICLE 3.

Tile Contractors.

§ 87-28. License required of tile contractors.

This article is unconstitutional as an unwarranted interference with the fundamental right to engage in an ordinary and innocuous occupation in contravention of article I, §§ 1, 7, 17 and 31 of the Constitution of North Carolina. The statute cannot

be upheld as an exercise of the police power, since its provisions have no substantial relation to the public health, safety or welfare but tend to create a monopoly. *Roller v. Allen*, 245 N. C. 516, 96 S. E. (2d) 851 (1957).

§ 87-35. Power of Board to revoke or suspend licenses; charges; procedure.—The Board shall have the power after hearing to revoke or suspend the license of any tile contractor upon satisfactory proof that such license was secured by fraud or deceit practiced upon the Board, or upon satisfactory proof that such tile contractor is guilty of gross negligence, incompetency, or inefficiency in carrying on the business of tile contracting. Each charge against any contractor submitted to the Board shall be in writing and sworn to by the complainant. The procedure for the revocation or suspension of a license shall be in accordance with the provisions of chapter 150 of the General Statutes. (1937, c. 86, s. 8; 1953, c. 1041, s. 6.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, added the reference to chapter 150 of the General Statutes, and made other changes.

Plumbing.—The license required by this section is for those who install, alter, or restore plumbing, and is not required for the dismantling of plumbing. *State v. Kermon*, 232 N. C. 342, 60 S. E. (2d) 580 (1950).

License Not Required for Dismantling of

ARTICLE 4.

Electrical Contractors.

§ 87-43. Persons required to obtain licenses; examination required; licenses for firms or corporations.—No person, firm or corporation shall engage in the business of installing, maintaining, altering or repairing within the State of North Carolina any electric wiring, devices, appliances or equipment unless such person, firm or corporation shall have received from the Board of Examiners of Electrical Contractors an electrical contractor's license: Provided, however, that the provisions of this article shall not apply (a) to the installation, construction, or maintenance of power systems for the generation and primary and secondary distribution of electric current ahead of the customer's meter; (b) to the installation, construction, maintenance, or repair of telephone, telegraph, or signal systems, by public utilities; (c) to any mechanic employed by a licensee of this Board; (d) to the installation, construction or maintenance of electrical equipment and wiring for temporary use by contractors in connection with the work of construction; (e) to the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by persons, firms or corporations, upon their own property, who regularly employ one or more electricians or mechanics for the purpose of installing, maintaining or repairing of electrical

wiring, devices or equipment used for the conducting of the business of said persons, firms or corporations; (f) to the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by State institutions and private educational institutions which maintain a private electrical department; (g) to the replacement of lamps and fuses and to the installation and servicing of appliances and equipment connected by means of attachment plug-in devices to suitable receptacles which have been permanently installed. No license shall be issued by said Board without an examination of the applicant for the purpose of ascertaining his qualifications for such work, but no such examination shall be required for the annual renewal of such license: Provided, however, that persons, firms or corporations residing in the State of North Carolina on March 1, 1937, who have paid the license fees required of electrical contractors by the State Revenue Act of one thousand nine hundred and thirty-five, upon proper certification or establishment of such fact, shall be granted a license by the Board of Examiners under this article without examination. Individuals, firms or corporations shall be eligible to secure licenses from the Board of Examiners: Provided they have regularly on active duty in their respective principal places of business at least one person duly qualified as an electrical contractor under the provisions of this article; and provided further that they have regularly on active duty in each branch place of business operated by them at least one person, who has passed the examination required by this article for electrical contractors, whose duty it shall be to direct and supervise any and all electrical wiring or electrical installations done or made by such branch place or places of business. No license or renewal of any license shall be issued to applicant until the fees herein prescribed shall have been paid. (1937, c. 87, s. 5; 1951, c. 650, ss. 1-2½; 1953, c. 595.)

Editor's Note. — The 1951 amendment struck out the words "for which a permit is now or may hereafter be required by the statutes of the State of North Carolina, or by municipal or county ordinances in the county in which such work is undertaken, dealing with the erection and inspection of buildings and fire protection and electrical

installation", which formerly appeared after the word "equipment" in line three. The amendment also rewrote the latter part of exemption (e) and added exemption (g).

The 1953 amendment rewrote the last two sentences of this section.

§ 87-48. Licenses not assignable or transferable; suspension or revocation.—No license issued in accordance with the provisions of this article shall be assignable or transferable. Any such license may, in accordance with the provisions of chapter 150 of the General Statutes, be suspended for a definite length of time or revoked by the Board of Examiners if the person, firm or corporation holding such license shall willfully or by reason of incompetence violate any of the statutes of the State of North Carolina, or any ordinances of any municipality or county relating to the installation, maintenance, alteration or repair of electric wiring, devices, appliances or equipment. (1937, c. 87, s. 10; 1953, c. 1041, s. 7.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, inserted "in accordance with the provisions of chapter 150 of the General

Statutes" in lieu of "after hearing" formerly appearing in the second line of this section.

ARTICLE 5.

Refrigeration Contractors.

§ 87-52. Board of Examiners; appointment; term of office.—For the purpose of carrying out the provisions of this article there is hereby created a State Board of Refrigeration Examiners consisting of seven members to be appointed by the Governor within sixty days after January 1, 1956. The Board shall

consist of one member from the State Board of Health, one member from the Engineering School of the Greater University of North Carolina, two members who are licensed refrigeration contractors, one member from the Division of Public Health of the Greater University of North Carolina, one member who is a manufacturer of refrigeration equipment and one member who is a wholesaler of refrigeration equipment. The term of office of said members shall be further designated by the Governor so that the term of one member shall expire each year. Thereafter in each year the Governor shall in like manner appoint one person to fill the vacancy on the Board thus created. Vacancies in the membership of the Board shall be filled by appointment of the Governor for the unexpired term. Whenever the word "Board" is used in this article it shall be deemed and held to refer to the State Board of Refrigeration Examiners. (1955, c. 912, s. 1.)

Editor's Note.—The act from which this article was derived is effective as of January 1, 1956.

§ 87-53. **Removal, qualifications and compensation of members; allowance for expenses.**—The Governor may remove any member of the Board for misconduct, incompetency or neglect of duty. Each member of the Board shall be a citizen of the United States and a resident of this State at the time of his appointment. Each member of the Board shall receive fifteen dollars (\$15.00) per day for attending sessions of the Board or of its committees, and for the time spent in necessary traveling in carrying out the provisions of this article, and in addition to the per diem compensation, each member shall be reimbursed by the Board from funds in its hands for necessary traveling expenses and for such expenses incurred in carrying out the provisions hereof, as shall be approved by a majority of the members of the Board. (1955, c. 912, s. 2.)

§ 87-54. **Organization meeting; officers; seal; rules.**—The Board shall within thirty days after its appointment meet in the city of Raleigh and organize, and shall elect a chairman and secretary and treasurer, each to serve for one year. Thereafter said officers shall be elected annually. The secretary and treasurer shall give bond approved by the Board for the faithful performance of his duties, in such sum as the Board may, from time to time, determine. The Board shall have a common seal, shall formulate rules to govern its actions, and is hereby authorized to employ such personnel as it may deem necessary to carry out the provisions of this article. (1955, c. 912, s. 3.)

§ 87-55. **Regular and special meetings; quorum.** — The Board after holding its first meeting, as hereinbefore provided, shall thereafter hold at least two regular meetings each year. Special meetings may be held at such times and places as the bylaws and/or rules of the Board provide; or as may be required in carrying out the provisions hereof. A quorum of the Board shall consist of four members. (1955, c. 912, s. 4.)

§ 87-56. **Record of proceedings and register of applicants; reports.**—The Board shall keep a record of its proceedings and a register of all applicants for examination, showing the date of each application, the name, age and other qualifications, place of business and residence of each applicant. The books and records of the Board shall be prima facie evidence of the correctness of the contents thereof. On or before the first day of March of each year the Board shall submit to the Governor a report of its activities for the preceding year, and file with the Secretary of State a copy of such report, together with a statement of receipts and expenditures of the Board attested by the chairman and secretary. (1955, c. 912, s. 5.)

§ 87-57. **License required of persons, firms or corporations engaged in the refrigeration trade.** — In order to protect the public health, safety, morals, order and general welfare of the people of this State, all persons, firms or corporations, whether resident or nonresident of the State of North Carolina, before engaging in refrigeration business or contracting, as defined in this article, shall first apply to the Board and shall procure a license. (1955, c. 912, s. 6.)

§ 87-58. **Definitions; contractors licensed by Board; towns excepted; examinations.**—(a) As applied in this article, refrigeration trade or business is defined to include all persons, firms or corporations engaged in the installation, maintenance, servicing and repairing of refrigerating machinery, equipment, devices and components relating thereto and within limits as set forth in the codes, laws and regulations governing refrigeration installation, maintenance, service and repairs within the State of North Carolina or any of its political subdivisions, provided however, that this article shall not apply to the replacement of lamps and fuses and to the installation and servicing of appliances and equipment connected by means of attachment plug-in devices to suitable receptacles which have been permanently installed, “or devices using gas as a fuel, or ice using or storing equipment”; and provided, further, that the provisions of this article shall not repeal any wording, phrase, or paragraph as set forth in North Carolina General Statutes, chapter 87, article 2; and provided, further, that this article shall not apply to employees of persons, firms, or corporations or persons, firms or corporations, not engaged in refrigeration contracting as herein defined, that install, maintain and service their own refrigerating machinery, equipment and devices. The provisions of this article shall not apply to any person, firm or corporation engaged in the business of selling, repairing and installing any air conditioning units, devices or systems for the purpose of cooling offices, buildings, houses, works, manufacturing plants, or any machinery, manufactured article or processing of material.

(b) The phrase “refrigeration contractor” is hereby defined to be a person, firm or corporation engaged in the business of refrigeration contracting.

(c) Any person, firm or corporation who for valuable consideration engages in the refrigeration business or trade as herein defined shall be deemed and held to be in the business of refrigeration contracting.

(d) In order to protect the public health, comfort and safety, the Board shall prescribe the standard of efficiency to be required of an applicant for license and shall give an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating cost, fundamentals of installation and design as same pertain to refrigeration; and as a result of such examination, the Board shall issue a certificate of license in refrigeration to applicants who pass the required examination and a license shall be obtained in accordance with the provisions of this article, before any person, firm or corporation shall engage in, or offer to engage in the business of refrigeration contracting as herein defined. Each application for examination shall be accompanied by a check, post-office money order or cash in the amount of the annual license fee required by this article. Regular examinations shall be given in the months of April and October of each year and additional examinations may be given at such other times as the Board may deem wise and necessary. Any person may demand in writing a special examination and upon payment by the applicant of the cost of holding such examination and the deposit of the amount of the annual license fee, the Board in its discretion will fix a time and place for such examination. A person who fails to pass any examination shall not be re-examined until the next regular examination.

(e) The requirements of this article shall apply only to persons, firms or corporations who engage in, or attempt to engage in, the business of refrigeration in cities or towns having a population of more than 10,000 in accordance with the last official United States census.

(f) Persons who have an established place of business prior to January 1, 1956, and who produce satisfactory evidence that they are engaged in the refrigeration business as herein defined, shall be granted a certificate of license, without examination, upon application to the Board and payment of the license fee.

(g) The current license issued in accordance with the provisions of this article shall be posted in the business location of the licensee, and its number shall appear on all proposals or contracts and requests for permits issued by municipalities. (1955, c. 912, s. 7.)

§ 87-59. Revocation or suspension of license for cause.—The Board shall have power to revoke or suspend the license of any refrigeration contractor who is guilty of any fraud or deceit in obtaining a license, or who fails to comply with any provision or requirement of this article, or for gross negligence, incompetency, or misconduct, in the practice of or in carrying on the business of a refrigeration contractor as defined in this article. Any person may prefer charges of such fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this article, against any refrigeration contractor who is licensed under the provisions of this article. All of such charges shall be in writing and verified by the complainant, and such charges shall be heard and determined by the Board in accordance with the provisions of chapter 150 of the General Statutes. (1955, c. 912, s. 8.)

§ 87-60. Re-issuance of revoked licenses; replacing lost or destroyed licenses.—The Board may in its discretion re-issue license to any person, firm or corporation whose license may have been revoked: Provided, three or more members of the Board vote in favor of such re-issuance for reasons deemed sufficient by the Board. A new certificate of registration to replace any license which may be lost or destroyed may be issued subject to the rules and regulations of the board. (1955, c. 912, s. 9.)

§ 87-61. Violations made misdemeanor; employees of licensees excepted.—Any person, firm or corporation who shall engage in or offer to engage in, or carry on the business of refrigeration contracting as defined in this article, without first having been licensed to engage in such business, or businesses, as required by the provisions of this article; or any person, firm or corporation holding a refrigeration license under the provisions of this article who shall practice or offer to practice or carry on any type of refrigeration contracting not authorized by said license; or any person, firm or corporation who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a license, or who shall falsely impersonate any other practitioner of like or different name, or who shall use an expired or revoked license, or who shall violate any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction fined not less than one hundred dollars (\$100.00) or imprisoned for not more than three months, or both, in the discretion of the court. Employees, while working under the supervision and jurisdiction of a person, firm or corporation licensed in accordance with the provisions of this article, shall not be construed to have engaged in the business of refrigeration contracting. (1955, c. 912, s. 10.)

§ 87-62. Only one person in partnership or corporation need have license.—A corporation or partnership may engage in the business of refrigeration contracting provided one or more persons connected with such corporation or partnership is registered and licensed as herein required; and provided such licensed person shall execute all contracts, exercise general supervision over the work done thereunder and be responsible for compliance with all the provisions of this article. Nothing in this article shall prohibit any employee from becoming licensed pursuant to the provisions thereof. (1955, c. 912, s. 11.)

§ 87-63. **License fees payable in advance; application of.**— All license fees shall be paid in advance as hereafter provided to the secretary and treasurer of the Board and by him held as a fund for the use of the Board. The compensation and expenses of the members of the Board as herein provided, the salaries of its employees, and all expenses incurred in the discharge of its duties under this article shall be paid out of such fund, upon the warrant of the chairman and secretary and treasurer: Provided, upon the payment of the necessary expenses of the Board as herein set out, and the retention by it of twenty-five per centum (25%) of the balance of funds collected hereunder, the residue, if any, shall be paid to the State Treasurer. (1955, c. 912, s. 12.)

§ 87-64. **Examination and license fees; annual renewal.**—Each applicant for a license by examination shall pay to the secretary and treasurer of the Board an examination fee in an amount not to exceed the sum of twenty-five dollars (\$25.00) before being admitted to the examination. In the event said applicant shall fail to pass the examination, the examination fee so paid shall be refunded by the Board.

The license of every person licensed under the provisions of this statute shall be annually renewed. On or before November 1 of each year the Board shall cause to be mailed an application for renewal of license to every person who has received from the Board a license to engage in the refrigeration business, as heretofore defined. On or before January 1 of each year every licensed person who desires to continue in the refrigeration business shall forward to the Board a renewal fee of twenty-five dollars (\$25.00) together with the application for renewal. Upon receipt of the application and renewal fee the Board shall issue a renewal certificate for the current year. Failure to renew the license annually shall automatically result in a forfeiture of the right to engage in the refrigeration business. Any licensee who allows his license to lapse may be reinstated by the Board upon payment of a fee of thirty dollars (\$30.00); provided any person who fails to renew his license for two consecutive years shall be required to take and pass the examination prescribed by the Board for new applicants before being licensed to engage further in the refrigeration business. (1955, c. 912, s. 13.)

Chapter 88.

Cosmetic Art.

Sec.

88-27. Procedure for refusal, suspension
or revocation of certificate.

§ 88-10. **Qualifications for certificate of registration.**—No person shall be issued a certificate of registration as a registered apprentice by the State Board of Cosmetic Art Examiners, hereinafter established—

(a) Unless such person is at least sixteen years of age.

(b) Unless such person passes a satisfactory physical examination prescribed by the said Board of Cosmetic Art Examiners.

(c) Unless such person has completed at least one thousand hours in classes in a reliable cosmetic art school, or college approved by said Board of Cosmetic Art Examiners.

(d) Unless such person passes the examination prescribed by the Board of Cosmetic Art Examiners and pays the required fees hereinafter enumerated.

(e) Unless such person is admitted as an apprentice under the reciprocity section of this chapter. (1933, c. 179, s. 10; 1941, c. 234, s. 1; 1953, c. 1304, ss. 1, 2.)

Editor's Note.—

The 1953 amendment substituted "six-

teen" for "eighteen" in subsection (a) and added subsection (e).

§ 88-12. Qualifications for registered cosmetologist.

(b) Who is at least seventeen years of age.
(1953, c. 1304, s. 3.)

Editor's Note.—The 1953 amendment was not affected by the amendment only substituted “seventeen” for “nineteen” in subsection (b) is set out. subsection (b). As the rest of the section

§ 88-14. Office in Raleigh; seal; officers and secretary.—The Board of Cosmetic Art Examiners shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. Said Board shall elect its own officers and in addition thereto shall employ an executive secretary, who shall not be a member of the Board. The salary of such executive secretary shall be fixed by the Board with the approval of the Director of the Budget of the State of North Carolina. The secretary shall keep and preserve all the records of the Board, issue all necessary notices and perform such other duties, clerical and otherwise, as may be imposed upon such secretary by said Board of Cosmetic Art Examiners. The secretary is hereby authorized and empowered to collect in the name and on behalf of said Board the fees prescribed by this chapter and shall turn over to the State Treasurer all funds collected or received under this chapter, which fund shall be credited to the Board of Cosmetic Art Examiners, and said funds shall be held and expended under the supervision of the Director of the Budget of the State of North Carolina exclusively for the administration and enforcement of the provisions of this chapter. The said secretary shall, before entering upon the duties of the office, execute a satisfactory bond with a duly licensed surety or other surety approved by the Director of the Budget, said bond to be in the penal sum of not less than ten thousand dollars (\$10,000.00), and conditioned upon the faithful performance of the duties of the office and the true and correct accounting of all funds received by such secretary by virtue of such office. Nothing in this chapter shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer, derived from fees and fines collected under the provisions of this chapter and received by the State Treasurer in the manner aforesaid. (1933, c. 179, s. 14; 1943, c. 354, s. 1; 1957, c. 1184, s. 1.)

Editor's Note.— second sentence and inserted the present The 1957 amendment deleted the former second and third sentences in lieu thereof.

§ 88-15. Compensation and expenses of Board members; inspectors; reports; budget; audit.—Each member of the Board of Cosmetic Art Examiners shall receive for such services an annual salary in an amount to be fixed by the Director of the Budget, and shall be reimbursed for actual necessary expenses incurred in the discharge of such duties, not to exceed eight dollars (\$8.00) per day for subsistence, plus the actual traveling expenses, or an allowance of seven cents (7c) per mile where such member uses his or her personally owned automobile.

(1957, c. 1184, s. 2.)

Editor's Note.— to \$8.00 and from 5¢ to 7¢. As only the The 1957 amendment changed the first paragraph was changed, the rest of the amounts in the first paragraph from \$5.00 the section is not set out.

§ 88-19. Admitting operators from other states.—Any person who has been licensed to practice cosmetic art in another state, either as an apprentice or registered cosmetologist by the examining board of such other state by whatever name called, shall be admitted to practice cosmetic art in North Carolina under the same reciprocity or comity provisions which the state of his or her registration or licensing grants to cosmetologists licensed under the laws of this State. All applicants from states which have no examining, licensing or registering board or agency for cosmetologists and all applicants from states which do not

grant reciprocity or comity to cosmetologists licensed under the laws of this State, before being issued a certificate of registration to practice cosmetic art in this State, must have completed at least one thousand (1,000) hours in classes in a reliable college approved by the Board of Cosmetic Art Examiners and shall be required to take and pass an examination as provided in subsection (e) of G. S. 88-20 and pay a fee of fifteen dollars (\$15.00) in addition to the regular license fee of five dollars (\$5.00). (1933, c. 179, s. 19; 1953, c. 1304, s. 4; 1957, c. 1184, s. 3.)

Editor's Note.—The 1953 amendment rewrote this section. The 1957 amendment increased the regular license fee from \$3.50 to \$5.00.

§ 88-21. Fees required.—The fee to be paid by an applicant for a certificate of registration to practice cosmetic art as an apprentice shall be three dollars. The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered cosmetologist shall be five dollars. The regular or annual license fee of a registered cosmetologist shall be five dollars (\$5.00), and the renewal of the license of a registered cosmetologist shall be five dollars (\$5.00) if renewed before the same becomes delinquent, and if renewed after the same becomes delinquent there shall be charged a penalty of one dollar and fifty cents (\$1.50) in addition to the regular license fee of five dollars (\$5.00); the annual license fee of a registered apprentice shall be two dollars and fifty cents (\$2.50), and all licenses, both for apprentices and for registered cosmetologists, shall be renewed as of the 30th day of June each and every year. All cosmetic art schools shall pay a fee of ten dollars (\$10.00) annually. The fees herein set out shall not be increased by the Board of Cosmetic Art Examiners, but said Board may regulate the payment of said fees and prorate the license fees in such manner as it deems expedient. The fee for registration of an expired certificate for a registered cosmetologist shall be five dollars and registration of an expired certificate of an apprentice shall be three dollars. (1933, c. 179, s. 21; 1955, c. 1265.)

Editor's Note.—The 1955 amendment rewrote the third and fourth sentences.

§ 88-25. Annual renewal of certificates.—Every registered cosmetologist and every registered apprentice, who continues in active practice or service shall annually, on or before June 30th, of each year, file with the secretary of the Board, a renewal certificate as to physical fitness, renew his, or her certificate of registration which has not been renewed prior to, or during the month of July in any year, and which shall expire on the first day of August in that year. A registered cosmetologist, or a registered apprentice whose certificate of registration has expired may have his or her certificate restored immediately upon payment of the required restoration fee, and furnishing to the secretary of the Board renewal certificate as to physical fitness. Any registered cosmetologist who retires from the practice of cosmetic art for not more than three years may renew his or her certificate of registration upon payment of the required restoration fee, and by paying the license fee for the years that such license fees have not been paid. (1933, c. 179, s. 25; 1957, c. 1184, s. 4.)

Editor's Note.—Prior to the 1957 amendment the part of the last sentence after the comma read: "and by furnishing to the secretary of the Board renewal certificate as to physical fitness."

§ 88-27. Procedure for refusal, suspension or revocation of certificate.—The Board may neither refuse to issue, nor refuse to renew, nor suspend, nor revoke any certificate of registration, however, for any of these causes, except in accordance with the provisions of chapter 150 of the General Statutes. (1933, c. 179, s. 27; 1939, c. 218, s. 1; 1953, c. 1041, s. 8.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, added the reference to chapter 150 of the General Statutes, and made other changes.

Chapter 89.

Engineering and Land Surveying.

Sec.	Short title.	Sec.	revocation of registration; hearing and procedure; re-issuance of certificate.
89-1.	Short title.	89-10.	Effect of certification; seals.
89-2.	Definitions.	89-11.	Unauthorized practice of engineering or land surveying; penalties.
89-3.	Registration requirements.	89-12.	Limitations on application of chapter.
89-4.	State Board of Registration created; powers; duties; qualifications and compensation.	89-13.	Corporate or partnership practice of engineering or land surveying.
89-5.	Secretary, duties and liabilities; expenditures.	89-14.	Land surveyors.
89-6.	Records and reports of Board; evidence.	89-15.	Existing registration not affected; persons not representing themselves to be registered.
89-7.	Certification by Board; qualification requirements.	89-16.	Manual of practice for land surveyors.
89-8.	Further as to qualifications; denial or expiration and renewal of certificate.		
89-9.	Determining charges of malpractice, etc.; reprimand or suspension or		

§ 89-1. **Short title.**—This chapter shall be known by the short title of “The North Carolina Engineering and Land Surveying Act.” (1951, c. 1084, s. 1.)

Editor’s Note.—The 1951 amendment rewrote this chapter which formerly consisted of §§ 89-1 to 89-17.

§ 89-2. **Definitions.**—When used in this chapter, unless the context otherwise requires:

(a) The term “engineer” as used in this chapter shall mean a professional engineer as hereinafter defined.

(a1) The term “professional engineer” within the meaning and intent of this chapter shall mean a person who, by reason of his special knowledge of the mathematical, physical and engineering sciences, and the principles and methods of engineering analysis and design, acquired by professional education, and/or practical experience, is qualified to engage in the practice of professional engineering as hereinafter defined, as attested by his legal registration as a professional engineer.

(b) The term “engineer-in-training” within the meaning and intent of this chapter shall mean a candidate for registration as a professional engineer who is certified as having satisfactorily passed the basic written examination, in the fundamentals of engineering, to be given by the Board, as hereinafter provided in this chapter. The Board is hereby given power to offer this grade of registration, which is designed primarily for graduates just leaving college, when and if the Board considers it expedient.

(c) The term “practice of professional engineering” within the meaning and intent of this chapter shall mean any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures or building incidental to machines, equipment, processes, works or projects, but the practice of engineering under this chapter shall not include, the work ordinarily performed by persons who operate or perform routine maintenance on machinery, equipment and structures or of mechanics in the performance of their established functions; the execution of work as distinguished

from the planning or design thereof, and the supervision of construction of such work as a foreman or superintendent; services performed by employees of a company engaged in manufacturing operations, or by employees of laboratory research affiliates of such a manufacturing company which is incidental to the manufacture, sales and installation of the products of the company; inspection and service work done by employees of the State of North Carolina, any political subdivision thereof or any municipality therein, and of insurance companies or insurance agents; services performed by those ordinarily designated as chief operating engineer, locomotive, stationary, marine, power plant, or hoisting and portable engine operators, or electrical maintenance or service engineers, or service engineers employed in connection with street lighting, traffic control signals, police and fire alarm systems, waterworks, steam electric and sewage treatment and disposal plants, or the service ordinarily performed by any workman regularly employed as locomotive, stationary, marine, power plant, or hoisting and portable engine operator, or electrical maintenance or service engineer for any corporation, contractor, or employer; services performed by those persons ordinarily designated as supervising engineer, or superintendent of power, or supervising electrical maintenance or service engineers who supervise the operation of, or who operate machinery or equipment, or who supervise the construction of equipment within a plant which is under their own immediate supervision; services of superintendents, inspectors or foremen employed by the State of North Carolina or any political subdivision thereof, or municipal corporation therein, contractors or owners in the construction of engineering works or the installation of equipment.

A person shall be construed to practice engineering, within the intent and meaning of this chapter, who practices or offers to practice any branch of engineering; or who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be, or capable of being, an engineer, or through the use of some other title implies that he is an engineer; or who does perform any engineering service or work or professional service recognized by the profession as engineering.

(d) The term "land surveyor" as used in this chapter shall mean a person who engages in the practice of land surveying as hereinafter defined.

(e) The term "practice of land surveying" within the meaning and intent of this chapter includes surveying of areas for their correct determination and for conveyancing, or for the establishment or re-establishment of land boundaries or for the plotting of lands and subdivisions thereof, or the determination of elevations and the drawing descriptions of lands or lines so surveyed.

(f) The term "Board" as used in this chapter shall mean the State Board of Registration for Professional Engineers and Land Surveyors provided for by this chapter. (1951, c. 1084, s. 1; 1953, c. 999, s. 1.)

Editor's Note.—The 1953 amendment inserted present subsection (a) and redesignated former subsection (a) as (a1).

§ 89-3. Registration requirements.—In order to safeguard life, health, and property, any person practicing or offering to practice engineering or land surveying in this State shall hereafter be required to submit satisfactory evidence to the Board that he is qualified so to practice, and shall be registered as hereinafter provided; and it shall be unlawful for any person to practice or offer to practice engineering or land surveying in this State, as herein defined, unless such person has been duly registered under the provisions of this chapter. (1921, c. 1, s. 1; C. S., s. 6055(b); 1951, c. 1084, s. 1.)

§ 89-4. State Board of Registration created; powers; duties; qualifications and compensation.—To carry out the provisions of this chapter, the State Board of Registration for Professional Engineers and Land Surveyors is

hereby created, whose duty it shall be to administer the provisions of this chapter. The Board shall consist of four registered engineers and one registered land surveyor, appointed by the Governor. Each member of the Board shall be a citizen of the United States, a resident of this State, and shall have been a practicing registered engineer, or registered land surveyor, in North Carolina for at least ten years. Each member of the Board shall receive ten dollars (\$10.00) per diem for attending the sessions of the Board or of its committees, and for time spent in necessary travel, and in addition shall be reimbursed for all necessary travel, and incidental and clerical expense incurred, in carrying out the provisions of this chapter. When the terms of office of the present members of the Board expire on 31 December 1957, one member shall be appointed for a term of one year, one member shall be appointed for a term of two years, one member shall be appointed for a term of three years, one member shall be appointed for a term of four years, and one member for a term of five years. Thereafter, as their terms of office expire their successors shall be appointed for terms of five years and shall serve until their successors are appointed and qualified. Each member shall continue in office after the expiration of his term until his successor shall be duly appointed and qualified. The Governor may remove any member of the Board for misconduct, incompetency, neglect of duty or for any other sufficient cause. Vacancies in the membership of the Board, however created, shall be filled by appointment by the Governor for the unexpired term. Each member of the Board shall receive a certificate of appointment from the Governor, and before beginning his term of office he shall file with the Secretary of State the constitutional oath of office. Notwithstanding anything herein contained, the present members of the Board shall continue in office as members of said Board until their present respective terms expire.

The Board shall have power to compel the attendance of witnesses, may administer oaths and may take testimony and proofs concerning all matters within its jurisdiction. The Board shall adopt and have an official seal, which shall be affixed to all certificates of registration granted; and shall make all bylaws and rules, not inconsistent with law, needed in performing its duty.

The Board shall hold at least two regular meetings each year. Special meetings shall be held at such times as the bylaws of the Board may provide. Notice of all meetings shall be given in such manner as the bylaws may provide. The Board shall elect annually from its members a chairman, a vice-chairman, and a secretary. The secretary shall receive compensation at a rate to be determined by the Board. A quorum of the Board shall consist of not less than three members. (1921, c. 1, ss. 3 to 6; C. S., ss. 6055(d) to 6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1.)

Editor's Note.—The 1957 amendment changed the term of office which formerly lasted for a period of four years.

§ 89-5. Secretary, duties and liabilities; expenditures.—The secretary of the Board shall receive and account for all moneys derived from the operation of this chapter, and shall pay them to the State Treasurer, who shall keep such moneys in a separate fund, to be known as the "Fund of the Board of Registration for Professional Engineers and Land Surveyors," which fund shall be continued from year to year separate and apart from all other moneys in the State treasury, and shall be drawn against only for the purposes of this chapter as herein provided. All expenses certified by the Board as properly and necessarily incurred in the discharge of its duties, including authorized compensation, shall be paid out of said fund on the warrant of the Auditor of the State, issued on requisition signed by the chairman and secretary of the Board: Provided, however, that at no time shall the total of warrants issued exceed the total amount of funds accumulated under this chapter. The secretary of the Board shall give a surety bond satisfactory to the State Treasurer, conditioned upon the faithful

performance of his duties. The premium on said bond shall be regarded as a proper and necessary expense of the Board. (1921, c. 1, s. 7; C. S., s. 6055(h); 1951, c. 1084, s. 1.)

§ 89-6. **Records and reports of Board; evidence.**—The Board shall keep a record of its proceedings and a register of all applicants for registration, showing for each the date of application, name, age, education and other qualifications, place of business and place of residence, whether the applicant was rejected or a certificate of registration granted, and the date of such action. The books and register of the Board shall be prima facie evidence of all matters recorded therein, and a copy duly certified by the secretary of the Board under seal shall be admissible in evidence as if the original were produced. A roster showing the names and places of business and of residence of all registered professional engineers and land surveyors shall be prepared by the secretary of the Board during the month of January of each year; such roster shall be printed by the Board out of the fund of the said Board as provided in G. S. 89-5, and distributed as set forth in the bylaws. On or before the first day of March of each year the Board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of the receipts and expenditures of the Board, attested by the affidavits of the chairman and the secretary, and a copy of the said roster of registered professional engineers and registered land surveyors. (1921, c. 1, s. 8; C. S., s. 6055(i); 1951, c. 1084, s. 1.)

§ 89-7. **Certification by Board; qualification requirements.**—(a) Issuance of Certificates of Registration; Fees.—The Board shall issue a certificate of registration on application therefor on prescribed form, and on payment of a fee not to exceed fifty dollars (\$50.00) by engineer applicants, or on payment of a fee not to exceed thirty dollars (\$30.00) by land surveying applicants, or on payment of a fee not to exceed fifteen dollars (\$15.00) by engineer-in-training applicants to persons qualified under parts (1) and (2) of this subsection. This fee for candidates required to stand written examination shall be divided at the discretion of the Board between an application fee to be collected at the time application is made, an examination fee to be collected at the time the examination is taken, and a registration fee to be collected upon completion of all requirements for registration. The fee shall cover the cost of one examination and if any examination is failed and a re-examination is given, an additional fee will be required as set forth in G. S. 89-8. A candidate for registration who holds an unexpired certificate of registration in another state or territory of the United States, as set forth in G. S. 89-7 (a) (2), shall be charged the total current registration fee as fixed by the Board.

- (1) To any applicant who, in the opinion of the Board, has satisfactorily met all the requirements of this chapter; or
- (2) To any person who holds an unexpired certificate of registration issued to him by proper authority in any state or territory of the United States in which the requirements for the registration of engineers or land surveyors are of a standard satisfactory to the Board: Provided, however, that the engineering registration board of said states and territories shall grant full and equal reciprocal registration rights and privileges to North Carolina registrants: Provided, however, that no person shall be eligible for registration or certification who is under twenty-one years of age; who is not a citizen of the United States; who does not speak and write the English language; and, who is not of good character and repute, provided no applicant shall be refused the right to examination without being given opportunity to appear before the Board and present evidence in support of his application.

(b) Minimum Evidence of Qualification Requirements.—Unless disqualifying evidence be before the Board in considering an application, filled out as set forth in the bylaws or rules and regulations of the Board, the following shall be considered as minimum evidence satisfactory to the Board that the applicant is qualified for registration as an engineer or land surveyor or for certification as an engineer-in-training, respectively:

(1) As an engineer:

- a. Graduation in an engineering or science curriculum of four scholastic years or more from a school or college approved by the Board, and a specific record of four years or more of progressive experience in engineering work of a nature and level approved by the Board, and satisfactorily passing such basic examination or applied engineering examination, or both, written in the presence of and as required by the Board, all of which shall determine and indicate that the applicant is competent to practice engineering; or
- b. Graduation in a curriculum from a secondary school or equivalent approved by the Board, and a specific record of ten years or more of progressive experience in engineering work of a nature and level approved by the Board, and satisfactorily passing such basic examination or applied engineering examination, or both, written in the presence of and as required by the Board, all of which shall determine and indicate that the applicant is competent to practice engineering; or
- c. Rightful possession of an engineer-in-training certificate or equivalent issued in North Carolina or in another state where the requirements for this certificate are fundamentally the same as those in North Carolina, and a specific record of four years or more or progressive experience in engineering work of a nature and level approved by the Board, and satisfactorily passing such applied engineering examination written in the presence of and as required by the Board, all of which shall determine and indicate that the applicant is competent to practice engineering. At its discretion in evaluating years of experience in progressive engineering work under a, b and c above, the Board may give credit not in excess of one year for graduate study; the Board may give credit not in excess of two years for progressive land surveying work, engineering sales, or construction work; the Board may give credit not in excess of four years for the teaching of advanced engineering or science subjects of courses. In addition the Board may require an applicant to submit exhibits, drawings, designs, or other tangible evidence of engineering work executed by him and which he personally accomplished or supervised.

(2) As a registered land surveyor:

- a. Graduation from a school or college approved by the Board and including the satisfactory completion of a program of study in surveying approved by the Board, and a specific record of one year or more of progressive land surveying work of a nature and level approved by the Board, and satisfactorily passing such oral and written examination, written in the presence of and as required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying; or
- b. A specific record of five years or more of progressive land surveying work of a nature and level approved by the Board, and

satisfactorily passing such oral and written examination written in the presence of and as required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying. At its discretion in evaluating years of experience in land surveying work under (2) a and (2) b above, the Board may give credit not in excess of one year for the teaching of college level courses in land surveying. In addition the Board may require an applicant to submit exhibits, drawings, plats, or other tangible evidence of land surveying work executed by him and which he personally accomplished or supervised.

(3) As an engineer-in-training:

- a. Graduation in an engineering or science curriculum of four scholastic years or more from a school or college approved by the Board, and satisfactorily passing such basic examination written in the presence of and as required by the Board; or
- b. Graduation in a curriculum from a secondary school or equivalent approved by the Board, and a specific record of four years or more of progressive experience in engineering work of a nature and level approved by the Board, and satisfactorily passing such basic examination written in the presence of and as required by the Board. (1921, c. 1, s. 9; C. S., s. 6055(j); 1951, c. 1084, s. 1; 1953, c. 999, s. 2; 1957, c. 1060, ss. 2, 3.)

Editor's Note. — The 1957 amendment rewrote this section as changed by the 1953 amendment.

§ 89-8. Further as to qualifications; denial or expiration and renewal of certificate.—The satisfactory completion of each year of a curriculum in engineering of a school or college approved by the Board, may be considered as equivalent to a year of experience in G. S. 89-7. Graduation in a curriculum other than engineering from a college or university approved by the Board may be considered as equivalent to two years of experience in G. S. 89-7: Provided, however, that no applicant shall receive credit for more than four years of experience in evaluating his undergraduate educational record.

Applicants for registration, in cases where the evidence originally presented in the application does not appear to the Board conclusive or warranting the issuing of a certificate, may present further evidence for consideration of the Board.

In case the Board denies the issuance of a certificate to an applicant, the registration fee deposited shall be returned by the Board to the applicant; and such denial must be in accordance with the provisions of chapter 150 of the General Statutes.

A candidate failing an examination may apply, and be considered by the Board, for re-examination at the end of six months. The Board shall make such re-examination charge as is necessary to defray the cost of the examination provided the charge for any one re-examination shall not exceed twenty dollars (\$20.00).

Certificates for registration shall expire on the last day of the month of December next following their issuance or renewal, and shall become invalid on that date unless renewed. It shall be the duty of the secretary of the Board to notify by mail every person, except engineers-in-training, registered hereunder, of the date of the expiration of his certificate and the amount of the fee required for its renewal for one year; such notice shall be mailed at least one month in advance of the date of expiration of such certificate. Renewal shall be effected at any time during the month of January immediately following, by payment to the secretary of the Board of a renewal fee, as determined by the Board, which shall not exceed ten dollars (\$10.00). Failure on the part of any regis-

trant to renew his certificate annually in the month of January, as required above, shall deprive the registrant of the right to practice until renewal has been effected. Renewal may be effected at any time during the first thirty-six months immediately following its invalidation on payment of the renewal fee increased ten per cent (10%) for each month or fraction of a month that payment for renewal is delayed. Failure of a registrant to renew his registration for a period of thirty-six months shall require the individual, prior to resuming practice in North Carolina, to submit an application therefor on the prescribed form, and to meet all other requirements for registration as set forth in G. S. 89-7. The secretary of the Board is instructed to remove from the official roster of engineers and land surveyors the names of all registrants who have not affected their renewal by the first day of February immediately following the date of their expiration. The Board may enact rules to provide for renewals in distress or hardship cases due to military service, prolonged illness, or prolonged absence from the State, where the applicant for renewal demonstrates to the Board that he has maintained his active knowledge and professional status as an engineer or land surveyor, as the case may be. It shall be the responsibility of each registrant to inform the Board promptly concerning change in address. (1921, c. 1, s. 9; C. S., s. 6055(k); 1951, c. 1084, s. 1; 1953, c. 1041, s. 9; 1957, c. 1060, s. 4.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, rewrote the third paragraph of this section, adding the reference to chapter 150 of the General

Statutes.

The 1957 amendment rewrote the last two paragraphs.

§ 89-9. Determining charges of malpractice, etc.; reprimand or suspension as revocation of registration; hearing and procedure; re-issuance of certificate.—In the interest of protecting the public, the Board shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, unprofessional conduct, fraud, deceit, gross negligence, or gross incompetence or gross misconduct in obtaining a certificate of registration or in the practice of engineering or land surveying, made against any engineer, engineer-in-training, or land surveyor registered or certified in North Carolina and may administer the penalty of:

- (1) Reprimand;
- (2) Suspension from practice for a period not exceeding twelve months;
- (3) Revocation of registration; and
- (4) Probationary revocation, upon conditions set by the Board, with revocation upon failure to comply, as the case shall in their judgment warrant, for any of the following causes:
 - a. Commission of a criminal offense showing professional unfitness;
 - b. Conduct involving deceit, fraud, gross negligence, gross incompetence, or gross misconduct, in obtaining a certificate of registration in, or in the practice of, engineering or land surveying.

The Board may invoke the processes of the courts in any case in which they deem it desirable to do so, and shall formulate rules of procedure governing the hearing of charges directed against such person which shall conform as near as may be to the procedure now provided by law for hearings. Provided, however, that the Board in conducting the hearing shall have power to remove the same to any county in which the offense, or any part thereof, was committed, if in the opinion of the Board the ends of justice or convenience of witnesses require such removal. Any person may prefer charges against any engineer, an engineer-in-training, or a registered land surveyor; such charges shall be in writing and sworn to by the complainant and submitted to the Board. Charges unless dismissed without hearing by the Board as unfounded or trivial, shall be heard

and determined by the Board within three months after the date on which they are preferred. Such Board proceeding shall be in accordance with the provisions of chapter 150 of the General Statutes.

The Board may, by unanimous vote, for reasons they deem sufficient, at any time after the expiration of one year from the date of revocation and upon finding that the cause upon which such revocation was made no longer exists, reissue a certificate of registration to any such person whose certificate has been revoked.

The Board shall immediately notify the Secretary of State and the clerks of the several counties and municipalities in the State of the revocation of a certificate by it or the re-issuance of a certificate to a person whose certificate has previously been revoked. (1921, c. 1, s. 10; C. S., s. 6055(1); 1939, c. 218, s. 2; 1951, c. 1084, s. 1; 1953, c. 1041, s. 10; 1957, s. 1060, s. 5.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, rewrote this section, inserting therein the reference to chapter 150 of the General Statutes.

The 1957 amendment rewrote the first paragraph to appear as the first two paragraphs above.

§ 89-10. Effect of certification; seals.—The Board shall issue a certificate of registration upon payment of a registration fee as provided for in this chapter, to an applicant who, in the opinion of the Board, has satisfactorily met all the requirements of this chapter. In the case of a professional engineer, the certificate shall authorize the "practice of engineering." In the case of an engineer-in-training, the certificate shall state that the applicant has successfully passed the examination in fundamental engineering subjects required by the Board and has been enrolled as an "engineer-in-training." In the case of a land surveyor, the certificate shall authorize the "practice of land surveying." Certificates of registration and certificates as engineer-in-training shall show the full name of the registrant, and shall be signed by the chairman and the secretary of the Board under the seal of the Board.

The issuance of a certificate of registration by this Board shall be evidence that the person named therein is entitled to all the rights and privileges of a registered engineer, or registered land surveyor, or engineer-in-training, while the said certificate remains unrevoked or unexpired.

Each registrant hereunder shall, upon registration, obtain a seal of the design authorized by the Board, bearing the registrant's name and the legend, "registered engineer," or "registered land surveyor." All plans, specifications, plats, and reports issued by a registrant shall be stamped with said seal during the life of a registrant's certificate, but it shall be unlawful for anyone to stamp or seal any document or documents with said seal after the certificate of the registrant named thereon has expired or has been revoked, unless said certificate has been renewed or reissued. It shall be unlawful for any registrant to stamp or seal with said seal any documents other than those prepared by, or under the direct supervision of, the registrant. (1921, c. 1, s. 11; C. S., s. 6055(m); 1951, c. 1084, s. 1; 1957, c. 1060, s. 6.)

Editor's Note.—The 1957 amendment added the last sentence of the last paragraph.

§ 89-11. Unauthorized practice of engineering or land surveying; penalties.—Any person who is not legally authorized to engage in the practice of engineering or land surveying in this State according to the provisions of this chapter, and who shall so engage or offer to engage in the practice of engineering or land surveying in this State except as provided in G. S. 89-12, and any person presenting or attempting to file as his own the certificate or seal of registration of another, or who shall give false or forged evidence of any kind to the Board, or to any member thereof, in obtaining a certificate of registration, or who shall falsely impersonate any other practitioner of like or different name or who

shall use an expired or revoked certificate of registration or seal, or who shall violate any of the provisions of this chapter shall be deemed guilty of a misdemeanor, and shall for each offense of which he is convicted be punished by a fine of not less than one hundred dollars (\$100.00) or by imprisonment for three months, or by both fine and imprisonment, in the discretion of the court. (1921, c. 1, s. 12; C. S., s. 6055(n); 1951, c. 1084, s. 1.)

§ 89-12. Limitations on application of chapter.—This chapter shall not be construed to prevent or to affect:

(a) The practice of architecture or contracting or any other legally recognized profession or trade; or

(b) The practice of engineering or land surveying in this State by any person not a resident of this State and having no established place of business in this State, when this practice does not aggregate more than thirty days in any calendar year: Provided, however, that such person is legally qualified by registration to practice the said profession in his own state or country, in which the requirements and qualifications for obtaining a certificate of registration are satisfactory to the Board; or

(c) The practice of engineering or land surveying in this State not to aggregate more than thirty days by any person residing in this State, but whose residence has not been of sufficient duration for the Board to grant or deny registration: Provided, however, such person shall have filed an application for registration as a registered engineer or land surveyor and shall have paid the fee provided for in G. S. 89-7: Provided, that such a person is legally qualified by registration to practice engineering or land surveying in his own state or country in which the requirements and qualifications for obtaining a certificate of registration are satisfactory to the Board; or

(d) Engaging in engineering or land surveying as an employee or assistant to or under the supervision of a registered engineer or a registered land surveyor, or as an employee or assistant of a nonresident engineer or a nonresident land surveyor, provided for in paragraphs (b) and (c) of this section: Provided, that said work as an employee may not include responsible charge of design or supervision; or

(e) The practice of engineering or land surveying by any person not a resident of, and having no established place of business in, this State, as a consulting associate of an engineer or land surveyor registered under the provisions of this chapter: Provided, the nonresident is qualified for such professional service in his own state or country; or

(f) At the discretion of the Board a noncitizen of the United States who is professionally qualified for registration may be registered, on an annual renewal basis, for a specific engineering project, subject to revocation as provided in this chapter.

(g) Practice of engineering and land surveying solely as an officer in the armed forces of the United States government.

(h) The practice of engineering or land surveying by an individual, firm, or corporation, or by a person employed solely by said individual, firm, or corporation on property owned or leased by said individual, firm, or corporation unless the life, health, or property of the public are endangered, involved, or influenced.

(i) A registered engineer engaging in the practice of land surveying. (1921, c. 1, s. 13; C. S., s. 6055(o); 1951, c. 1084, s. 1.)

§ 89-13. Corporate or partnership practice of engineering or land surveying.—A corporation or partnership may engage in the practice of engineering or land surveying in this State: Provided, however, the person or persons connected with such corporation or partnership in charge of the designing or supervision which constitutes such practice is or are registered as herein required of professional engineers and land surveyors. The same exemptions shall

apply to corporations and partnerships as apply to individuals under this chapter. (1921, c. 1, s. 14; C. S., s. 6055(p); 1951, c. 1084, s. 1.)

§ 89-14. **Land surveyors.**—At any time within eighteen months after April 14, 1951, upon new application therefor and the payment of a registration fee of ten dollars (\$10.00), the Board shall issue a certificate of registration without oral or written examination, to any land surveyor, when such applicant shall submit evidence under oath, satisfactory to the Board, that he is of good moral character, has been a resident of the State and has practiced land surveying in North Carolina for at least five years immediately preceding January 1, 1951, or has had previous land surveying practice of a character satisfactory to the Board. (1921, c. 1, s. 15; C. S., s. 6055(q); 1951, c. 1084, s. 1.)

§ 89-15. **Existing registration not affected; persons not representing themselves to be registered.**—Nothing in this chapter shall be construed as affecting the status of registration of any engineer or land surveyor who is rightfully in possession of a certificate of registration duly issued by the Board and prior to April 14, 1951.

Nothing in this chapter shall prohibit any person from doing land surveying provided that he does not represent himself to be a registered land surveyor. (1951, c. 1084, s. 1.)

§ 89-16. **Manual of practice for land surveyors.**—The State Board of Registration for Engineers and Land Surveyors, provided for in chapter 89 of the General Statutes of North Carolina, are authorized and directed to prepare or have prepared and approved a manual of practice for the information and guidance of those engaged in the practice of land surveying in North Carolina. The expenses incurred in the preparation and necessary for the distribution of said manual are to be paid from the fund of the Board of Registration for Engineers and Land Surveyors in accordance with the provisions of G. S. 89-7. (1953, c. 1215.)

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ARTICLE 1.

Practice of Medicine.

§ 90-8. Officers may swear applicants and summon witnesses.—The president and secretary of the Board of Medical Examiners of this State shall have power to administer oaths to all persons who may apply for examination before the Board. or to any other persons deemed necessary in connection with performing the duties of the Board as imposed by law. The Board shall have power to summon any witnesses deemed necessary to testify under oath in connection with any cause to be heard before it; or to summon any licentiate against whom charges are preferred in writing, and the failure of the licentiate, against whom charges are preferred, to appear at the stated time and place to answer to the charges, after due notice or summons has been served in writing, shall be deemed a waiver of his right to said hearing, as provided in § 90-14.2. (1913, c. 20, s. 7; C. S., s. 6612; Ex. Sess. 1921, c. 44, s. 3; 1953, c. 1248, s. 1.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, substituted "90-14.2" for "90-14" at the end of this section.

§ 90-14. Board may rescind license.—The Board shall have the power to revoke and rescind any license granted by it, when, after due notice and hearing, it shall find that any physician licensed by it has been guilty of grossly immoral conduct, or of producing or attempting to produce a criminal abortion, or, by false and fraudulent representations, has obtained or attempted to obtain, practice in his profession, or is habitually addicted to the use of morphine, cocaine or other narcotic drugs, or is habitually addicted to the use of marijuana, barbiturates, demerol or any other habit forming drug or derivative of such drug, or has by false or fraudulent representations of his professional skill obtained, or attempted to obtain, money or anything of value, or has advertised or held himself out under a name other than his own, or has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he holds a license, or is guilty of any fraud or deceit by which he was admitted to practice, or has been guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession, or has been convicted in any court, state or federal, of any felony or other criminal offense involving moral turpitude, or has been adjudicated a mental incompetent or whose mental condition renders him unable safely to practice medicine. Upon the hearing before said Board of any charge involving a conviction of such felony or other criminal offense, a transcript of the record thereof certified by the clerk of the court in which such conviction is had, shall be sufficient evidence to justify the revocation or rescinding of such license. And, for any of the above reasons, the said Board of Medical Examiners may refuse to issue a license to an ap-

plicant. The findings and actions of the Board of Medical Examiners in revoking or rescinding and refusing to issue licenses under this section shall be subject to review upon appeal to the superior court, as hereinafter provided in this article. The said Board of Medical Examiners may, in its discretion, restore a license so revoked and rescinded, upon due notice being given and hearing had, and satisfactory evidence produced of reformation of the licentiate. (C. S., s. 6618; 1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; 1953, c. 1248, s. 2.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, inserted in the first sentence the provision as to marijuana, barbiturates, etc., and added the clause as to mental condi-

tion at the end of the sentence. It deleted the former provision as to conclusiveness of findings of the Board, and inserted the next to last sentence.

§ 90-14.1. Judicial review of Board's decision denying issuance of a license.—Whenever the Board of Medical Examiners has determined that a person who has duly made application to take an examination to be given by the Board showing his education, training and other qualifications required by said Board, or that a person who has taken and passed an examination given by the Board, has failed to satisfy the Board of his qualifications to be examined or to be issued a license, for any cause other than failure to pass an examination, the Board shall immediately notify such person of its decision, and indicate in what respect the applicant has so failed to satisfy the Board. Such applicant shall be given a formal hearing before the Board upon request of such applicant filed with or mailed by registered mail to the secretary of the Board at Raleigh, North Carolina, within ten days after receipt of the Board's decision, stating the reasons for such request. The Board shall within twenty days of receipt of such request notify such applicant of the time and place of a public hearing, which shall be held within a reasonable time. The burden of satisfying the Board of his qualifications for licensure shall be upon the applicant. Following such hearing, the Board shall determine whether the applicant is qualified to be examined or is entitled to be licensed as the case may be. Any such decision of the Board shall be subject to judicial review upon appeal to the Superior Court of Wake County upon the filing with the Board of a written notice of appeal with exceptions taken to the decision of the Board within twenty days after service of notice of the Board's final decision. Within thirty days after receipt of notice of appeal, the secretary of the Board shall certify to the clerk of the Superior Court of Wake County the record of the case which shall include a copy of the notice of hearing, a transcript of the testimony and evidence received at the hearing, a copy of the decision of the Board, and a copy of the notice of appeal and exceptions. Upon appeal the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony may be taken by the court. The decision of the Board shall be upheld unless the substantial rights of the applicant have been prejudiced because the decision of the Board is in violation of law or is not supported by any evidence admissible under this article, or is arbitrary or capricious. Each party to the review proceeding may appeal to the Supreme Court as hereinafter provided in section 90-14.11. (1953, c. 1248, s. 3.)

§ 90-14.2. Hearing before revocation or suspension of a license.— Before the Board shall revoke or rescind any license granted by it to any physician, it will give to the physician a written notice indicating the general nature of the charges, accusation, or complaints preferred against him and stating that the licensee will be given an opportunity to be heard concerning such charges or complaints at a time and place stated in such notice, or to be thereafter fixed by the Board, and shall hold a public hearing not less than thirty days from the date of the service of such notice upon such licensee, at which he may appear personally or through counsel, may cross-examine witnesses and present

evidence in his own behalf. A physician who is mentally incompetent shall be represented at such hearing and shall be served with notice as herein provided by and through a guardian ad litem appointed by the clerk of the court of the county in which the physician has his residence. Such licensee or physician may, if he desires, file written answers to the charges or complaints preferred against him within thirty days after the service of such notice, which answer shall become a part of the record but shall not constitute evidence in the case. (1953, c. 1248, s. 3.)

§ 90-14.3. **Service of notices.**—Any notice required by this chapter may be served either personally or by an officer authorized by law to serve process, or by registered mail, return receipt requested, directed to the licensee or applicant at his last known address as shown by the records of the Board. If notice is served personally, it shall be deemed to have been served at the time when the officer delivers the notice to the person addressed. Where notice is served by registered mail, it shall be deemed to have been served on the date borne by the return receipt showing delivery of the notice to addressee or refusal of the addressee to accept the notice. (1953, c. 1248, s. 3.)

§ 90-14.4. **Place of hearings for revocation or suspension of license.**—Upon written request of the accused physician, given to the secretary of the Board twenty days after service of the charges or complaints against him, a hearing for the purpose of determining revocation or suspension of his license shall be conducted in the county in which such physician maintains his residence, or at the election of the Board, in any county in which the act or acts complained of occurred. In the absence of such request, the hearing shall be held at a place designated by the Board, or as agreed upon by the physician and the Board. (1953, c. 1248, s. 3.)

§ 90-14.5. **Use of trial examiner or depositions.**—Where the licensee requests that the hearing herein provided for be held by the Board in a county other than the county designated for the holding of the meeting of the Board at which the matter is to be heard, the Board may designate in writing one or more of its members to conduct the hearing as a trial examiner or trial committee, to take evidence and report a written transcript thereof to the Board at a meeting where a majority of the members are present and participating in the decision. Evidence and testimony may also be presented at such hearings and to the Board in the form of depositions taken before any person designated in writing by the Board for such purpose or before any person authorized to administer oaths, in accordance with the procedure for the taking of depositions in civil actions in the superior court. (1953, c. 1248, s. 3.)

§ 90-14.6. **Evidence admissible.**—In proceedings held pursuant to this article the Board shall admit and hear evidence in the same manner and form as prescribed by law for civil actions. A complete record of such evidence shall be made, together with the other proceedings incident to such hearing. (1953, c. 1248, s. 3.)

§ 90-14.7. **Procedure where person fails to request or appear for hearing.**—If a person who has requested a hearing does not appear, and no continuance has been granted, the Board or its trial examiner or committee may hear the evidence of such witnesses as may have appeared, and the Board may proceed to consider the matter and dispose of it on the basis of the evidence before it. For good cause, the Board may reopen any case for further hearing. (1953, c. 1248, s. 3.)

§ 90-14.8. **Appeal from Board's decision revoking or suspending a license.**—A physician whose license is revoked or suspended by the Board may

obtain a review of the decision of the Board in the Superior Court of Wake County or in the superior court in the county in which the hearing was held or upon agreement of the parties to the appeal in any other superior court of the State, upon filing with the secretary of the Board a written notice of appeal within twenty days after the date of the service of the decision of the Board, stating all exceptions taken to the decision of the Board and indicating the court in which the appeal is to be heard.

Within thirty days after the receipt of a notice of appeal as herein provided, either by an applicant or a licensee, the Board shall prepare, certify and file with the clerk of the superior court in the county to which the appeal is directed the record of the case comprising a copy of the charges, notice of hearing, transcript of testimony, and copies of documents or other written evidence produced at the hearing, decision of the Board, and notice of appeal containing exceptions to the decision of the Board. (1953, c. 1248, s. 3.)

§ 90-14.9. Appeal bond; stay of Board order.—The person seeking the review shall file with the clerk of the reviewing court a copy of the notice of appeal and an appeal bond of \$200 at the same time the notice of appeal is filed with the Board. At any time before or during the review proceeding the aggrieved person may apply to the reviewing court for an order staying the operation of the Board decision pending the outcome of the review, which the court may grant or deny in its discretion. (1953, c. 1248, s. 3.)

§ 90-14.10. Scope of review.—Upon the review of the Board's decision revoking or suspending a license, the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The court may affirm the decision of the Board or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material, and substantial evidence admissible under this article, or are arbitrary or capricious. At any time after the notice of appeal has been filed, the court may remand the case to the Board for the hearing of any additional evidence which is material and is not cumulative and which could not reasonably have been presented at the hearing before the Board. (1953, c. 1248, s. 3.)

§ 90-14.11. Appeal to Supreme Court; appeal bond.—Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the superior court under rules of procedure applicable in other civil cases. No appeal bond shall be required of the Board. The appealing party may apply to the superior court for a stay of that court's decision or a stay of the Board's decision, whichever shall be appropriate, pending the outcome of the appeal to the Supreme Court. (1953, c. 1248, s. 3.)

§ 90-14.12. Injunctions.—The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. (1953, c. 1248, s. 3.)

§ 90-15. License fee; salaries, fees and expenses of Board.—Each applicant for a license by examination shall pay to the treasurer of the Board of Medical Examiners of the State of North Carolina a fee which shall be prescribed by said Board in an amount not exceeding the sum of fifty dollars (\$50.00) before being admitted to the examination: Provided however, that in the case of applicants taking the examination in two halves, as provided in § 90-10, one-half of the prescribed fee shall be paid by the applicant for each of the two half exami-

nations. Whenever any license is granted without examination, as authorized in § 90-13, the applicant shall pay to the treasurer of the Board a fee in an amount to be prescribed by the Board not in excess of one hundred dollars (\$100.00). Whenever a limited license is granted as provided in § 90-12, the applicant shall pay to the treasurer of the Board a fee of fifty dollars (\$50.00), except where a limited license to practice within the confines of a hospital for the purpose of education or training, the applicant shall pay a fee of ten dollars (\$10.00). A fee of ten dollars (\$10.00) shall be paid for the issuance of a duplicate license. All fees shall be paid in advance to the treasurer of the Board of Medical Examiners of the State of North Carolina, to be held by him as a fund for the use of said Board. The compensation and expenses of the members and officers of the said Board and all expenses proper and necessary in the opinion of the Board to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of said fund, upon the warrant of the president and secretary of said Board. The salaries and fees of the officers and members of said Board shall be fixed by the Board but shall not exceed ten dollars (\$10.00) per day per member for time spent in the performance and discharge of his duties as a member of said Board, and reimbursement for travel and other necessary expenses incurred in the performance of his duties as a member of said Board. Any unexpended sum or sum of money remaining in the treasury of said Board at the expiration of the terms of office of the members thereof shall be paid over to their successors in office. (1858-9, c. 258, s. 13; Code, s. 3130; Rev., s. 4501; 1913, c. 20, ss. 4, 5; C. S., s. 6619; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; 1953, c. 187.)

§ 90-15.1. Registration every two years with Board.—Every person heretofore or hereafter licensed to practice medicine by said Board of Medical Examiners shall, during the month of January, 1958, and during the month of January in every even-numbered year thereafter, register with the secretary-treasurer of said Board his name and office and residence address and such other information as the Board may deem necessary and shall pay a registration fee fixed by the Board not in excess of five dollars (\$5.00). In the event a physician fails to register as herein provided he shall pay an additional amount of ten dollars (\$10.00) to the Board. Should a physician fail to register and pay the fees imposed, and should such failure continue for a period of thirty days, the license of such physician may be suspended by the Board, after notice and hearing at the next regular meeting of the Board. Upon payment of all fees and penalties which may be due, the license of any such physician shall be reinstated. (1957, c. 597.)

Editor's Note.—The act inserting this section is effective as of January 1, 1958.

§ 90-18. Practicing without license; practicing defined; penalties.

Cross Reference.—As to indictment and prosecution for violation of section, see note to § 90-21. **Quoted in** Crawford v. Crowell-Collier Pub. Co., 87 F. Supp. 509 (1949).

§ 90-19. Practicing without registration; penalties.

Cross Reference.—As to indictment and prosecution for violation of section, see note to § 90-21. **Quoted in** Crawford v. Crowell-Collier Pub. Co., 87 F. Supp. 509 (1949).

§ 90-20. Clerk punishable for illegally registering physician.

Cross Reference.—As to indictment and prosecution for violation of section, see note to § 90-21.

§ 90-21. Certain offenses prosecuted in superior court; duties of Attorney General.

This section merely establishes a method whereby the Board of Medical Examiners may procure an investigation by the Attorney General with respect to alleged violations of §§ 90-18 to 90-20. There is nothing in this chapter which requires the Board of Medical Examiners or the Attorney General to take any action before a criminal prosecution may be instituted for such violations. *State v. Loesch*, 237 N. C. 611, 75 S. E. (2d) 654 (1953).

Indictment Need Not Show Compliance with Section.—The contention that a strict compliance with the procedure outlined in this section is a prerequisite to any prosecution for the violation of §§ 90-18 to 90-20, and that a bill of indictment charging a violation of any such sections must show upon its face that there has been

a compliance with the provisions of this section, is without merit. It would be unnecessary to include these averments as a prerequisite to the validity of a bill of indictment charging a violation of § 90-18 even though the prosecution was instituted pursuant to a complaint filed by the Board of Medical Examiners with the Attorney General. *State v. Loesch*, 237 N. C. 611, 75 S. E. (2d) 654 (1953).

Solicitor Not Deprived of Authority and Duty to Prosecute.—There is nothing in this chapter which would or could deprive the solicitor of a district of his constitutional authority and sworn duty to prosecute violations of the criminal laws of the State. *State v. Loesch*, 237 N. C. 611, 75 S. E. (2d) 654 (1953).

ARTICLE 2.

Dentistry.

§ 90-22. Practice of dentistry regulated in public interest; article liberally construed; Board of Dental Examiners; membership.—The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This article shall be liberally construed to carry out these objects and purposes.

The North Carolina State Board of Dental Examiners heretofore created by chapter one hundred and thirty-nine, Public Laws, one thousand eight hundred and seventy-nine and by chapter one hundred and seventy-eight, Public Laws one thousand nine hundred and fifteen, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State, said Board to consist of six (6) members of the North Carolina Dental Society, to be elected by the said Society at its annual meeting; said members so elected to be commissioned by the Governor for a period of three years or until their successors are elected, commissioned and qualified. Any vacancy in the said Board shall be filled by a member of the North Carolina Dental Society to be elected by said Board by and with the consent and approval of the executive committee of the North Carolina Dental Society, and commissioned by the Governor to hold office for the unexpired term to which elected. Nothing in this article and no provision of this section shall in any way change the terms of office of the members of the North Carolina State Board of Dental Examiners as now constituted, and said members of said Board shall hold their office for the term to which they have been elected. (1935, c. 66, s. 1; 1957, c. 592, s. 1.)

Editor's Note.—The 1957 amendment added the first paragraph.

§ 90-29. Necessity for license; dentistry defined; certain practices exempted.—No person shall engage in the practice of dentistry in this State or attempt to do so without first having applied for and obtained a license for such purpose from the said North Carolina State Board of Dental Examiners, or with-

out first having obtained from said Board a certificate of renewal of license for the calendar year in which such person proposes to practice dentistry. The said Board may issue a "limited license" to employees of the Division of Oral Hygiene of the North Carolina Board of Health who are graduates of a reputable dental institution. Limited licenses shall be valid for one year from date of issue, or until the announcement of the results of the next succeeding examination conducted by the said Board, whichever shall first occur. Limited licensees may perform only such dental operations as may be authorized by the said Board and those only in the course of their official duties. No limited license shall confer any right or privilege upon the recipient not stated in such license and no limited license may be renewed after the date of its expiration. A person shall be deemed to practice dentistry in this State within the meaning of this article and this section of this article, who represents himself as being able to remove stains and accretions from teeth, diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the human teeth, alveolar process, gums or maxillary bones and associated tissues or parts and/or who offers or undertakes by any means or methods to remove stains or accretions from teeth, diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the same, or to take impressions of the teeth or jaws or who uses a Roentgen or X-ray machine for dental treatment, Roentgenograms or for dental diagnostic purposes, (except that a registered dental hygienist shall be permitted to take Roentgenograms), or who owns, maintains or operates an office for the practice of dentistry, or who engages in any of the practices included in the curricular of recognized and approved dental schools or colleges, or who is a manager, proprietor, operator or conductor of a place where dental operations are performed, or who performs dental operations of any kind gratuitously, or for a fee, gift, compensation or reward, paid or to be paid, either to himself or to another person or agency, or who furnishes, supplies, constructs, reproduces or repairs, or offers to furnish, supply, construct, reproduce or repair prosthetic dentures (sometimes known as "plates"), bridges or other substitutes for natural teeth, to the user or prospective user thereof.

The fact that a person uses any dental degree or designation or any card, device, directory, poster, sign or other media, whereby he represents himself to be a dentist practicing in the State, shall constitute prima facie evidence that such person is engaged in the practice of dentistry.

The following practices, acts, and operations, however, shall be exempt from the provisions of this article:

(a) Any act in the practice of his profession by a duly licensed physician or surgeon.

(b) The rendering of dental relief in emergency cases in the practice of his profession by a physician or surgeon licensed as such and registered under the laws of this State, unless he undertakes to reproduce or reproduces lost parts of the human teeth in the mouth, or to restore or replace in the human mouth, lost or missing teeth.

(c) The practice of dentistry in the discharge of their official duties by dentists in the United States army, the United States navy, the United States public health service, the United States veterans bureau, or other federal agency.

(d) The teaching of dentistry in dental schools or colleges conducted in this State and approved by the North Carolina State Board of Dental Examiners, by persons licensed to practice dentistry anywhere within the United States, and the practice of dentistry by students in dental schools or colleges so approved when such students (1) are acting under the supervision of registered and licensed dentists acting as instructors or (2) have satisfactorily completed the junior year requirements and, as part of their course of instruction, are assigned to perform dental work, without remuneration, upon the patients or inmates of an institution

wholly owned and supported by the State of North Carolina, or a political subdivision thereof, under the supervision of a registered and licensed dentist acting as an instructor.

(e) The practice of dentistry by licensed dentists of another state, territory or country at meetings of the North Carolina Dental Society, or component parts thereof, meetings of dental colleges or other like dental organizations while appearing as clinicians, or when appearing in emergency cases upon the specific call of dentist duly licensed under the provisions of this article.

(f) The practice of dentistry for not to exceed one year, as a bona fide intern under the supervision of the dental staff of a hospital approved by the North Carolina Board of Dental Examiners, by a person who is a graduate of a reputable dental institution. (1935, c. 66, s. 6; 1953, c. 564, s. 3; 1957, c. 592, s. 2.)

Editor's Note.—The 1953 amendment added all of the first paragraph following the first sentence, rewrote subsection (d) and added former subsection (g).

The 1957 amendment deleted the words "thirty days after" formerly appearing after the word "until" in line nine of the first paragraph and rewrote the latter part of that paragraph. It also struck out subsection (f) and redesignated former subsection (g) as (f).

The mere want of a license does not raise any inference of negligence. If an unlicensed dentist exercises the requisite skill and care in administering treatment to a patient, he is not liable in damages for injury to the patient, merely because of his want of a license to practice dentistry. The failure to possess such license is immaterial on the question of due care. *Grier v. Phillips*, 230 N. C. 672, 55 S. E. (2d) 485 (1949).

§ 90-29.1. Extraoral services performed for dentists. — Licensed dentists may employ or engage the services of any person, firm or corporation to construct or repair, extraorally, prosthetic dentures, bridges, or other replacements for a part of a tooth, a tooth, or teeth. A person, firm or corporation, so employed or engaged, when constructing or repairing such dentures, bridges or replacements, exclusively, directly and solely on the direction, prescription or order of a licensed member of the dental profession, and not for the public or any part thereof, shall not be deemed or considered to be practicing dentistry as defined in this article. However, it is unlawful for persons, firms or corporations so employed or engaged, to advertise in any manner the appliances constructed or repaired, or the services rendered in the construction, repair or alteration thereof, except, that persons, firms or corporations so employed may announce in trade journals and professional publications which circulate among members of the dental profession, their names, the locations or places of their business, their office hours, telephone numbers, and the fact that they are engaged in the construction, reproduction or repair of such appliances, together with such display advertisements as disclose the character and application of their work, and persons, firms or corporations so employed or engaged may furnish to licensed dentists information regarding their products, materials, uses and prices therefor. Announcements may also be made by business card, in business and telephone directories and by signs located upon the premises wherein the place of business is situated, but announcements made by business card or in business and telephone directories and signs shall not contain any amount as a price or fee for the services rendered, or to be rendered, or for any material or materials used or to be used, or any picture or other reproduction of a human head, mouth, denture or specimen of dental work or any other media calling attention of the public to their business. The lettering on signs shall be no more than seven inches in height and no illuminated or glaring light signs shall be used. (1957, c. 592, s. 3.)

§ 90-31. Annual renewal of licenses.

If the application for such renewal certificate, accompanied by the fee required by this article, is not received by the Board before January 31 of each year, an additional fee of five dollars (\$5.00) shall be charged for renewal certificate. If

such application, accompanied by the renewal fee, plus the additional fee, is not received by the board before June 30 of each year, every person thereafter continuing to practice dentistry without having applied for a certificate of renewal shall be guilty of the unauthorized practice of dentistry and shall be subject to the penalties prescribed by G. S. 90-40. (1935, c. 66, s. 8; 1953, c. 564, s. 5.)

Editor's Note.—The 1953 amendment added the above paragraph at the end of the section. As the rest of the section was not affected by the amendment it is not set out.

§ 90-38. Licensing former dentists who have moved back into State or resumed practice.—Any person who shall have been licensed by the North Carolina State Board of Dental Examiners to practice dentistry in this State who shall have retired from practice or who shall have moved from the State and shall have returned to the State, may, upon a satisfactory showing to said Board of his proficiency in the profession of dentistry and his good moral character during the period of his retirement, be granted by said Board a license to resume the practice of dentistry upon making application to the said Board in such form as it may require. The license to resume practice, after issuance thereof, shall be subject to all the provisions of this article. (1935, c. 66, s. 11; 1953, c. 564, s. 2.)

Editor's Note.—The 1953 amendment struck out the former provision relating to payment of fee.

§ 90-39. Fees collectible by Board.—In order to provide the means of carrying out and enforcing the provisions of this article and the duties devolving upon the North Carolina State Board of Dental Examiners, it shall charge and collect for:

- (1) Each applicant for examination, a fee of thirty dollars (\$30.00);
- (2) Each certificate of renewal of license, a fee of five dollars (\$5.00);
- (3) Each certificate of practice to a resident dentist desiring to change to another state or territory, a fee of five dollars (\$5.00);
- (4) Each license issued to a legal practitioner of another state or territory to practice in this State, a fee of thirty dollars (\$30.00);
- (5) Each license to resume the practice issued to a dentist who has retired from the practice of dentistry, or has removed from and returned to the State, a fee of thirty dollars (\$30.00). (1935, c. 66, s. 12; 1953, c. 564, s. 1.)

Editor's Note.—The 1953 amendment rewrote this section and increased the fees stated therein.

§ 90-40. Unauthorized practice; penalty.—If any person shall practice or attempt to practice dentistry in this State without first having passed the examination and obtained a license from the North Carolina Board of Dental Examiners; or if he shall practice dentistry after June 30 of each year without applying for a certificate of renewal of license, as provided in § 90-31; or shall practice or attempt to practice dentistry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall violate any of the provisions of this article for which no specific penalty has been provided; or shall practice or attempt to practice, dentistry in violation of the provisions of this article; or shall practice dentistry under any name other than his own name, said person shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine or imprisonment, or both, in the discretion of the court. Each day's violation of this article shall

constitute a separate offense. (1935, c. 66, s. 13; 1953, c. 564, s. 6; 1957, c. 592, s. 4.)

Cross Reference.—See note under § 90-29.

Editor's Note.—The 1953 amendment rewrote the second clause of the first paragraph.

The 1957 amendment rewrote this section beginning with the latter part of the second clause.

Cited in *Grier v. Phillips*, 230 N. C. 672, 55 S. E. (2d) 485 (1949).

§ 90-40.1. **Enjoining unlawful acts.**—(a) The practice of dentistry by any person who has not been duly licensed so as to practice or whose license has been suspended or revoked, or the doing, committing or continuing of any of the acts prohibited by this article by any person or persons, whether licensed dentists or not, is hereby declared to be inimical to public health and welfare and to constitute a public nuisance. The Attorney General for the State of North Carolina, the solicitor of any of the superior courts, the North Carolina State Board of Dental Examiners in its own name, or any resident citizen may maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry and from the doing, committing or continuing of such unlawful act. This proceeding shall be in addition to and not in lieu of criminal prosecutions or proceedings to revoke or suspend licenses as authorized by this article.

(b) In an action brought under this section the final judgment, if in favor of the plaintiff, shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of dentistry. The provisions of the statutes or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(c) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unlicensed or unlawful practice of dentistry are alleged to have been committed or in which there appear reasonable grounds to believe that they will be committed or in the county where the defendants in such action reside.

(d) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses before filing complaint and before trial in the same manner as provided by law for the examination of the parties. (1957, c. 592, s. 5.)

§ 90-41. **Revocation or suspension of license.**—Whenever it shall appear to the North Carolina State Board of Dental Examiners that any dentist who has received license to practice dentistry in this State, or who has received from the said Board of Dental Examiners a certificate of renewal of license, has been guilty of fraud, deceit or misrepresentation in obtaining his license, or of gross immorality, or is an habitual user of intoxicants or drugs, rendering him unfit for the practice of dentistry, or has been guilty of malpractice, or is grossly ignorant or incompetent or has been guilty of willful neglect in the practice of dentistry, or has had a professional connection or association with any person, firm or corporation in any manner in an effort to avoid and circumvent the provisions of this article, or has permitted the use of his name by another for the illegal practice of dentistry by such person, or has been employing unlicensed persons to perform work which, under this article, can be legally done or performed only by persons holding a license to practice dentistry in this State, or of practicing deceit or other fraud upon the public or individual patients in obtaining or attempting to obtain practice, or has been guilty of fraudulent and/or misleading statements of his art, skill or knowledge, or of his method of treatment or practice, or has been convicted of or entered a plea of guilty to a felony charge, or any offense involving moral turpitude, or has by himself or another,

solicited or advertised in any manner for professional business, or has been guilty of any other unprofessional conduct in the practice of dentistry, or in the procurement of license has filed, as his own, a diploma or license of another, or a forged diploma or a forged or false affidavit of identification or qualification, the Board may revoke the license of such person, or may suspend the license of such person for such period of time as, in the judgment of said Board, will be commensurate with the offense committed: Provided, however, it shall not be considered advertising within the meaning of this article for a dentist, duly authorized to practice in this State, to place a card containing his name, telephone number and office address and office hours in a registry or other publication, or to place upon the window or door of his office his name followed by the word, "dentist."

(1957, c. 592, s. 7.)

Editor's Note.—The 1957 amendment inserted, beginning in line nine, the words "or has had a professional connection or association with any person, firm or corporation in any manner in an effort to avoid and circumvent the provisions of this article, or has permitted the use of his name

by another for the illegal practice of dentistry by such person," and several lines later inserted the words "or has been convicted of or entered a plea of guilty to a felony charge." As only the first paragraph was changed the rest of the section is not set out.

§ 90-47. Restrictions on lectures and teaching.—Lectures on the science of dentistry shall not be made in North Carolina in connection with the demonstration, promotion or distribution of any product or products used or claimed to be useful in the promotion of the health of the oral cavity, except after specific authority has been granted by the North Carolina State Board of Dental Examiners, nor shall the science of dentistry be taught in North Carolina except by persons licensed to practice dentistry within the United States acting as teachers in a duly organized school or college of dentistry or a dental department of a college or university or dental department of a hospital approved by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 18; 1953, c. 564, s. 4.)

Editor's Note.—The 1953 amendment substituted in line seven "persons licensed to practice dentistry within the United

States" for "duly licensed dentists" and added the provision as to dental department of hospital at the end of the section.

§ 90-48. Rules and regulations of Board; violation a misdemeanor.—The North Carolina State Board of Dental Examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules and regulations are not inconsistent with the provisions of this article. Such rules and regulations shall become effective thirty days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the Board, and/or by certified copy under the hand and official seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule, regulation, or bylaw shall be guilty of a misdemeanor, subject to a fine of not more than two hundred dollars (\$200.00) or imprisonment for not more than ninety (90) days for each offense, and each day that this section is violated shall be considered a separate offense. (1935, c. 66, s. 19; 1957, c. 592, s. 6.)

Editor's Note.—The 1957 amendment increased the maximum fine from \$50 to \$200 and the maximum imprisonment from

30 to 90 days and added the provision that each day of violation is a separate offense.

ARTICLE 4.

Pharmacy.

Part 1. Practice of Pharmacy.

§ 90-60. **Fees collectible by Board.**—The Board of Pharmacy shall be entitled to charge and collect the following fees: For the examination of an applicant for license as a pharmacist, ten dollars; for renewing the license as a pharmacist or an assistant pharmacist, ten dollars; for licenses without examination as provided in § 90-64, original, twenty-five dollars, and renewal thereof, five dollars; for original registration of a drugstore, twenty-five dollars, and renewal thereof, fifteen dollars; for issuing a permit to a physician to conduct a drugstore in a village of not more than five hundred inhabitants, ten dollars; for the renewal of permit to a physician to conduct a drugstore in a village of not more than five hundred inhabitants, five dollars. All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the Board. (1905, c. 108, s. 12; Rev., s. 4478; C. S., s. 6657; 1921, c. 57 s. 3; 1945, c. 572, s. 3; 1953, c. 183, s. 1.)

Editor's Note.—

The 1953 amendment substituted "ten" "ten" in line seven.

for "five" in line four and "fifteen" for

§ 90-66. **Expiration and renewal of license; failure to renew misdemeanor.**—Every licensed pharmacist or assistant pharmacist who desires to continue in the practice of his profession, and every physician holding a permit to sell drugs in a village of not more than eight hundred inhabitants, shall within thirty days next preceding the expiration of his license or permit, file with the secretary and treasurer of the Board of Pharmacy an application for the renewal thereof, which application shall be accompanied by the fee hereinbefore prescribed. (1953, c. 1051.)

Editor's Note.—

The 1953 amendment substituted "eight hundred" for "six hundred" in the first sentence. As only the first sentence was affected by the amendment the rest of the section is not set out.

The amendatory act which also made changes in §§ 90-67 and 90-71 stated that

it was the purpose of the act to increase from six hundred inhabitants to eight hundred inhabitants the size village in which the board of pharmacy may grant permits to legally registered practicing physicians to conduct drug stores and pharmacies.

§ 90-67. **License to be displayed; penalty.**—Every certificate or license to practice as a pharmacist or assistant pharmacist and every permit to a practicing physician to conduct a pharmacy or drugstore in a village of not more than eight hundred inhabitants, and every last renewal of such license or permit, shall be conspicuously exposed in the pharmacy or drugstore or place of business of which the pharmacist, or other person to whom it is issued, is the owner or manager, or in which he is employed.

The holder of such license, permit, or renewal who fails to expose it as required by this section shall be guilty of a misdemeanor, and fined not less than five nor more than twenty-five dollars, and each day that such license, permit, or renewal thereof shall not be exposed shall be held to constitute a separate and distinct offense. (1905, c. 108, ss. 18, 26, Rev., ss. 3651, 4485; C. S., s. 6663; 1921, c. 68, s. 3; 1953, c. 1051.)

Editor's Note.—The 1953 amendment substituted "eight hundred" for "six hun-

dred" in line four. As to purpose of amendment, see note to § 90-66.

§ 90-71. **Selling drugs without license prohibited; drug trade regulated.**

Nothing in this section shall be construed to interfere with any legally regis-

tered practitioner of medicine in the compounding of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the selling at retail of nonpoisonous domestic remedies, nor with the sale of patent or proprietary preparations which do not contain poisonous ingredients, nor, except in cities and towns wherein there is located an established drugstore, and except in the counties of Avery, Bertie, Cabarrus, Cleveland, Cumberland, Duplin, Forsyth, Gaston, Guilford, Halifax, Harnett, Henderson, Iredell, Mecklenburg, Montgomery, Moore, New Hanover, Orange, Pender, Richmond, Robeson, Rockingham, Rowan, Scotland and Wilson, shall this section be construed to interfere with the sale of paregoric, Godfrey's Cordial, aspirin, alum, borax, bicarbonate of soda, calomel tablets, castor oil, compound cathartic pills, copperas, cough remedies which contain no poison or narcotic drugs, cream of tartar, distilled extract witch hazel, epsom salts, harlem oil, gum asafetida, gum camphor, glycerin, peroxide of hydrogen, petroleum jelly, saltpetre, spirit of turpentine, spirit of camphor, sweet oil, and sulphate of quinine, nor with the sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "Poison," the vignette of the skull and crossbones, and the name of at least two readily obtainable antidotes.

In any village of not more than eight hundred inhabitants the Board of Pharmacy may, after due investigation, grant any legally registered practicing physician a permit to conduct a drugstore or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than eight hundred. (1905, c. 108, s. 4; Rev., s. 4487; C S., s. 6667; 1921, c. 68, s. 6; Ex. Sess. 1924, c. 116; 1953, c. 1051; 1957, c. 617.)

Editor's Note.—

The 1953 amendment substituted "eight hundred" for "six hundred" in the first and last lines of the last paragraph. The 1957 amendment deleted "Nash" from the list

of counties in the second paragraph. As the first paragraph was not changed it is not set out.

For purpose of amendatory act see note to § 90-66.

§ 90-75. Registration of drugstores and pharmacies.—The Board of Pharmacy shall require and provide for the annual registration of every drugstore and pharmacy doing business in this State. The proprietor of every drugstore or pharmacy opening for business after January 1, 1928, shall apply to the Board of Pharmacy for registration, and it shall be unlawful for any drugstore or pharmacy to do business until so registered. All permits issued under this section shall expire on December thirty-first of each year

(1953, c. 183, s. 2.)

Editor's Note.—The 1953 amendment deleted the former provision of the first paragraph providing for a registration fee.

As the second paragraph was not affected by the amendment it is not set out.

Part 2. Dealing in Specific Drugs Regulated.

§ 90-77. Poisons; sales regulated; label; penalties.

Section Is Restricted to Pharmaceutics.—The history of this section considered in context as shown by the original act, and subsequent codifications, on which it is founded, indicate a legislative intent to restrict its provisions to the profession of pharmacy, and its relation to pharmaceutics—the science of preparing, using and

dispensing of medicines—, and not to manufacture and sale of paint products for commercial purposes. The intent and spirit of act controls in its construction. Porter v. Yoder & Gordon Co., 246 N. C. 398, 98 S. E. (2d) 497 (1957).

And Does Not Apply to Sale and Delivery of Commercial Paints.—The sale

and delivery of a lead compound, such as lead monoxide or litharge, used in commercial paints, does not come within the purview of the provisions of this statute requiring the labeling of containers in

which it is sold by the manufacturer with the word "poison." *Porter v. Yoder & Gordon Co.*, 246 N. C. 398, 98 S. E. (2d) 497 (1957).

§ 90-80.1. Unauthorized sale of Salk vaccine.—The sale of Salk vaccine is prohibited except when sold by wholesale drug distributors, licensed medical doctors, registered pharmacists or the State Board of Health.

Any person found guilty of violating the provisions of this section by selling authentic vaccines shall be fined five hundred dollars (\$500.00) or shall be imprisoned in the State Prison or county jail not less than four months nor more than ten years, or both. Any persons found guilty of violating the provisions of this section by selling substances that are misrepresented as being authentic vaccines shall be fined one thousand dollars (\$1,000.00), or be imprisoned in the State Prison or county jail not less than four months nor more than ten years, or both. (1955, c. 1358.)

§§ 90-81 to 90-85: Repealed by Session Laws 1955, c. 1330, s. 8.

ARTICLE 5.

Narcotic Drug Act.

§ 90-87. Definitions.

(o) "Narcotic drugs" means coca leaves, opium, cannabis, and every other substance neither chemically nor physically distinguishable from them; any other drugs to which the federal narcotic laws may now apply; and any drug found by the State Board of Health, after reasonable notice and opportunity for hearing, to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine, from the effective date of determination of such finding by said State Board of Health.

(1953, c. 909, s. 1; 1953, c. 1321.)

Editor's Note.—

The 1953 amendment rewrote subsection (o). As only this subsection was affected

by the amendments the rest of the section is not set out.

§ 90-88. Manufacture, sale, etc., of narcotic drugs regulated.

Applied in *State v. Miller*, 237 N. C. 427, 75 S. E. (2d) 242 (1953).

Cited in *State v. McPeak*, 243 N. C. 243, 90 S. E. (2d) 501 (1955).

§ 90-93. Sale of drugs on prescription of physician, dentist or veterinarian.—A pharmacist in good faith may sell and dispense narcotic drugs to any person upon the written prescription, or an oral prescription in pursuance to regulations promulgated by the United States Commissioner of Narcotics under federal narcotic statutes, of a physician, dentist or veterinarian, provided written prescriptions are properly executed, dated and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom, or of the owner of the animal for which, the drug is dispensed, and the full name, address and registry number under the federal narcotic laws of the person so prescribing if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. A person filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years so as to be readily accessible for the inspection of any officers engaged in the enforcement of this article. The prescription shall not be refilled.

(1955, c. 278, s. 1.)

Editor's Note.—The 1955 amendment inserted in the first sentence the words "or

an oral prescription in pursuance to regulations promulgated by the United States

Commissioner of Narcotics under federal narcotic statutes." The amendment also substituted in said sentence the words "written prescriptions are" for the words

"it is." As only the first paragraph was affected by the amendment the rest of the section is not set out.

§ 90-94. Prescribing, administering or dispensing by physicians or dentists.—A physician or a dentist, in good faith and in the course of his professional practice, only, may prescribe on a written prescription, or an oral prescription in pursuance to regulations promulgated by the United States Commissioner of Narcotics under federal narcotic statutes, administer, or dispense narcotic drugs or may cause the same to be administered by a nurse or interne under his direction and supervision. Such a written prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the patient for whom the narcotic drug is prescribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, providing he is required by those laws to be so registered. (1935, c. 477, s. 8; 1955, c. 278, s. 2.)

Editor's Note.—The 1955 amendment inserted in the first sentence the words "or an oral prescription in pursuance to regulations promulgated by the United

States Commissioner of Narcotics under federal narcotic statutes." It also inserted "written" before "prescription" near the beginning of the second sentence.

§ 90-95. Prescribing, administering or dispensing by veterinarians.—A veterinarian, in good faith and in the course of his professional practice only not for use by a human being, may prescribe on a written prescription or an oral prescription in pursuance to regulations promulgated by the United States Commissioner of Narcotics under federal narcotic statutes, administer and dispense narcotic drugs and he may cause them to be administered by an assistant or orderly under his direction and supervision. Such a written prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the owner of the animal, the species of the animal for which the narcotic drug is prescribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, provided he is required by those laws to be so registered. (1935, c. 477, s. 8; 1955, c. 278, s. 3.)

Editor's Note.—The 1955 amendment inserted in the first sentence the words "or an oral prescription in pursuance to regulations promulgated by the United

States Commissioner of Narcotics under federal narcotic statutes." It also inserted "written" before "prescription" near the beginning of the second sentence.

§ 90-97. Article not applicable in certain cases.—(a) Except as otherwise in this article specifically provided, this article shall not apply to the administering, dispensing, or selling at retail of any medicinal preparation that contains in one fluid ounce, or if solid or semi-solid preparation, in one avoirdupois ounce, (1) not more than one grain of codeine or of any of its salts, or (2) not more than one-sixth grain of dihydrocodeinone or any of its salts, or (3) not more than one-fourth grain of morphine or any of its salts, (4) not more than two grains of opium, or (5) not more than two grains of papaverine or any of its salts, or (6) not more than two grains of noscapine or any of its salts, or (7) not more than one-fourth grain of ethylmorphine or any of its salts, or (8) not more than one-half grain of dihydrocodeine or any of its salts.

(b) The exemption authorized by this section shall be subject to the following conditions: (1) That the medicinal preparation administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone; and (2) that such preparation shall be administered, dispensed, and sold in good faith as a medicine and not for the purpose of evading the provisions of this article.

(c) Nothing in this section shall be construed to limit the quantity of codeine, dihydrocodeine, or morphine or of any of their salts that may be prescribed, administered, dispensed, or sold, in compliance with the general provisions of the article. (1935, c. 477, s. 9; 1953, c. 909, s. 2; 1955, c. 278, s. 4; 1957, c. 542.)

Editor's Note.—The 1953 amendment rewrote this section.

The 1955 amendment substituted the word "dihydrocodeinone" for "dihydrocodeine" in subsection (a).

The 1957 amendment added (4) through (8) to the first paragraph. It seems that the matter added by the 1957 amendment should have been preceded by an "or".

§ 90-108. Possession of hypodermic syringes and needles regulated.

Evidence Insufficient to Support Conviction.—Evidence that a hypodermic syringe, needles, gauze, and a bottle of water labeled for use in injections, were found in the glove compartment of defendant's car was insufficient to support a conviction of violation of this section, since there was no evidence that the articles found had

been used and possessed for the purpose of administering habit forming drugs other than their bare presence in the glove compartment. *State v. Dunn*, 245 N. C. 102, 95 S. E. (2d) 274 (1956).

Applied in *State v. Miller*, 237 N. C. 427, 75 S. E. (2d) 242 (1953).

§ 90-110. State Board of Pharmacy and peace officers to enforce article.—It is hereby made the duty of the State Board of Pharmacy, its officers, agents, inspectors and representatives, and of all peace officers within the State, including the State Bureau of Investigation, and of all State's attorneys, to enforce all provisions of this article, except those specifically delegated, and to co-operate with all agencies charged with the enforcement of the laws of the United States, of this State and of all other states, relating to narcotic drugs. The State Bureau of Investigation is hereby authorized to make initial investigations of all violations of this article, and is given original but not exclusive jurisdiction in respect thereto with all other law enforcement officers of the State. (1935, c. 477, s. 21; 1953, c. 909, s. 3.)

Editor's Note.—The 1953 amendment inserted the words "including the State Bureau of Investigation" in line three and added the second sentence.

§ 90-111. Penalties for violation.—(a) Any person violating any provision of this article or any person who conspires, aids, abets, or procures others to do such acts shall upon conviction be punished, for the first offense, by a fine of not more than one thousand dollars (\$1,000.00) or be imprisoned in the penitentiary for not more than five years, or both, in the discretion of the court. For a second violation of this article, or where in case of a first conviction of violation of this article, the defendant shall previously have been convicted of a violation of any law of the United States, or of this or any other state, territory, or district, relating to the sale or use or possession of narcotic drugs or marijuana, and such violation would have been punishable in this State if the offending act had been committed in this State, the defendant shall be fined not more than two thousand dollars (\$2,000.00) and be imprisoned not less than five nor more than ten years. For a third or subsequent violation of this article, or where the defendant shall previously have been convicted two or more times in the aggregate of a violation of any law of the United States, or of this or any other state, territory, or district relating to the sale, use or possession of narcotic drugs or marijuana, and such violation would have been punishable in this State, the defendant shall be fined not more than three thousand dollars (\$3,000.00) and be imprisoned in the penitentiary not less than fifteen (15) years nor more than life imprisonment.

(b) Upon conviction for a second or subsequent offense the sentence provided by this section shall not be suspended and probation shall not be granted unless the presiding judge shall find that the violation for which the defendant was convicted did not consist of peddling, selling, bartering or otherwise distributing narcotics to others in violation of this article, or the possession of narcotics for

the purpose of peddling, selling, bartering or otherwise distributing narcotics to others in violation of this article. For the purpose of making the finding provided in this subsection before a sentence may be suspended, the defendant shall have the burden of proving that the violation for which he was convicted did not consist of peddling, selling, bartering or otherwise distributing narcotics to others in violation of this article or the possession of narcotics for the purpose of peddling, selling, bartering or otherwise distributing narcotics to others in violation of this article. The charge contained in the warrant or bill of indictment shall not be considered in making such finding for the purpose of suspending the sentence.

(c) If the offense shall consist of the sale, barter, peddling, exchange, dispensing or supplying of marijuana or a narcotic drug to a minor by an adult in violation of any provision of this article, such person shall upon conviction be punished by a term of not less than ten years nor more than life imprisonment and shall be fined not more than three thousand dollars (\$3,000.00) for the first and all subsequent violations of this article, and the imposition or execution of sentence shall not be suspended, and probation shall not be granted. (1935, c. 477, s. 22; 1953, c. 909, s. 4.)

Editor's Note.—The 1953 amendment rewrote this section.

Under this section as it stood before the 1953 amendment it was observed that since violations of the section were not punishable by either death or imprisonment in the State's prison, such violations must be punished as misdemeanors rather than as felonies. See *State v. Miller*, 237 N. C. 427, 75 S. E. (2d) 242 (1953).

Indictment and Punishment for Second or Subsequent Offense.—Where, in a prosecution for violation of §§ 90-88 and 90-

108, the indictment does not allege that either of the offenses charged was a second or subsequent offense, the court is without power to impose a punishment in excess of that prescribed by this section for a first offense, and sentence in excess thereof upon the court's findings that defendant had theretofore been repeatedly convicted of violations of the Uniform Narcotics Drug Act must be vacated. *State v. Miller*, 237 N. C. 427, 75 S. E. (2d) 242 (1953).

§ 90-111.1. Growing of narcotic plant known as marijuana by unlicensed persons.—A person who without being licensed to do so under the federal narcotic laws, grows the narcotic plant known as marijuana or knowingly allows it to grow on his land without destroying the same shall be guilty of a felony and shall be punished according to the provisions of this article. (1953, c. 909, s. 5.)

§ 90-111.2. Seizure and forfeiture of vehicles, vessels or aircraft unlawfully used to conceal, convey or transport narcotics.—(a) Except under circumstances authorized in this article, it shall be unlawful to (1) transport, carry, or convey any narcotic drug in, upon, or by means of any vehicle, vessel or aircraft; or (2) to conceal or possess any narcotic drug in or upon any vehicle, vessel or aircraft, or upon the person of anyone in or upon any vehicle, vessel or aircraft; or (3) to use any vehicle, vessel or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any narcotic drug.

(b) Any vehicle, vessel or aircraft which has been or is being used in violation of subdivision (a), except a vehicle, vessel or aircraft used by any person as a common carrier in the transaction of business as such common carrier, shall be seized by any peace officer, and forfeited as in the case of vehicles, vessels or aircraft unlawfully used to conceal, convey or transport intoxicating beverages. (1953, c. 909, s. 5.)

What Owner Must Prove to Defeat Forfeiture.—The forfeiture of a car for illegal transportation of narcotics can be defeated and the car recovered by the true owner only if he can establish his title and

show that the transportation of contraband was without his knowledge or consent. *State v. McPeak*, 243 N. C. 273, 90 S. E. (2d) 505 (1955).

§ 90-111.3. **Reports by physicians.**—It shall be the duty of every attending or consulting physician to report to the State Board of Health, promptly, the name and, if possible, the address of any person under treatment if it appears that such person is an habitual user of any narcotic drug. Such reports shall be open for inspection only to federal and State officers whose duty it is to enforce the laws of this State or of the United States relating to narcotic drugs, or who are concerned with the commitment, care, treatment and rehabilitation of persons addicted to the use of narcotic drugs. No such officers having knowledge by virtue of his office of any such report shall divulge such knowledge except in connection with his duties. (1953, c. 909, s. 5.)

ARTICLE 5A.

Barbiturate Drugs.

§ 90-113.1. **Definitions.**—As used in this article

(1) The term "barbiturate drug" means (A) the salts and derivatives of barbituric acids or compounds, preparations or mixtures thereof, and (B) drugs, compounds, preparations or mixtures which have a hypnotic or somnifacient effect on the body of a human or animal, to be found by the State Board of Pharmacy and duly promulgated by rule or regulation; except that the term "barbiturate drug" shall not include any drug the manufacture or delivery of which is regulated by the narcotic drug laws of this State: Provided, however, that the term "barbiturate drug" shall not include compounds, mixtures, or preparations containing salts or derivatives of barbituric acid when such compounds, mixtures, or preparations contain a sufficient quantity of another drug or drugs, in addition to such salts or derivatives, to cause it to produce an action other than its hypnotic or somnifacient action.

(2) The term "delivery" means sale, dispensing, giving away, or supplying in any other manner.

(3) The term "patient" means, as the case may be, (A) the individual for whom a barbiturate drug is prescribed or to whom a barbiturate drug is administered, or (B) the owner or the agent of the owner of the animal for which a barbiturate drug is prescribed or to which a barbiturate drug is administered, provided that the prescribing or administering referred to in (A) and (B) hereof is in good faith and in the course of professional practice only.

(4) The term "person" includes individual, corporation, partnership, and association.

(5) The term "practitioner" means a person licensed in this State to prescribe and administer barbiturate drugs, as herein defined, in the course of his professional practice; professional practice of a practitioner means treatment of patients under a bona fide practitioner-patient relationship.

(6) The term "pharmacist" means a person duly registered with the State Board of Pharmacy pursuant to chapter 90, article 4 of the General Statutes of North Carolina.

(7) The term "prescription" means a written order issued by a practitioner in good faith in the course of his professional practice to a pharmacist for a barbiturate drug for a particular patient, which specifies the date of its issue, the name and address of such practitioner, the name and address of the patient (and if such barbiturate drug is prescribed for an animal, the species of such animal), the barbiturate drug and quantity of the barbiturate drug prescribed, the directions for use of such barbiturate drug, and the signature of such practitioner, or in cases of emergency, a telephonic order therefor made by such practitioner and promptly reduced to writing, and filed, by the pharmacist. The written statement of the telephonic order shall be signed by the pharmacist and shall include the name of the issuing practitioner and all information required in a written order.

(8) The term "manufacturer" means a person who manufactures barbiturate drugs, and includes persons who prepare such barbiturate drugs in dosage forms by mixing, compounding, encapsulating, entableting, or other process, but does not include pharmacists so preparing such barbiturate drugs solely for dispensing on prescriptions received or to be received by them.

(9) The term "wholesaler" means a person engaged in the business of distributing barbiturate drugs to persons included in any of the classes named in clauses (a) to (e) inclusive of § 90-113.3 (1) (B).

(10) The term "warehouseman" means a person who, in the usual course of business, stores barbiturate drugs for others lawfully entitled to possess them and who has no control over the disposition of such barbiturate drugs except for the purpose of such storage. (1955, c. 1330, s. 1.)

§ 90-113.2. Prohibited acts.—It shall be unlawful

(1) To deliver any barbiturate drugs unless:

(A) Such barbiturate drug is delivered by a pharmacist in good faith upon prescription and there is affixed to the immediate container in which such barbiturate drug is delivered a label bearing (a) the name and address of the establishment from which such barbiturate drug was delivered; (b) the date on which the prescription for such barbiturate drug was filled; (c) the number of such prescription as filed in the prescription files of the pharmacist who filled such prescription; (d) the name of the practitioner who prescribed such barbiturate drug; (e) the name of the patient, and if such barbiturate drug was prescribed for an animal, a statement showing the species of the animal; and (f) the direction for use of the barbiturate drug and cautionary statements, if any, as contained in the prescription; and

(B) In the event that such delivery is pursuant to telephonic order, such prescription shall be promptly reduced to writing and filed by the pharmacist; or

(C) Such barbiturate drug is delivered by a practitioner in good faith and in the course of his professional practice only.

(2) To refill any prescription for a barbiturate drug unless such refilling is specifically authorized by the practitioner.

(3) For any person to possess a barbiturate drug unless such person obtained such barbiturate drug in good faith on the prescription of a practitioner or in accordance with paragraph (1) (C) of this section or in good faith from a person licensed by the laws of any other state or the District of Columbia to prescribe or dispense barbiturate drugs.

(4) For any person to obtain or attempt to obtain a barbiturate drug by fraud, deceit, misrepresentation, or subterfuge; or by the forgery or alteration of a prescription; or by the use of a false name or the giving of a false address. (1955, c. 1330, s. 2.)

§ 90-113.3. Exemptions.—(1) The provisions of paragraphs (1) and (3) of § 90-113.2 shall not be applicable (A) to the delivery of barbiturate drugs for medical or scientific purposes only to persons included in any of the classes hereinafter named, or to the agents or employees of such persons, for use in the usual course of their business or practice or in the performance of their official duties, as the case may be; or (B) to the possession of barbiturate drugs by such persons or their agents or employees for such use; (a) pharmacists; (b) practitioners; (c) persons who procure barbiturate drugs (i) for disposition by or under the supervision of pharmacists or practitioners employed by them, or (ii) for the purpose of lawful research, teaching, or testing and not for resale; (d) hospitals and other institutions which procure barbiturate drugs for lawful administration by or under the supervision of practitioners; (e) manufacturers and wholesalers; (f) carriers and warehousemen.

(2) Nothing contained in § 90-113.2 shall make it unlawful for a public officer, agent or employee, or person aiding such public officer in performing his official

duties to possess, obtain, or attempt to obtain a barbiturate drug for the purpose of enforcing the provisions of any law of this State or of the United States relating to the regulation of the handling, sale or distribution of barbiturate drugs. (1955, c. 1330, s. 3.)

§ 90-113.4. **Complaints, etc., need not negative exceptions, excuses or exemptions; burden of proof.**—In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this article, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant. (1955, c. 1330, s. 4.)

§ 90-113.5. **Retention of invoices by persons within exemptions.**—Persons (other than carriers) to whom the exemptions to this article are applicable shall retain all invoices relating to barbiturate drugs manufactured, purchased, sold and handled for not less than two calendar years after the date of the transaction shown by such invoice. (1955, c. 1330, s. 4½.)

§ 90-113.6. **Enforcement of article; co-operation with federal authorities; investigations.**—It is hereby made the duty of the State Board of Pharmacy, its officers, agents, inspectors and representatives, and of all peace officers, within the State, including the State Bureau of Investigation, and of all State's attorneys, to enforce all provisions of this article, except those specifically delegated, and to co-operate with all agencies charged with the enforcement of the laws of the United States, of this State and of all other states, relating to narcotic drugs. The State Bureau of Investigation is hereby authorized to make initial investigations of all violations of this article, and is given original but not exclusive jurisdiction in respect thereto with all other law enforcement officers of the State. (1955, c. 1330, s. 5.)

§ 90-113.7. **Penalties.**—Any person violating any provision of this article or any person who conspires, aids, abets, or procures others to violate any provision of this article shall for the first offense be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars (\$1,000.00) or by imprisonment for not more than two years, or both, in the discretion of the court. For a second violation of this article, or in case of a first conviction of a violation of this article by a defendant who shall previously have been convicted of a violation of any law of the United States, or of this or any other state, territory or district, relating to the possession, delivery or use of the drugs defined in this article which violation would have been punishable under this article if the offending act had been committed in this State, the defendant shall be guilty of a felony and fined or imprisoned, or both, in the discretion of the court. (1955, c. 1330, s. 6.)

ARTICLE 6.

Optometry.

§ 90-117. **Organization; meetings and powers thereat; records, witnesses and evidence.**—The Board of Examiners shall choose, at the first regular meeting and annually thereafter, one of its members as president and one as secretary and treasurer. The Board shall make such rules and regulations, not inconsistent with law, as may be necessary to the proper performance of its duties, and each member may administer oaths and take testimony concerning any matter within the jurisdiction of the Board. A majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the times and places of meeting to be designated by the president and secretary. The secretary of the Board shall keep a full record of its proceedings, which shall at all reasonable times be

open to public inspection. The president, secretary-treasurer, or any member of the Board shall have power in connection with any matter within the jurisdiction of the Board to summon and examine witnesses under oath and to compel their attendance and the production of books, papers, or other documents or writings deemed by it necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary-treasurer or the president of the Board and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to contempt charges in the manner set forth in G. S. 150-17. Said Board shall pay to any witness subpoenaed before it the fees and per diem as paid witnesses in civil actions in the superior court of the county where such hearing is held. (1909, c. 444, s. 4; C. S., s. 6690; 1935, c. 63; 1953, c. 1041, s. 11.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, substituted the words "to contempt charges in the manner set forth in G. S.

150-17" for the words "to punishment for contempt by the Board" at the end of the next to last sentence.

§ 90-124. Discipline, suspension, revocation and regrant of certificate.—The Board shall have the power to make, adopt, and promulgate such rules, regulations and ethics as may be necessary and proper for the regulation of the practice of the profession of optometry, and for the performance of its duties. The Board shall have jurisdiction and power to hear and determine all complaints, allegations, charges of malpractice, corrupt or unprofessional conduct, and of the violation of the rules, regulations and ethics made against any optometrist licensed to practice in North Carolina; may administer the punishment of private reprimand, suspension from the practice of optometry for a period not exceeding twelve months and revocation of license as the case shall in their judgment warrant for violation of the rules, regulations and ethics made, adopted and promulgated by the Board and also any of the following causes:

1. Commission of a criminal offense showing professional unfitness;
2. Habitual drunkenness;
3. Gross incompetence;
4. Being afflicted with a contagious or infectious disease;
5. Conduct involving wilful deceit;
6. Conduct involving fraud or any other conduct involving moral turpitude;
7. Advertising the "free examination of the eyes," "free consultation," "consultation without obligation," "free advice" or any other words or phrases of similar import which convey or are calculated to convey the impression to the public that the eyes are examined free;
8. Advertising of a character or nature tending to deceive or mislead the public, or in the nature of "bait advertising," or advertising declared to be unethical by the Board and as prescribed in the Code of Ethics promulgated and established by the North Carolina State Board of Examiners in Optometry;
9. Use of advertising, directly or indirectly, whether printed, radio, display, or of any other nature which seeks or solicits practice on any installment payment plan;
10. House-to-house canvassing or peddling directly or through any agent or employee for the purpose of selling, fitting, or supplying frames, mounting, lenses, or other ophthalmic products.

Board action in revoking a certificate of registration shall be in accordance with the provisions of chapter 150 of the General Statutes. Any person whose certificate has been revoked for any of the grounds or reasons herein set forth, or on account of nonpayment of dues, may, after the expiration of ninety days, and within two years, apply to the Board to have same regranted, and upon a showing satisfactory to the said Board, and at the discretion of the Board, license to

practice optometry may be restored to such person. (1909, c. 444, s. 13; C. S., s. 6697; 1935, c. 63; 1953, c. 189; 1953, c. 1041, s. 12; 1955, c. 996.)

Editor's Note.—

The first 1953 amendment inserted the former words "or has violated any provision of the article or of any rules or regulations adopted pursuant thereto" at the end of the former second sentence of the introductory paragraph. And the second

1953 amendment rewrote the first part of the last paragraph, inserting therein the reference to chapter 150 of the General Statutes.

The 1955 amendment rewrote and extended the scope of the section.

ARTICLE 7.

Osteopathy.

§ 90-136. **Revocation or suspension of license.**—The North Carolina State Board of Osteopathic Examination and Registration may refuse to issue a license to anyone otherwise qualified, and may suspend or revoke any license issued by it to any osteopathic physician, who is not of good moral character, and/or for any one or any combination of the following causes:

1. Conviction of a felony, as shown by a certified copy of the record of the court of conviction;
2. The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value, by fraudulent misrepresentations;
3. Gross malpractice;
4. Advertising by means of knowingly false or deceptive statements;
5. Advertising, practicing, or attempting to practice under a name other than one's own;
6. Habitual drunkenness or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.

Each of the following acts constitutes a misdemeanor, punishable upon conviction by a fine of not less than twenty-five (\$25.00) dollars nor more than two hundred (\$200.00) dollars; or imprisonment for not less than thirty days nor more than one year, or both in the discretion of the court:

1. The practice of osteopathy or an attempt to practice osteopathy, or professing to do so without a license;
2. The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value by fraudulent misrepresentation;
3. The making of any willfully false oath or affirmation whenever an oath or affirmation is required by this article;
4. Advertising, practice or attempting to practice osteopathy under a name other than one's own.

The board may neither suspend nor revoke any license, however, for any of the causes hereinabove set forth except in accordance with the provisions of chapter 150 of the General Statutes. (1937, c. 301, s. 3; 1953, c. 1041, s. 13.)

Editor's Note.—The 1953 amendment, inserting in lieu thereof the present last paragraph, effective July 1, 1953, struck out the former last three paragraphs of this section.

ARTICLE 9.

Registered Nurses.

§ 90-158: Repealed by Session Laws 1953, c. 1199.

Editor's Note.—The repealing act is effective as of January 1, 1954. See note to § 90-158.1.

§ 90-158.1. **Board of Nurse Registration and Nursing Education.**—There is hereby created and established for the purposes and with the powers

hereinafter set forth the North Carolina Board of Nurse Registration and Nursing Education, hereinafter designated and referred to as the Board, which shall consist of nine members to be chosen and commissioned as hereinafter provided.

Five members of said Board shall be registered nurses who are licensed to practice in North Carolina, and who have had nursing experience, all five of whom shall be appointed and commissioned by the Governor of North Carolina.

Two members of said Board shall be physicians with experience in teaching nurses, both of whom shall be appointed and commissioned by the Governor of North Carolina.

Two members of said Board shall be representatives of hospitals operating nursing schools who shall not be physicians, both of whom shall be appointed and commissioned by the Governor of North Carolina.

In appointing the members of said Board, the Governor shall designate the term for which each member is appointed. Three of said members shall be appointed for a term of one year; two for a term of two years; two for a term of three years; and two for a term of four years; and thereafter all appointments shall be for a term of four years.

An interim vacancy on the Board shall be filled for the remainder of the unexpired term by appointment of the Governor from a list of two nominees filed by the organization or association which previously nominated the member creating the vacancy, or by appointment by the Governor if such member was not a nominee of any of said organizations. (1953, c. 1199, s. 1.)

Editor's Note.—The provisions of former Article 9 entitled "Trained Nurses" and containing §§ 90-158 to 90-171, are repealed as of January 1, 1954, by Session Laws 1953, c. 1199, which substitutes therefor §§ 90-158.1 to 90-158.40 of the present article, effective as of the date

aforsaid. Another act (chapter 1208), effective April 30, 1953, adds § 90-158.41, relating to a nurse training program at State-supported educational institutions.

For brief comment on §§ 90-158.1 to 90-158.40, see 31 N. C. Law Rev. 384.

§ 90-158.2. Officers.—The officers of the Board shall be a chairman, a vice-chairman, and such other officers as the Board may deem necessary, which officers shall be elected annually by the Board for terms of one year each and until their successors shall have been elected and qualified. The Board shall employ an executive secretary, who shall not be a member of the Board, but who shall be a registered nurse, duly registered in the State of North Carolina, and who shall perform such duties and functions as may be prescribed by the Board and who shall be responsible to the Board for the accomplishment of such duties and functions. The Board shall fix the compensation of the executive secretary. The executive secretary shall serve as treasurer and shall furnish surety bond in such sum as may be prescribed by the Board, conditioned upon the true and faithful accounting for all funds of the Board which may come into the hands, custody, or control of the executive secretary, which said bond shall be made payable to the Board and approved by said Board. The Board shall require a surety bond to be furnished by the executive secretary for each year of employment, and any surety bond executed and furnished for the faithful accounting of the executive secretary, if continued or renewed from year to year by endorsement or otherwise, shall be deemed to be a bond covering the faithful accounting of the executive secretary to the extent of the principal amount of said bond for each and every year during which said bond shall be renewed or continued in force, and the provisions of this section of this statute shall be a part of the contract, terms and conditions of any such bond.

The Board shall have power and authority to employ legal counsel, certified public accountants, and such employees, assistants and agents as may be necessary in the opinion of the Board to carry into effect the provisions of this statute, and to fix the compensation of such persons employed, and to incur such other expenses as may be deemed necessary to carry into effect the provisions of this statute. (1953, c. 1199, s. 1.)

§ 90-158.3. **Compensation of members.**—The members of the Board shall receive such compensation in addition to reimbursement for actual traveling and hotel expenses as shall be fixed by the Board on a per diem basis. (1953, c. 1199, s. 1.)

§ 90-158.4. **Expenses payable from fees collected by board.**—All salaries, compensation and expenses of every kind incurred or allowed for the purposes of carrying out the provisions of this statute shall be paid by the Board exclusively out of the fees received by the Board as authorized by the provisions of this statute, or funds received from other sources, and in no case shall any salaries, expenses or other obligations of the Board be charged upon the treasury of the State of North Carolina. All moneys and receipts shall be kept in a special fund by and for the use of the Board exclusively for the purpose of carrying out the provisions of this statute. (1953, c. 1199, s. 1.)

§ 90-158.5. **Official seal; rules and regulations.**—The Board shall adopt an official seal, which shall be affixed to all licenses or certificates of registration issued by it, and the Board shall make such rules and regulations, not inconsistent with law, as may be necessary to regulate its proceedings and otherwise carry out the purposes and enforce the provisions of this statute. (1953, c. 1199, s. 1.)

§ 90-158.6. **Meetings; quorum; power to compel attendance of witnesses and to take testimony.**—The Board shall hold at least one meeting each year, and may hold additional meetings as necessary, for the purpose of licensing qualified applicants as registered nurses, for the purpose of considering and acting upon the accreditation of schools of nursing within the jurisdiction of the Board, and for the transaction of other business and affairs within the jurisdiction of the Board. The Board is authorized and directed to establish rules with respect to the calling, holding and conduct of regular and special meetings. A majority of the members of the Board shall constitute a quorum. The Board shall have the power to compel the attendance of witnesses and to take testimony and proof concerning any matter within its jurisdiction, and for such purposes each member of the Board shall have the power to administer oaths, which shall be administered according to law. (1953, c. 1199, s. 1.)

§ 90-158.7. **Practice as registered professional nurse regulated.**—In order to safeguard the life and health of the citizens of North Carolina individually and collectively, any person practicing or offering to practice nursing in this State as a “trained nurse”, “graduate nurse”, “professional nurse”, “registered nurse” shall be required to submit evidence that he or she is qualified so to practice and shall be licensed and registered as hereinafter provided. (1953, c. 1199, s. 1.)

§ 90-158.8. **Practice of Nursing.**—A person is engaged in the practice of professional nursing when such person for compensation or personal profit performs any professional service requiring the application of principles of the biological, physical or social sciences and nursing skills in the care of the sick, in the prevention of disease or in the conservation of health, such as responsible supervision of a patient requiring skill in observation of symptoms and reactions and the accurate recording of the facts, and carrying out of treatments and medications as prescribed by a licensed physician, and the application of such nursing procedures as involve understanding of cause and effect in order to safeguard life and health of a patient and others; provided, however, that nothing in this statute shall be construed in any way to prohibit or limit:

(a) Gratuitous nursing of the sick by friends or members of the family.

(b) Incidental care of the sick by domestic servants or by persons primarily employed as housekeepers as long as they do not practice nursing within the meaning of this statute.

(c) Domestic administration of family remedies by any person.

(d) Nursing services in case of an emergency. "Emergency", as used in this subdivision includes an epidemic or public disaster.

(e) The performance by any person of such duties as are required in the physical care of a patient or carrying out medical orders prescribed by a licensed physician; provided, such person shall not in any way assume to practice as a "professional nurse", "registered nurse", "graduate nurse" or "trained nurse". (1953, c. 1199, s. 1.)

§ 90-158.9. Use of title by nonlicensed persons prohibited.—Except as herein specifically provided to the contrary, no person shall use the title "trained nurse", "graduate nurse", "registered nurse", or "professional nurse", nor shall any person use any title abbreviation, sign, or device to indicate that he or she is a graduate, trained, registered, or professional nurse, nor shall any person engage in the practice as a "trained nurse", "graduate nurse", "registered nurse", or "professional nurse" in the State of North Carolina until and unless such person shall have been licensed by the Board in accordance with the provisions of this statute. (1953, c. 1199, s. 1.)

§ 90-158.10. Licensure by examination.—At least once each year, and at such other times as the Board may determine, the Board shall cause an examination to be given to applicants for a license to practice as a registered nurse at such time and place as may be fixed by the Board. The Board shall give due publicity in advance as to each examination in order that qualified persons may become applicants, including notice to all accredited nursing schools in the State. The Board shall also notify each applicant of the time and place of each examination. The Board is hereby empowered to prescribe such regulations as it may deem proper governing the furnishing of proof of qualifications of applicants for license, the conduct of applicants during examination and the conduct of the examination proper not inconsistent with the provisions of this article.

Every applicant for a license to practice as a registered nurse, except an applicant who has been duly licensed as a registered nurse under the laws of another state, territory or foreign country, shall be required to pass a written examination approved and given by the Board, as herein provided, which examination may be supplemented by an oral or practical examination as may be determined by the Board. When an applicant shall have successfully passed such examination, as determined by the Board, whose decision shall be final, the Board shall issue to the applicant a license to practice nursing as a registered nurse. The form of the license shall be determined by the Board. (1953, c. 1199, s. 1.)

§ 90-158.11. Scope of examination; uniformity in standards of admission.—Applicants shall be examined on their knowledge of anatomy and physiology, pharmacology, nutrition, bacteriology, obstetrical, medical and surgical nursing, nursing of children, ethics of nursing, and theory of psychiatric nursing. All examinations given by the Board shall be adopted and approved by the Board and the grade or grades given to all persons taking such examinations shall be determined and approved by the Board. In preparing and giving examinations to applicants for licensure to practice as registered nurses in North Carolina the Board may use its own methods of examination or the various "State Board Test Pool Examination" forms such as those prepared and published by the National League for Nursing, provided, however, that any examinations used by the Board shall be examined and approved by the Board and the grade or grades given to all persons taking such examination shall be determined and approved by the Board. No examination shall be given on subjects not required by this article. (1953, c. 1199, s. 1.)

§ 90-158.12. Qualification of applicants for licensure by examination.—In order to be eligible for the examination for licensure as a registered

nurse every applicant shall make written application to the Board on forms furnished by the Board and shall submit to the Board written evidence, verified by oath, sufficient to satisfy the Board that the applicant meets the following qualifications and conditions:

- (a) The applicant shall be at least twenty (20) years of age.
- (b) The applicant shall be of good moral character.
- (c) The applicant shall be in good physical and mental health.
- (d) The applicant shall be a graduate of a high school accredited by the State agency charged by law with approving and accrediting high schools, or shall have a high school education equivalent thereto as determined by the Board.
- (e) The applicant shall have completed the basic professional curriculum in, and shall have graduated from, a school of nursing accredited by the Board in accordance with the provisions of this statute hereinafter set forth, or a school of nursing accredited by the appropriate accrediting agency of another state or territory, or the District of Columbia, or a foreign country, and approved by the Board. (1953, c. 1199, s. 1.)

§ 90-158.13. Licensure by reciprocity.—The Board may issue a license to practice nursing as a registered nurse, without examination, to an applicant who has been duly licensed as a registered nurse under the laws of another state, territory or foreign country, if in the opinion of the Board the applicant is competent to practice as a registered nurse in this State. The Board in its discretion may require such applicant for licensure to demonstrate her competency and qualifications to practice as a registered nurse in North Carolina and for that purpose the Board may require such applicant to successfully pass an examination, written or oral, or both, and submit evidence satisfactory to the Board of such applicant's competency to practice as a registered nurse, and the decision of the Board thereon shall be final. (1953, c. 1199, s. 1.)

§ 90-158.14. Fees.—Every applicant for license to practice nursing as a registered nurse in North Carolina, whether by examination or by reciprocity, shall pay to the Board at the time of making of application a fee of \$15.00. Any applicant who fails to pass the examination by the Board may take another examination with payment of fee in the same amount; provided, however, the second examination is taken within two years of the date of the first examination. Upon the failure of an applicant to pass the second examination, the Board may require the applicant to complete additional courses of study designated by the Board, and before taking any such subsequent examination the applicant shall present to the Board satisfactory evidence of having completed such additional course of study and shall pay an additional fee in the same amount as that required by this statute for the filing of an original application. (1953, c. 1199, s. 1.)

§ 90-158.15. Custody and use of funds.—All fees payable to the Board shall be deposited by the executive secretary of the Board in a bank or banks designated by the Board as an official depository for funds of the Board, which funds shall be deposited in the name of the Board and shall be used for the payment of salaries and other costs and expenses of the Board in carrying out the provisions of this statute and for promoting and extending nursing education in North Carolina pursuant to Board authorization. An annual audit of the accounts of the executive secretary shall be made by the State of North Carolina. (1953, c. 1199, s. 1.)

§ 90-158.16. Temporary nursing in State.—The Board may make reasonable rules and regulations for the purpose of permitting registered nurses from other states, territories and foreign countries to do temporary nursing in the State of North Carolina for periods not exceeding six months. For such temporary license, except in emergencies referred to in § 90-158.8, an applicant shall pay to the Board a temporary registration fee of \$5.00. (1953, c. 1199, s. 1.)

§ 90-158.17. **Nurses registered under previous law.**—Every person holding a license or certificate of registration to practice nursing as a registered nurse issued by competent authority pursuant to the provisions of any statute heretofore in force and effect providing for the licensing and registration of professional nurses in North Carolina shall be deemed to be licensed as a registered nurse under the provisions of this statute, but such person previously licensed shall comply with the provisions of this statute with respect to renewal of licenses. (1953, c. 1199, s. 1.)

§ 90-158.18. **Renewal of license.**—The license of every person licensed or deemed to be licensed under the provisions of this statute shall be annually renewed except as hereinafter provided. On or before November 1 of each year the Board shall cause to be mailed an application for renewal of license to every person who has received from the Board a license to practice nursing as a registered nurse or who has a right to renewal of license because of having received a license under the provisions of any law heretofore existing which provided for the registration and licensing of professional nurses. The application for renewal of license shall be mailed to the last known address of such registered nurse as it appears on the records of the Board. It shall be the duty of every registered nurse in North Carolina to keep the Board informed of the current mailing address of such registered nurse, and the failure of the Board to send or the failure of any registered nurse to receive any such application for renewal of license shall not excuse any practitioner as a registered nurse from the requirements for renewal of license herein contained. On or before January 1 of each year every registered nurse who desires to continue the practice of nursing as a registered nurse shall file application for renewal on forms furnished by the Board and shall forward with such application, completed in accordance with the rules and regulations of the Board, a renewal fee of \$2.00. Upon receipt of the application and fee for renewal of license, the executive secretary of the Board shall verify the accuracy of the application and issue to each such applicant entitled to renewal a certificate of renewal for the year beginning January 1 and ending December 31. Such certificate of renewal shall render the holder thereof a legal practitioner for the period stated on the certificate of renewal. Failure to renew the license annually as required by this section shall automatically result in the forfeiture of the right to practice nursing in North Carolina as a registered nurse until application shall have been made and the fee therefor paid for the current year as herein provided. Any licensee who allows his or her license to lapse by failing to renew the license as herein provided may be reinstated by the Board upon satisfactory explanation of such failure to renew the license and upon payment of a fee of \$5.00. A lapse shall not be deemed to have accrued during a period of service in the Armed Services of the United States and for a period of six months immediately thereafter. A person licensed under the provisions of this statute or any previously existing statute regulating the licensing of registered nurses who desires to retire from practice temporarily shall send a written notice thereof to the Board. Upon receipt of such notice the Board shall place the name of such person upon the nonpracticing list. While remaining on such list the person shall not be subject to the payment of any renewal fees and shall not practice as a registered nurse in this State. When any such person desires to resume practice as a registered nurse application for renewal of license and payment of the renewal fee required for the current year shall be made to the Board and the Board shall issue a certificate of renewal. (1953, c. 1199, s. 1.)

§ 90-158.19. **Revocation or suspension of license and procedure therefor.**—The Board shall have power to deny, revoke or suspend any license to practice nursing as a registered nurse which has been issued by the Board or by any predecessor board or which has been applied for in accordance with the provisions of this statute, after notice and hearing in accordance with the provi-

sions of chapter 150, General Statutes of North Carolina. If the Board shall determine, upon findings of fact supported by substantial competent evidence adduced at such hearing, that such person:

- (a) Is guilty of fraud or deceit in procuring or attempting to procure a license to practice nursing as a registered nurse in North Carolina; or
- (b) Has been convicted of a felony or any other crime involving moral turpitude; or
- (c) Is guilty of gross immorality or dishonesty; or
- (d) Is unfit or incompetent to practice as a registered nurse by reason of negligence, or habits; or
- (e) Is an habitual drunkard or is addicted to the use of habit forming drugs such as, but not limited to, narcotics and their derivatives, barbiturates and the like; or
- (f) Is mentally incompetent. (1953, c. 1199, s. 1.)

§ 90-158.20. **Proceedings.**—Upon filing of a sworn complaint with the Board charging a person with having been guilty of any of the actions specified as a ground for disciplinary action as provided in the preceding section, the executive secretary of the Board shall fix a time and place for a hearing and shall cause a copy of the charges, together with a notice of the time and place fixed for the hearing, to be served on the accused. The notice, the hearing, and all other proceedings in connection therewith shall be conducted in accordance with the provisions of chapter 150, General Statutes of North Carolina. If the accused is found guilty of the charges, the Board may refuse to issue a license to the applicant or may revoke or suspend the license or otherwise discipline a licensee. Upon revocation of a license the name of the holder thereof shall be stricken from the roll of registered nurses in the custody of the executive secretary of the Board and thereafter such person shall not have the right to practice nursing as a registered nurse in the State of North Carolina. In the event the Board shall suspend the license of any such person for a specific period of time, such person shall not during the specified period of time engage in the practice of nursing as a registered nurse in North Carolina; and the Board shall have the power to provide that in the event any such person shall violate the terms of an order suspending a license or otherwise disciplining the licensee, the license of such person shall be revoked. A revoked or suspended license may be reissued after one year, in the discretion of the Board, upon good cause shown. (1953, c. 1199, s. 1.)

§ 90-158.21. **Basic requirements for accreditation of school of nursing.**—A school of nursing in order to be accredited by the Board shall meet the following standards and requirements:

(a) The school shall be conducted in connection with one or more general hospitals having fifty or more beds.

(b) The school shall give instruction in anatomy and physiology, pharmacology, nutrition, bacteriology, obstetrical, medical and surgical nursing, pediatric nursing, ethics of nursing, and theory of psychiatric nursing; and such instruction shall consist of not less than 1,000 hours of theoretical instruction in subjects and hours as follows:

THEORETICAL AND CLASSROOM WORK

Anatomy and Physiology	120
Microbiology	45
Chemistry	60
Pharmacology	50
History of Nursing	10
Nursing Arts	155
Psychology	30
Nutrition and Diet Therapy	60
Sociology	20
Elementary Pathology	30
Nursing in General Medicine	60
Nursing in General Surgical	60
Operating Room Technique	30
Nursing in Medical Specialities (Communicable and skin diseases)	35
Nursing in Surgical Specialities, eye, ear, nose and throat, includ- ing other surgical specialities	60
Obstetric Nursing	40
Pediatric Nursing	40
Psychiatric Nursing (theory only)	45
Unassigned	50
Total	1000

The Board is further authorized, upon application of a school or schools of nursing, to permit reasonable variations in the foregoing specification of the number of hours of instruction to be given in particular subjects; provided, that such variations do not lower the overall standard of instruction herein provided.

The school shall also give instruction and practice of not less than 2285 hours in the actual care of medical, surgical, and obstetrical patients, and sick children. The Board shall not require instruction and practice covering more than a three year period as a prerequisite for accreditation.

(c) The hospital or hospitals affiliated with or in connection with which the school of nursing is conducted shall provide clinical facilities so that each student nurse may obtain clinical instruction and experience in (1) medical nursing, (2) surgical nursing, (3) obstetrical nursing, and (4) pediatric nursing.

(d) The school shall provide minimum instructional facilities as follows:

1. The school shall have a library consisting of 100 books on technical subjects sufficiently diversified and in late editions so as to be suitable for reference and study in connection with the basic curriculum required for a school of nursing, which library shall be physically located so as to be easily accessible to the students.

2. The school shall have adequate classrooms and laboratory facilities and other reasonably suitable instructional facilities sufficient to accommodate the student body and to instruct the students in the subjects required by this statute and to prepare them for professional practice.

3. The members of the faculty of the school of nursing shall have educational qualifications and experience and shall be sufficient in number to effectively administer, teach and supervise the students at the school.

(e) The school of nursing shall keep and maintain an accurate system of records containing up-to-date and complete information regarding each student's classroom hours in each course of instruction and the hours spent by each student in clinical instruction and experience, and showing the progress of each student graded under a suitable system of grades. The form, content and other requirements with respect to records shall be subject to the approval of the Board. The records shall be readily accessible and shall be subject to inspection by the Board

or its authorized representatives during normal business hours. Any person who shall intentionally falsify any record required to be kept and maintained by this statute and regulations of the Board made pursuant to this statute shall be guilty of a misdemeanor and punishable as such.

(f) A school of nursing shall, from time to time and in accordance with regulations adopted by the Board, file with the Board such records, data, and reports as may be prescribed furnishing information concerning the conduct of the school and concerning any student or graduate of the school, as required by the Board. Any person who shall intentionally falsify any such record, data, or report shall be guilty of a misdemeanor and punishable as such.

(g) Each school of nursing shall pay to the Board an annual fee to be determined by the Board, not to exceed \$5.00 per student according to the average number of students enrolled throughout the preceding year, provided the Board shall find that the payment of such fees by the schools of nursing is necessary to enable the Board to meet the necessary expenses of performing its duties under this article. (1953, c. 1199, s. 1.)

§ 90-158.22. **Accredited list of nursing schools.** — The Board shall prepare and maintain a list of accredited schools of nursing in this State, whose graduates, if they have the other necessary qualifications as provided by this statute, shall be eligible to apply for a license to practice nursing as a registered nurse in this State by examination. The list shall be known as "The List of Accredited Schools of Professional Nursing of North Carolina" hereinafter referred to as the Fully Accredited List. (1953, c. 1199, s. 1.)

§ 90-158.23. **Board approval of nursing schools.**—A fully accredited school of nursing is one which has met the standards and requirements for accreditation as provided by § 90-158.21 as determined by the Board, and which has been approved by the Board. New schools of nursing and those not previously accredited may be provisionally accredited by the Board in accordance with the procedure prescribed by § 90-158.25. (1953, c. 1199, s. 1.)

§ 90-158.24. **Certain nursing schools placed on the Fully Accredited List.**—Every nursing school fully accredited by the present Board as of January 1, 1953, shall be listed as fully accredited by this article. Such schools of nursing and every school of nursing subsequently placed upon the Fully Accredited List shall remain on the list and shall be deemed to be meeting the requirements and standards for the conduct of schools of nursing as prescribed by this statute until any such school shall have been removed from the list in accordance with the procedure hereinafter prescribed. (1953, c. 1199, s. 1.)

§ 90-158.25. **Procedure for accreditation of new schools.**—A new school of nursing or a school not previously accredited by the Board may become accredited as follows:

(a) The institution applying for accreditation shall submit to the Board a written plan of organization containing a statement of the purposes and aims of the institution in establishing the school; the composition, powers, duties and responsibilities of the governing body of the school; a financial plan of the school; the titles and duties of the members of the faculty and the qualifications required of each; the proposed curriculum and the plan for its administration; the clinical facilities available at the hospital or hospitals affiliated with or in connection with which the school will be conducted; the scholastic standards to be met by the students; and such other written evidence as shall be necessary to show to the satisfaction of the Board that the school is able and willing to provide nursing education and clinical instruction and experience in accordance with the requirements for accreditation as prescribed by § 90-158.21 and written evidence sufficient to show to the satisfaction of the Board that the school can and will comply with the mini-

mum standards and requirements for accreditation upon the enrollment of students and the commencement of the operation of the school.

(b) The executive secretary or some other designated representative of the Board shall conduct a general survey of the proposed educational program and clinical facilities and shall submit a written report of the survey to the Board with respect to the new school of nursing which has applied for accreditation.

(c) The Board at a meeting at which representatives of the petitioning institution may appear after reasonable written notice shall consider the plan of organization, the report of survey, and such other evidence as may be presented, and shall act upon the application at the same or at a subsequent meeting.

(d) If the application for accreditation is approved and the school enrolls its first class of students within one year after approval, the school shall be provisionally accredited for a period of one year beginning with the date of the enrollment of the first class of students.

(e) The school shall be deemed to be fully accredited upon completion of a period of one year of satisfactory operation under provisional accreditation, if after survey and written report to the Board made by the executive secretary or other representative of the Board it shall appear that the school of nursing is meeting the standards and requirements prescribed by § 90-158.21.

If a school has been provisionally accredited under this section for one year and the survey and report of the executive secretary or other representative of the Board indicates that the school is not meeting the standards and requirements for complete accreditation as prescribed in § 90-158.21, the Board through its executive secretary shall cause a notice to be served upon the school notifying the school in writing that the survey indicates that the school is not complying with the standards and requirements for accreditation as prescribed by § 90-158.21, setting forth the respects in which the school fails to so comply therewith, and notifying the school that a hearing will be held before the Board on a specified date, to be not less than twenty days from the date on which the notice was given, and setting forth the time and place of such hearing at which the school of nursing may appear before the Board and show cause, if any, why the school should be placed upon the list of fully accredited schools of professional nursing. The school shall have the right and opportunity to present witnesses and other evidence on the question of its compliance with the standards and requirements for accreditation of schools of nursing, and to cross-examine other witnesses, and to be fully represented at the hearing by legal counsel. From the evidence presented at the hearing the Board shall make findings and conclusions on the question of whether or not the school of nursing has complied and is complying with the standards and requirements for accreditation as prescribed by § 90-158.21 and if the Board determines that the school has complied and is complying with such standards and requirements, the Board shall enter an order placing the school of nursing on the Fully Accredited List; if the Board determines to the contrary, the Board shall enter an order removing the school of nursing from the list of provisionally accredited schools. (1953, c. 1199, s. 1.)

§ 90-158.26. Periodic surveys of nursing schools. — The executive secretary of the Board, or such other representative of the Board as may be authorized from time to time by the Board, shall annually visit and make surveys of the various schools of nursing and the hospital or hospitals affiliated with the school of nursing or in connection with which the school of nursing is conducted. The purpose of such visit and survey shall be to make a preliminary determination concerning whether or not the particular school of nursing and the hospital or hospitals affiliated or connected therewith shall be then continuing to comply with the requirements and standards for the conduct of schools of nursing as prescribed by this statute. Following such visit and survey a written report of the survey and the findings shall be made to the Board. The Board shall consider such written reports covering surveys of schools of nursing at a regular or special

meeting and if the Board determines from any such report that it appears that any school of nursing on the Fully Accredited List is not then complying with the requirements and standards for the conduct of schools of nursing prescribed by this statute, the Board shall order the executive secretary or other employee of the Board to give notice to such school of nursing, specifying in writing the particulars in which the school of nursing appears to be failing to comply with the requirements and standards. The notice shall be sent to the school of nursing by registered mail and shall state that if the school of nursing fails to correct the conditions and the deficiencies so as to fully comply with the requirements and standards for the conduct of schools of nursing within a period of 180 days following the date upon which the written notice was placed in the United States mails, the said school of nursing will be removed from the Fully Accredited List and placed upon "The List of Provisionally Accredited Schools of Professional Nursing of North Carolina," hereinafter referred to as the Provisionally Accredited List, pending a formal hearing before the Board to determine whether or not the particular school of nursing is complying with the requirements and standards so as to entitle the school to be replaced upon the Fully Accredited List, in accordance with the procedure hereinafter set forth. At the end of the 180-day period referred to in the notice of apparent noncompliance given to a school of nursing, a committee of at least three members of the Board, designated by the Board, shall make a visit and survey of the school of nursing and the hospital or hospitals affiliated or connected therewith to make a preliminary determination as to whether or not the school of nursing has corrected the deficiencies specified in the notice; and if the committee shall determine that the school of nursing has not corrected all of those deficiencies specified and is not then complying with the requirements and standards for the conduct of schools of nursing as required by this statute, the committee shall authorize and direct the executive secretary to remove the school of nursing from the Fully Accredited List and place the name of the school of nursing on the Provisionally Accredited List until further action by the Board. If a hearing has not been held and action taken by the Board within a period of 180 days after any school of nursing has been so placed on the Provisionally Accredited List, such school at the end of 180 days shall be replaced on the Fully Accredited List subject to further removal in accordance with the provisions of this statute. (1953, c. 1199, s. 1.)

§ 90-158.27. **Effect of Provisionally Accredited List.** — When a school of nursing shall have been placed upon the Provisionally Accredited List in accordance with the procedure herein prescribed, the effect of such action shall be to inform students and prospective students and other persons, institutions and organizations interested in schools of professional nursing in North Carolina that a question has arisen as to whether or not the school of nursing is meeting the minimum requirements and standards for the conduct of schools of nursing as prescribed by statute and that proceedings are being held for the purpose of making a formal determination of that question. Insofar as applicants for examination for licensure as registered nurses in North Carolina are concerned, the appearance of the name of a school of nursing on the Provisionally Accredited List shall have the same effect as if said school had continued on the Fully Accredited List. (1953, c. 1199, s. 1.)

§ 90-158.28. **Procedure for removal from Provisionally Accredited List.**—When a school of nursing has been placed on the Provisionally Accredited List, it shall remain there until removed therefrom by action of the Board after a hearing as hereinafter provided for. The Board shall conduct a hearing at the time and place specified in the notice, at which hearing at least a majority of the members of the Board shall be present. A written transcript of the proceedings at the hearing shall be made by a qualified reporter. Any party to a proceeding before the Board shall be entitled to a copy of the record upon the payment of the

reasonable cost thereof as determined by the Board. After hearing the witnesses and receiving other evidence presented at the hearing, the Board shall give consideration to all of the evidence and upon such evidence appearing in the record shall make findings of fact and conclusions, which shall be set forth in writing, determining whether or not the school of nursing in question is complying with the requirements and standards for the conduct of schools of nursing as prescribed by statute. If a majority of all of the members of the Board shall determine from the findings of fact and conclusions based upon the evidence at such hearing that the school of nursing involved is complying with the requirements and standards, the Board shall enter a written order directing the executive secretary to replace the name of the school of nursing on the Fully Accredited List. If a majority of all of the members of the Board shall determine that the school of nursing involved is not complying with the requirements and standards for the conduct of schools of nursing prescribed by statute, the Board shall enter a written order confirming the removal of the school of nursing from the Fully Accredited List and directing the executive secretary to remove the name of the school of nursing from the Provisionally Accredited List, effective twenty days after the date of the mailing of the order unless appeal is taken as hereinafter provided. A copy of the findings, conclusions and orders of the Board, certified by the executive secretary shall be mailed to the school of nursing and to each student enrolled in said school of nursing. The executive secretary shall also cause to be published immediately in one or more daily newspapers of general circulation in North Carolina and also in a newspaper published in the county in which the school of nursing is located a notice of the decision of the Board after such decision has become final. In the event the decision of the Board is reversed on appeal, a notice of the final decision of the court shall be published by the executive secretary. (1953, c. 1199, s. 1.)

§ 90-158.29. Venue of hearings; authority of Board to issue subpoenas, administer oaths, etc.—All hearings before the Board shall be held in Wake County unless otherwise specifically ordered by the Board, in its discretion, for the convenience of witnesses. Hearings before the Board shall be open to the public. Every member of the Board shall have full power to administer oaths to witnesses appearing in any hearing before the Board, which oaths shall be administered according to law in the same form and manner as oaths are administered to witnesses testifying in the superior court. The Board shall have power to issue subpoenas to witnesses and to compel the attendance of witnesses at any hearing before the Board and shall have power to require the examination of persons and parties and compel the production of books, records and other documents pertinent to any matter pending before the Board. (1953, c. 1199, s. 1.)

§ 90-158.30. Refusal of witnesses to testify.—If any person duly subpoenaed to appear and testify before the Board shall fail or refuse to testify without lawful excuse, or shall refuse to answer any proper question propounded to him during the conduct of any hearing before the Board, or shall conduct himself in a rude, disrespectful or disorderly manner before the Board during the conduct of any hearing, such person shall be guilty of a misdemeanor and upon conviction thereof shall be punished in accordance with the law. (1953, c. 1199, s. 1.)

§ 90-158.31. Issuance and service of subpoenas.—All subpoenas for witnesses to appear before the Board shall be issued by the Board or its executive secretary and shall 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 sheriffs and other officers serving such subpoenas shall be entitled to the

same fees as are prescribed by law for serving subpoenas issued from the superior court. (1953, c. 1199, s. 1.)

§ 90-158.32. **Appeal to superior court.** — Within twenty days after the rendition of any adverse decision and the mailing to the school of nursing of a certified copy of the order of the Board containing such adverse decision, the school of nursing may appeal to the superior court of Wake County or the county in which the school is located by filing a written notice of such appeal with the Board, together with written exceptions to such order filed with the Board, specifically setting forth the ground or grounds on which the school of nursing, hereinafter called the appellant, considers said decision or order to be unlawful or unwarranted. Within twenty days after the filing of the notice of appeal, unless the time be extended by order of the court or by consent of the school of nursing involved, the Board shall transmit a copy of the entire record of the proceedings before the Board, certified under the seal of the Board, to the clerk of the court appealed to. The judge holding the courts of such county shall hear and determine all matters arising on such appeal as in this statute provided. After final determination of the case on appeal, the clerk of the superior court of such county shall transmit to the Board a certified copy of the judgment or order of the court. (1953, c. 1199, s. 1.)

§ 90-158.33. **Docketing of appeal.** — The cause shall be entitled "The North Carolina Board of Nurse Registration and Nursing Education v. (name of school of nursing)". The cause shall be placed on the civil issue docket of the court and shall have precedence over other civil actions. (1953, c. 1199, s. 1.)

§ 90-158.34. **Extent of review on appeal.**—No evidence shall be received at the hearing on appeal. On appeal, the court shall review the proceedings, without a jury, in chambers or at term time, and such review shall be confined to the record as certified by the Board to the court, except that in cases of alleged irregularities in procedure before the Board, not shown in the record, testimony thereon may be taken in the court. So far as necessary to the decision, when 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 Board action. The court may affirm or reverse the decision of the Board, declare the same null and void, or may remand the case for further procedure, if the substantial rights of the appellant school of nursing have been prejudiced because the Board's findings, conclusions or decisions are:

- (a) In violation of constitutional provisions, or
- (b) In excess of statutory authority or jurisdiction of the Board, or
- (c) Made upon unlawful proceedings, or
- (d) Affected by other errors of law, or
- (e) Unsupported by competent, material and substantial evidence in the record as submitted, or
- (f) Arbitrary or capricious.

The court shall also have power to compel action of the Board 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 the parties, and due account shall be taken of the rule of prejudicial error. The appellant school of nursing shall not be permitted to rely upon any grounds for relief on appeal which have not been set forth specifically in the written exceptions taken to the order of the Board. (1953, c. 1199, s. 1.)

§ 90-158.35. **Relief pending review on appeal.**—Pending judicial review, upon such conditions as may be required and to the extent necessary to prevent irreparable injury, 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 Board or take such action as may be necessary to preserve the status and

rights of any of the parties pending conclusion of the proceedings on appeal. (1953, c. 1199, s. 1.)

§ 90-158.36. **Appeal to Supreme Court.**—Either the appellant school of nursing or the Board may appeal to the Supreme Court of North Carolina from an adverse judgment of the superior court under the same rules and regulations as are prescribed by law for appeals. (1953, c. 1199, s. 1.)

§ 90-158.37. **Violation of statute misdemeanor.**—Any person procuring a license under this statute by false representation, or who shall refuse to surrender a license which has been revoked in the manner herein prescribed, or any person who shall use the title “trained nurse”, “graduate nurse”, “professional nurse”, or “registered nurse”, or any abbreviation, sign, or symbol thereof, without having first obtained a license as herein provided, and any person who shall otherwise violate any of the provisions of this statute, shall be guilty of a misdemeanor and upon conviction shall be punished according to law. Each act shall constitute a separate offense. (1953, c. 1199, s. 1.)

§ 90-158.38. **Board authorized to accept contributions, etc.** — The Board is authorized and empowered to accept grants, contributions, devises, bequests, or gifts to be kept in a separate fund and to be used by it in promotion and encouraging nurse recruitment and nurse education and training in this State, including the making of loans or gifts for the education and training of worthy student nurses. (1953, c. 1199, s. 1.)

§ 90-158.39. **Transfer of property, records, etc., of former Board of Nurse Examiners.**—From and after January 1, 1954, the title to all property, money, funds, books, records, furniture, fixtures and equipment shall automatically be transferred from the former board, known as the North Carolina Board of Nurse Examiners, to the new board created under the provisions of this article and designated as the North Carolina Board of Nurse Registration and Nursing Education. All records on file with the former Board of Nurse Examiners relating to the operation of the present duly licensed and accredited schools of nursing and all other records accumulated during the existence and enforcement of the provisions of the General Statutes pertaining to the Nurse Practice Act shall be retained by the North Carolina Board of Nurse Registration and Nursing Education. (1953, c. 1199, s. 11.)

§ 90-158.40. **Training school for nurses at sanatorium.**—The State sanatorium for the treatment of tuberculosis located at Sanatorium, North Carolina, is hereby authorized and power is hereby expressly given it to organize and conduct a training school for nurses in connection with the said sanatorium. The superintendent of the North Carolina sanatorium for the treatment of tuberculosis shall be ex officio dean of the training school for nurses, and he shall have power and authority to appoint such faculty, prescribe such course or courses of lectures, study and clinical work, and award such diplomas, certificates, or other evidence of the completion of such course or courses as he may think wise and proper, and perform such other functions and do such other acts as he may think necessary in the conduct of the said training school. (1915, c. 163, ss. 1, 2; C. S., s. 6739; 1953, c. 1199, s. 1.)

Editor's Note.—This section appears in the recompiled volume as § 90-171.

§ 90-158.41. **Nurse training program at State-supported educational institutions.** — The Governor is authorized to appoint a committee of three persons whose duty it shall be to investigate, study and make recommendations to him concerning the advisability and feasibility of establishing a program of nurse training at one or more of the several State-supported educational insti-

tutions. The committee so appointed shall give special consideration to establishing such program at one or more of the State-supported Negro educational institutions. The committee shall begin its investigation immediately upon its appointment and shall report its findings and recommendations to the Governor not later than July 1, 1953.

Upon receipt of the findings and recommendations, the Governor, as Director of the Budget, is authorized to adopt all or a part of such recommendations, and shall allocate to such institutions as he may determine, such amounts from the appropriations provided for in this section as will, in his judgment, best serve the purpose herein set forth.

There is hereby appropriated from the General Fund of the State, for the biennium 1953-1955, the sum of two hundred thousand dollars (\$200,000.00) for the purposes of this section. (1953, c. 1208.)

§§ 90-159 to 90-171: Repealed by Session Laws 1953, c. 1199.

Editor's Note.—Section 90-169, prior to its repeal, was amended by Session Laws 1953, c. 1041, s. 14, and § 90-171 was continued as § 90-158.40. See note to § 90-158.1.

ARTICLE 9A.

Practical Nurses.

§ 90-171.1. **Board of Nurse Registration and Nursing Education Enlarged.**—Solely and exclusively for the purpose of examining, licensing, and regulating practical nurses in accordance with and under the provisions of this article and for the purpose of administering the provisions of this article as it relates to practical nurses, the North Carolina Board of Nurse Registration and Nursing Education is hereby enlarged by adding to the Board three members who shall be licensed practical nurses and who may be members of the North Carolina Licensed Practical Nurses Association. The three practical nurses herein provided and added to the Board for the purposes herein stated shall be appointed and commissioned by the Governor of North Carolina for terms, commencing January 1, 1954, of four years each. Thereafter, the appointments shall be for a term of four years each. All vacancies in the membership of the licensed practical nurse members herein provided because of death, resignation or otherwise shall be filled by appointment of the Governor for the unexpired term of the member causing the vacancy; all expirations of regular terms of the members of the practical nurses shall be filled by appointment of the Governor for terms of four years each.

For all other purposes, except as herein specifically provided, the membership of the North Carolina Board of Nurse Registration and Nursing Education shall be and remain constituted as provided by General Statutes, chapter 90, article 9, and except as herein specifically provided, the powers, duties, and functions of the Board as constituted by chapter 90, article 9, of the General Statutes, shall not be affected by the provisions of this article.

The practical nurse members of the Board, as enlarged by this article, shall participate only in such action and functions of the Board as shall concern and affect matters relating to the examination, licensing and the regulation of undergraduate and practical nurses and relating to the administration of the provisions of this article. No business shall be transacted or other action taken concerning undergraduate and practical nurses at any meeting of the Board, as enlarged by this article, unless at least two of the practical nurse members shall be present.

The officers of the Board, as enlarged by this article, shall be the officers of the North Carolina Board of Nurse Registration and Nursing Education.

The executive secretary of the Board shall keep and maintain separate records and accounts of the funds arising from fees received under the provisions of Gen-

eral Statutes, chapter 90, article 9, as amended, from registered professional nurses and applicants for licensure as registered professional nurses, and of the funds arising from fees received under the provisions of this article from licensed practical nurses and applicants for licensure as licensed practical nurses.

The practical nurse members of the Board, as enlarged by this article, shall receive a per diem for attendance at meetings of the Board not exceeding ten dollars (\$10.00) per day, and in addition thereto they shall be entitled to their actual traveling and hotel expenses, to be approved by the enlarged Board, which shall be paid from the practical nurse funds arising from fees authorized by this article.

The Board, as enlarged by this article, is hereby empowered to authorize and direct the use of the funds arising from fees received under the provisions of this article from licensed practical nurses and applicants for licensure as licensed practical nurses for the purpose of contributing towards the payment of joint office expenses and joint operating expenses, including salaries of the secretary-treasurer and other employees who serve both the North Carolina Board of Nurse Registration and Nursing Education and the Board, as enlarged by this article. Provided, however, that the amount of funds arising from fees received under the authority and provisions of this article which may be so authorized and used for such joint purposes shall not exceed one-half of the total annual amount of such joint salaries and expenses during any fiscal year.

The Board, as enlarged by this article, is authorized and empowered to appoint and employ such assistants and clerical employees as it shall deem reasonably necessary to carry out its duties and functions relating to practical nurses.

All moneys received from fees authorized by this article from licensed practical nurses and from applicants for licensure as licensed practical nurses, in excess of the expenditures authorized and directed by the Board to be used for salaries and expenses as hereinbefore provided for, shall be held by the executive secretary for future expenses and for extending practical nursing education in North Carolina. No moneys used in carrying out this article shall be paid out of the State treasury.

The Board, as enlarged by this article, shall provide for the examination, licensing, and regulation of licensed practical nurses, and shall provide for the licensing of those now practicing as undergraduate and practical nurses, or attendants, in the manner hereinafter provided. (1947, c. 1091, s. 1; 1953, c. 1199, s. 2; 1955, c. 1266, s. 1.)

Editor's Note.—The 1953 amendment, effective January 1, 1954, rewrote the first paragraph, deleted from the fourth paragraph the requirement that officers of the Board shall continue to be registered professional nurses, substituted "executive

secretary" for "secretary-treasurer" in the fifth and ninth paragraphs, deleted from the seventh paragraph the former provision relating to salary of educational director, and rewrote the eighth paragraph.

§ 90-171.2. Participation of practical nurse members in meetings or activities of Board; establishment of standards, etc., for schools of practical nursing; construction of article.—The practical nurse members heretofore added to the Board shall participate only in those meetings or activities of the Board as concern or pertain to practical nursing. The Board, as enlarged by this article, shall have the power and authority to establish standards and provide minimum requirements for the conducting of schools of practical nursing, of which applicants for examination for the practical nurses' license under this article must be graduates before taking such examination. The standards and minimum requirements established by the Board shall relate to curricula, number of hours of theoretical instruction of a minimum period, educational facilities, library facilities, approved reference books, laboratory and clinical experience required, if any, practical experience required, if any, minimum hours to be required with reference to any or all of these standards, in-

cluding classrooms, suitable instructional facilities, faculty, and records. Nothing in this article shall be construed to limit or otherwise affect article 9 of chapter 90 of Volume 2C of the General Statutes relating to registered nurses except as herein set forth in this article. (1953, c. 1199, s. 3.)

Editor's Note.—The 1953 amendment, effective January 1, 1954, rewrote this section.

§ 90-171.3. Applicants; qualifications; procedure. — Any applicant who desires to obtain a license to practice as a licensed practical nurse shall submit to the Board, on forms furnished by the Board, satisfactory written evidence under oath that the applicant is at least eighteen years of age, is a citizen of the United States, or has legally declared intention of becoming a citizen, is of good moral character, is in good physical and mental health, has completed an education through the first year high school, or its equivalent, and has successfully completed a course of training for practical nursing approved and accredited by the Board Enlarged. Any person who has not completed a course of training for practical nursing approved and accredited by the Board Enlarged may nevertheless be an applicant for a license to practice as a licensed practical nurse and to obtain such license by examination as provided by G. S. 90-171.4 by submitting to the Board, on forms furnished by the Board, satisfactory written evidence under oath that such person (a) is at least twenty-one years of age; (b) is a citizen of the United States or has legally declared intention of becoming a citizen; (c) is of good moral character; (d) is in good physical and mental health; (e) has completed an education through the first year of high school, or its equivalent; and (f) has either satisfactorily completed eighteen months of practical and theoretical instruction in a school of nursing meeting the minimum requirements and standards established by article 9 of chapter 90 of the General Statutes for the education of persons desiring to become registered nurses, or has had twenty-four months of actual experience in practical nursing, such period of service and competency as a practical nurse to be certified by two physicians, or by one physician and one registered nurse, licensed to practice in the State of North Carolina. The application shall be accompanied by a fee of ten dollars (\$10.00) for examination and certification. Provided, that any person, who has not completed a course of training for practical nursing approved and accredited by the Board Enlarged, and who desires to be an applicant to practice as a licensed practical nurse under the conditions set forth in the second sentence in this section, shall file such application and complete and submit such forms as may be necessary to the Board on or before July 1, 1956, and no applications filed under this proviso after said date shall be considered or granted. (1947, c. 1091, s. 1; 1953, c. 750; 1953, c. 1199, s. 4; 1955, c. 1266, s. 2.)

Editor's Note. — This section was amended twice by the 1953 Session Laws. Chapter 750, effective April 10, 1953, inserted the second sentence. Chapter 1199, effective January 1, 1954, substituted the words "Board Enlarged" for "standardization committee" in lines nine and ten.

and substituted the phrase "by article 9 of chapter 90 of the General Statutes" for "pursuant to the provisions of G. S. 90-159" in clause (f) of the second sentence.

The 1955 amendment added the proviso at the end of the section.

§ 90-171.7. Renewal of licenses annually; procedure and fees.—The license of every person practicing under the provisions of this article shall be renewed annually upon application to the Board. On or before November one of each year, the secretary of the Board shall mail to the last known address an application for renewal of license to every licensed practical nurse in the State, but the failure to receive such application shall not excuse any practitioner from the requirements for renewal herein contained. The person receiving such application shall furnish the information indicated thereon and return the form to the Board with a renewal fee of two dollars (\$2.00) prior to January one of

the following year. Upon receipt of the application duly filled in and signed and the required fee, the secretary of the Board shall verify the accuracy of the application and issue to the applicant a certificate of renewal for the period beginning January one and ending December thirty-one of the following year. Such certificate of renewal shall constitute the holder thereof a duly licensed practical nurse for the period indicated on such certificate. Failure to renew the license thus annually shall automatically result in forfeiture of the right to practice nursing in North Carolina as a licensed practical nurse until application shall have been made and the fee therefor paid for the current year, and in addition to the regular renewal fee of two dollars (\$2.00) there shall also be assessed and paid a penalty of three dollars (\$3.00) for such failure to renew the annual license as herein required. (1947, c. 1091, s. 1; 1955, c. 1266, s. 3.)

Editor's Note.—The 1955 amendment changed the renewal fee from one dollar to two dollars. It also added the section the provision as to penalty for failure to renew license. at the end of

§ 90-171.8. Revocation and suspension of licenses; procedure for reinstatement.—The Board, as enlarged by this article, shall have power to deny, revoke or suspend any license to practice as a licensed practical nurse applied for or issued by the Board in accordance with the provisions of this article for gross incompetency, negligence while on duty, the commission of a felony or a crime involving moral turpitude, habitual drunkenness, addiction, to the use of drugs, or for any habit rendering her unfit to care for the sick, or for violation of any provision of this article. The procedure for denial, revocation or suspension of a license shall be in accordance with the provisions of chapter 150, General Statutes of North Carolina. Upon revocation or suspension of a license the name of the holder thereof shall be stricken from the roll of licensed practical nurses in the hands of the secretary of the Board.

When the license of any person has been revoked as herein provided, the Board may, after the expiration of three months, and upon payment of a fee of five dollars (\$5.00), entertain an application for and grant a new license without further examination. No such new license shall be granted except upon the affirmative vote of at least five members of the Board. (1947, c. 1091, s. 1; 1953, c. 1041, s. 15; 1953, c. 1199, s. 5.)

Editor's Note.— This section was amended twice by the 1953 Session Laws. Chapter 1041, effective July 1, 1953, deleted from the end of the second sentence the following: 1943, entitled, "Uniform Revocation of Licenses." Chapter 1199, effective January 1, 1954, inserted the word "denial" in line seven, and until that date the section should be read as if the quoted word had not been inserted.

§ 90-171.9. Accredited list of practical nursing schools; approval of certain schools already accredited; procedure for accreditation of new schools; surveys and provisional accreditation.— (1) The Board Enlarged shall prepare and maintain a list of accredited schools of practical nursing in this State, whose graduates, if they have the other necessary qualifications as provided by this article, shall be eligible to apply for a license to practice nursing as a licensed practical nurse in this State by examination. The list shall be known as "The List of Accredited Schools of Practical Nursing of North Carolina", hereinafter referred to as the Fully Accredited List.

A fully accredited school of practical nursing is one which has met the standards and requirements for accreditation as provided by the Board Enlarged under the authority of this article. New schools of practical nursing and those not previously accredited may be provisionally accredited by the Board Enlarged in accordance with the procedure prescribed by this article.

(2) Every school of practical nursing or institution conducting a course for the training of licensed practical nurses fully accredited by the present Board Enlarged, as of January 1, 1953, shall be listed as fully accredited by this article. Such schools of nursing or institutions conducting courses for the training of

licensed practical nurses subsequently placed upon the Fully Accredited List shall remain on the list and shall be deemed to be meeting the requirements and standards for the conduct of schools of nursing as prescribed by this article until any such school shall have been removed from the list in accordance with the procedure hereinafter prescribed.

(3) A new school of practical nursing or a school not previously accredited by the Board Enlarged may become accredited as follows:

(a) The institution applying for accreditation shall submit to the Board Enlarged a written plan of organization containing a statement of the purposes and aims of the institution in establishing the school; the composition, powers, duties and responsibilities of the governing body of the school; a financial plan of the school; the titles and duties of the members of the faculty and the qualifications required of each; the proposed curriculum and the plan for its administration; the clinical facilities available at the hospital or hospitals affiliated with or in connection with which the school will be conducted; the scholastic standards to be met by the students; and such other written evidence as shall be necessary to show to the satisfaction of the Board Enlarged that the school is able and willing to provide practical nursing education and clinical instruction and experience in accordance with the requirements for accreditation as prescribed by the Board Enlarged under the authority of this article and written evidence sufficient to show to the satisfaction of the Board Enlarged that the school can and will comply with the minimum standards and requirements for accreditation upon the enrollment of students and the commencement of the operation of the school.

(b) The executive secretary or some other designated representative of the Board Enlarged shall conduct a general survey of the proposed educational program and clinical facilities and shall submit a written report of the survey to the Board Enlarged with respect to the new school of practical nursing which has applied for accreditation.

(c) The Board Enlarged at a meeting at which representatives of the petitioning institution may appear after reasonable written notice shall consider the plan of organization, the report of survey, and such other evidence as may be presented, and shall act upon the application at the same or at a subsequent meeting.

(d) If the application for accreditation is approved and the school enrolls its first class of students within one year after approval, the school shall be provisionally accredited for a period of one year beginning with the date of the enrollment of the first class of students.

(e) The school shall be deemed to be fully accredited upon completion of a period of one year of satisfactory operation under provisional accreditation, if after survey and written report to the Board Enlarged made by the executive secretary or other representative of the Board Enlarged it shall appear that the school of practical nursing is meeting the standards and requirements prescribed by the Board Enlarged under the authority of this article.

If a school has been provisionally accredited under this section for one year and the survey and report of the executive secretary or other representative of the Board Enlarged indicates that the school is not meeting the standards and requirements for complete accreditation as prescribed by the Board Enlarged under the authority of this article, the Board Enlarged through the executive secretary shall cause a notice to be served upon the school notifying the school in writing that the survey indicates that the school is not complying with the standards and requirements for accreditation as prescribed by the Board Enlarged under the authority of this article, setting forth the respects in which the school fails to so comply therewith, and notifying the school that a hearing will be held before the Board Enlarged on a specified date, to be not less than twenty days from the date on which the notice was given, and setting forth the time and place of such hearing at which the school of nursing may appear before the Board Enlarged and show cause, if any, why the school should be placed upon the list

of fully accredited schools of practical nursing. The school shall have the right and opportunity to present witnesses and other evidence on the question of its compliance with the standards and requirements for accreditation of schools of practical nursing, and to cross-examine other witnesses, and to be fully represented at the hearing by legal counsel. From the evidence presented at the hearing the Board Enlarged shall make findings and conclusions on the question of whether or not the school of nursing has complied and is complying with the standards and requirements for accreditation as prescribed by the Board Enlarged under the authority of this article, and if the Board Enlarged determines that the school has complied and is complying with such standards and requirements, the Board Enlarged shall enter an order placing the school of nursing on the Fully Accredited List; if the Board Enlarged determines to the contrary, the Board Enlarged shall enter an order removing the school of practical nursing from the list of provisionally accredited schools. (1947, c. 1091, s. 1; 1953, c. 1199, s. 6.)

Editor's Note.—The 1953 amendment, effective January 1, 1954, rewrote this section.

§ 90-171.10. Periodic surveys of practical nursing schools.—The executive secretary, or such other representative of the Board Enlarged as may be authorized from time to time by the Board Enlarged, shall visit and make surveys of the various schools of practical nursing and the hospital or hospitals affiliated with the school of practical nursing or in connection with which the school of practical nursing is conducted, at such time as the executive secretary may consider necessary and proper or at such time as the Board Enlarged may direct. The purpose of such visit and survey shall be to make a preliminary determination concerning whether or not the particular school of nursing and the hospital or hospitals affiliated or connected therewith shall be then continuing to comply with the requirements and standards for the conduct of schools of practical nursing as prescribed by this article. Following such visit and survey a written report of the survey and the findings shall be made to the Board Enlarged. The Board Enlarged shall consider such written reports covering surveys of schools of practical nursing at a regular or special meeting and if the Board Enlarged determines from any such report that it appears that any school of practical nursing on the Fully Accredited List is not then complying with the requirements and standards for the conduct of schools of practical nursing prescribed by this article, the Board Enlarged shall order the executive secretary or other employee of the Board Enlarged to give notice to such school of practical nursing, specifying in writing the particulars in which the school appears to be failing to comply with the requirements and standards. The notice shall be sent to the school by registered mail and shall state that if the school fails to correct the conditions and the deficiencies so as to fully comply with the requirements and standards for the conduct of schools of practical nursing within a period of 180 days following the date upon which the written notice was placed in the United States mails, the said school of practical nursing will be removed from the Fully Accredited List and placed upon "The List of Provisionally Accredited Schools of Practical Nursing of North Carolina", hereinafter referred to as the Provisionally Accredited List, pending a formal hearing before the Board Enlarged to determine whether or not the particular school of practical nursing is complying with the requirements and standards so as to entitle the school to be replaced upon the Fully Accredited List, in accordance with the procedure hereinafter set forth. At the end of the 180 day period referred to in the notice of apparent noncompliance given to a school of practical nursing, a committee of at least three members of the Board Enlarged, designated by the Board Enlarged, shall make a visit and survey of the school of practical nursing and the hospital or hospitals affiliated or connected therewith to make a pre-

liminary determination as to whether or not the school has corrected the deficiencies specified in the notice; and if the committee shall determine that the school has not corrected all of those deficiencies specified and is not then complying with the requirements and standards for the conduct of schools of practical nursing as required by this article, the committee shall authorize and direct the executive secretary to remove the school from the Fully Accredited List and place the name of the school on the Provisionally Accredited List until further action by the Board Enlarged. If a hearing has not been held and action taken by the Board Enlarged within a period of 180 days after any school of practical nursing has been so placed on the Provisionally Accredited List, such school at the end of 180 days shall be replaced on the Fully Accredited List subject to further removal in accordance with the provisions of this article.

The executive secretary shall also at least annually cause the lists to be published in such daily newspapers circulated in North Carolina as in the opinion of the executive secretary may be reasonably calculated to give the lists general publicity throughout the State. A copy of the list shall also be sent at least annually to every school of practical nursing on each list. (1953, c. 1199, s. 7.)

Editor's Note.—The 1953 amendment, tion. For present section covering subject effective January 1, 1954, rewrote this section. For present section covering subject matter of former section, see § 90-171.13.

§ 90-171.11. Effect of Provisionally Accredited List.—(1) When a school of practical nursing shall have been placed upon the Provisionally Accredited List in accordance with the procedure herein prescribed, the effect of such action shall be to inform students and prospective students and other persons, institutions and organizations interested in schools of practical nursing in North Carolina that a question has arisen as to whether or not the school is meeting the minimum requirements and standards for the conduct of schools of practical nursing as prescribed by this article and that proceedings are being held for the purpose of making a formal determination of that question. Insofar as applicants for examination for licensure as licensed practical nurse in North Carolina are concerned, the appearance of the name of a school of practical nursing on the Provisionally Accredited List shall have the same effect as if said school had continued on the Fully Accredited List.

(2) When a school of practical nursing has been placed on the Provisionally Accredited List it shall remain there until removed therefrom by action of the Board Enlarged after a hearing as hereinafter provided for. The Board Enlarged shall conduct a hearing at the time and place specified in the notice, at which hearing at least a majority of the members of the Board Enlarged shall be present. A written transcript of the proceedings at the hearing shall be made by a qualified reporter. Any party to a proceeding before the Board Enlarged shall be entitled to a copy of the record upon the payment of the reasonable cost thereof as determined by the Board Enlarged. After hearing the witnesses and receiving other evidence presented at the hearing, the Board Enlarged shall give consideration to all of the evidence and upon such evidence appearing in the record shall make findings of fact and conclusions, which shall be set forth in writing, determining whether or not the school in question is complying with the requirements and standards for the conduct of schools of practical nursing as prescribed by this article. If a majority of all of the members of the Board Enlarged shall determine from the findings of fact and conclusions based upon the evidence at such hearing that the school of nursing involved is complying with the requirements and standards, the Board Enlarged shall enter a written order directing the executive secretary to replace the name of the school of practical nursing on the Fully Accredited List. If a majority of all of the members of the Board Enlarged shall determine that the school involved is not complying with the requirements and standards for the conduct of schools of practical nursing prescribed by this article, the Board Enlarged shall enter a written order confirming the removal of the school of practical nursing from the

Fully Accredited List and directing the executive secretary to remove the name of the school of practical nursing from the Provisionally Accredited List, effective twenty days after the date of the mailing of the order unless appeal is taken as hereinafter provided. A copy of the findings, conclusions and order of the Board Enlarged, certified by the executive secretary, shall be mailed to the school of practical nursing and to each student enrolled in said school. The executive secretary shall also cause to be published immediately in one or more daily newspapers of general circulation in North Carolina and also in a newspaper published in the county in which the school of practical nursing is located a notice of the decision of the Board Enlarged after such decision has become final. In the event the decision of the Board Enlarged is reversed on appeal, a notice of the final decision of the court shall be published by the executive secretary. (1953, c. 1199, s. 8.)

Editor's Note.—The 1953 amendment, effective January 1, 1954, rewrote this section. For present section covering subject matter of former section, see § 90-171.14.

§ 90-171.12. Venue; authority of Board Enlarged; subpoenas; oaths; conduct of hearing and appeals.—The venue of all hearings conducted by the Board Enlarged for the purposes of this article, the authority of the Board Enlarged to issue subpoenas, administer oaths, the punishment of witnesses for refusal to testify, service of subpoenas, the method of appeal to the superior court from adverse decisions of the Board Enlarged, the docketing of the appeal, the extent of judicial review on appeal and relief that may be granted pending review on appeal, as set forth in §§ 90-158.29, 90-158.30, 90-158.31, 90-158.32, 90-158.33, 90-158.34, 90-158.35 and 90-158.36 of article 9 of chapter 90 of volume 2C of the General Statutes, shall be applicable in all things and in all particulars to hearings, orders, decisions and other determinations and acts of the Board Enlarged to the same extent as if said sections were herein set forth, and said sections are in all respects made applicable to the Board Enlarged. (1953, c. 1199, s. 9.)

Editor's Note.—The 1953 amendment, effective January 1, 1954, rewrote this section. For present section covering subject matter of former section, see § 90-171.15.

§ 90-171.13. Article does not prohibit other persons from performing nursing service.—No provision of this article shall be construed to prohibit the performance of general nursing service by any person for compensation or gratuitously, or to prohibit the gratuitous nursing of the sick, the furnishing of services by domestic servants, friends or relatives, or any midwife or other person who does not assume to be or hold herself out to be a licensed practical nurse. (1947, c. 1091, s. 1; 1953, c. 1199, s. 10.)

Editor's Note.—The 1953 amendment, effective January 1, 1954, renumbered § 90-171.10 to appear as this section.

§ 90-171.14. Violation of article; penalties.—After the effective date of this article it shall be unlawful for any person to:

a. Represent herself to be a licensed practical nurse or use the designation "licensed practical nurse" or the abbreviation "L. P. N.," unless she is licensed under the provisions of this article.

b. Make a material false statement or representation to the Board in applying for a license under this article.

c. Refuse to surrender a license which has been revoked in the manner prescribed herein.

d. Represent that any school or course is approved or accredited as a course or school for the training of licensed practical nurses unless such course or school has been approved and accredited by the standardization committee hereinabove referred to.

Any person violating any of the provisions of this article shall be guilty of a

misdeemeanor, and upon conviction thereof shall be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty (30) days. (1947, c. 1091, s. 1; 1953, c. 1199, s. 10.)

Editor's Note.—The 1953 amendment, effective January 1, 1954, renumbered § 90-171.11 to appear as this section.

§ 90-171.15. **Undergraduate nurse.**—The words “practical nurse” or “licensed practical nurse,” shall mean and include “undergraduate nurse.” (1947, c. 1091, s. 2; 1953, c. 1199, s. 10.)

Editor's Note.—The 1953 amendment effective January 1, 1954, renumbered § 90-171.12 to appear as this section.

ARTICLE 10.

Midwives.

§ 90-172. **Midwives to register.**—All persons, other than regularly registered physicians, desiring to practice midwifery in this State, must first secure a permit from the State Board of Health or a local department of health in accordance with the provisions of article 18 of chapter 130 of the General Statutes of North Carolina. (1917, c. 257, ss. 8, 9; C. S., s. 6750; 1957, c. 1357, s. 6.)

Editor's Note.—The 1957 amendment, effective January 1, 1958, rewrote this section.

§§ 90-173 to 90-178: Repealed by Session Laws 1957, c. 1357, s. 7.

Editor's Note.—The act repealing these sections is effective as of January 1, 1958.

ARTICLE 11.

Veterinaries.

§ 90-183. **Examination and licensing of veterinaries.**—The Board of Examiners shall, at its annual meeting, examine all applicants who desire license to practice veterinary medicine or surgery in the State of North Carolina. To entitle a person to such examination, each applicant shall have attained the age of 21 years and shall be a person of good moral character and shall furnish said Board of Examiners with satisfactory evidence that said applicant is a graduate of a reputable and accredited veterinary school, college or university accepted and approved by the United States Bureau of Animal Industry and the United States Army. If upon such examination the applicant be found to possess sufficient skill to practice veterinary medicine or surgery, a license or certificate shall be issued to him. No certificate shall be granted except with a concurrence of a majority of the members present. To prevent delay and inconvenience two members of the Board of Examiners may grant a temporary certificate to practice veterinary medicine or surgery which shall be in force only until the next regular meeting of the Board of Examiners, but in no case shall such temporary certificate be granted to any person who theretofore has been an unsuccessful applicant for a certificate before the Board. The Board shall have power to require such applicant to pay a fee of not more than twenty-five dollars (\$25.00) before issuing a certificate, and ten dollars (\$10.00) before issuing a temporary certificate. (1903, c. 503, ss. 3, 5, 8; Rev., s. 5435; C. S., s. 6758; 1951, c. 749.)

Editor's Note.—The 1951 amendment rewrote this section.

§ 90-184. **Rescission of license.**—The Board shall have power to rescind any certificate that may have been granted by it or annul any registration made

under this article in accordance with the provisions of chapter 150 of the General Statutes upon satisfactory proof that the person thus licensed has been guilty of grossly immoral conduct or malpractice as determined by the Board. And it shall be the duty of said Board to furnish any information pertaining to the practice of veterinary medicine or surgery upon application for same by anyone practicing under this article. (1903, c. 503, s. 10; Rev., s. 5436; C. S., s. 6759; 1953, c. 1041, s. 16.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, substituted "chapter 150 of the General Statutes" for "§§ 150-1 to 150-8" formerly appearing in line three.

ARTICLE 12.

Chiropodists.

§ 90-197. Revocation of certificate; grounds for; suspension of certificate.—The Board of Chiropody Examiners may revoke by a majority vote of its members, and in accordance with the provisions of chapter 150 of the General Statutes, any certificate it has issued, and cause the name of the holder to be stricken from the book of the registration by the clerk of the court in the city or county in which the name of the person whose certificate is revoked is registered, for any of the following causes:

1. The willful betrayal of a professional secret.
2. Any person who in any affidavit required of the applicant for certificate, registration, or examination under this article shall make a false statement.
3. Any person convicted of a crime involving moral turpitude.
4. Any person habitually indulging in the use of narcotics, ardent spirits, stimulants or any other substance which impairs intellect and judgment to such an extent as in the opinion of the Board to incapacitate such person for the performance of his professional duties.

The Board may, in accordance with the provisions of chapter 150 of the General Statutes, suspend any certificate granted under this article for a period not exceeding six months on account of any misconduct on the part of the person registered which would not, in the judgment of the Board, justify the revocation of his certificate. (1919, c. 78, ss. 12, 13; C. S., s. 6772; 1953, c. 1041, ss. 17, 18.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, substituted "chapter 150 of the General Statutes" for "§§ 150-1 to 150-8" formerly appearing in line two of the first paragraph, struck out the former second paragraph, and inserted the words "in accordance with the provisions of chapter 150 of the General Statutes" near the beginning of the last paragraph.

ARTICLE 13.

Embalmers and Funeral Directors.

§ 90-203. State Board; members; election; qualifications; term; vacancies.—The State Board of Embalmers and Funeral Directors shall consist of seven members, elected by the North Carolina Funeral Directors and Burial Association, Incorporated, at least five of whom shall be licensed and practicing embalmers, having experience in the care and disposition of dead human bodies. Of the five members of the Board required to be licensed and practicing embalmers, one such member of the Board shall be elected in June, one thousand nine hundred and five, and one annually thereafter in the month of June. The term of office shall begin on the first day of July, next after the election and continue for five years. The two members of the Board not required to be licensed and practical embalmers shall be elected during the month of June, one thousand nine hundred and forty-nine, one for a term of two years, beginning on the first day of July, one thousand nine hundred and forty-nine, and

one for a term of three years, beginning July 1, one thousand nine hundred and forty-nine; the successor of these members of the Board shall be elected thereafter during the month of June in the year in which the term of the Board member expires. The North Carolina Funeral Directors and Burial Association, Incorporated, shall fill all vacancies in such Board. In addition to the seven members above provided for, the president of the State Board of Health shall serve ex officio as a member of said Board. (1901, c. 338, ss. 1, 2, 3; Rev., s. 4384; C. S., s. 6777; 1931, c. 174; 1945, c. 98, s. 1; 1949, c. 951, s. 1; 1957, c. 1240, s. 1.)

Editor's Note.—

The 1957 amendment added the last sentence of this section.

§ 90-204. **Definitions.**—As used in this article, unless the context otherwise requires, the term

- (1) "Embalmer" means a person who disinfects and preserves or attempts to disinfect and preserve the dead human body, entirely or in part, by the use or application of chemicals, fluids, or gases, externally or internally, or both, either by the introduction of same into the body by vascular or hypodermic injections or by direct application into the organs or cavities or by any other method, or who by restorative art restores or attempts to restore the appearance of the dead human body.
- (2) "Embalming" means the preservation and disinfection or attempted preservation and disinfection of the dead human body entirely or in part, by the application of chemicals, fluids, or gases, externally or internally, or both, either by the introduction of same into the body, by vascular or hypodermic injections or by direct application into the organs or cavities or by other approved or recognized methods, and shall include the restoration, or attempted restoration, of the appearance of the dead human body.
- (3) "Board" means the North Carolina State Board of Embalmers and Funeral Directors.
- (4) "Secretary" means the secretary for the North Carolina State Board of Embalmers.
- (5) "Funeral establishment", for the purposes of G. S. 90-204 through G. S. 90-210.8, means a place of business used in the care and preparation for burial or transportation or other disposal of dead human bodies, or any place or premises at or from which any person or persons shall represent himself or themselves or hold out himself or themselves as being engaged in the profession of embalming.
- (6) "Apprentice" means a person who is engaged in learning the art of embalming under the instruction and personal supervision of a duly licensed embalmer under the provisions of this article, and who is duly registered as such with the Board. (1957, c. 1240, s. 2.)

Editor's Note.—

Session Laws 1957, c. 1240, s. 2, rewrote this article.

§ 90-205. **Removal of members; oath.**—The North Carolina Funeral Directors and Burial Association, Incorporated, shall have power to remove from office any member of said Board for neglect of duty, incompetency, or improper conduct. The North Carolina Funeral Directors and Burial Association, Incorporated, shall furnish each person appointed to serve on the Board a certificate of appointment, except the president of the State Board of Health. The appointees shall qualify by taking and subscribing to the usual oath of office, to faithfully perform their duties, before some person authorized to ad-

minister oaths, within ten days after said appointment has been made, which oath shall be filed with the Board. (1901, c. 338, ss. 3, 4; Rev., s. 4385; C. S., s. 6778; 1945, c. 98, s. 2; 1949, c. 951, s. 2; 1957, c. 1240, s. 2.)

§ 90-206. **Common seal; powers.**—The Board shall adopt a common seal and shall have the powers and privileges conferred on it by the law of the State. (1901, c. 338, s. 6; Rev., s. 4386; C. S., s. 6779; 1957, c. 1240, s. 2.)

§ 90-207. **Meetings; quorum; bylaws; officers; president to administer oaths.**—The Board shall meet at least once every year, during the month of July, at such place as it may determine. Four members shall constitute a quorum. At each annual meeting the Board from its members shall select a president and a secretary, who shall hold their offices for one year, and until their successors are elected. The Board shall, from time to time, adopt rules, regulations, and bylaws not inconsistent with the laws of this State or the United States, whereby the performance of the duties of such Board and the practice of embalming of dead human bodies shall be regulated. The Board shall also enforce such rules and regulations relative to sanitation, health and the protection of the public from contagious and infectious diseases as are promulgated by the State Board of Health with respect to the handling of dead human bodies. The president of the Board (and in his absence a president pro tempore elected by the members present) is authorized to administer oaths to witnesses testifying before the Board. (1901, c. 338, ss. 5, 6, 7, 8; Rev., s. 4387; C. S., s. 6780; 1949, c. 951, s. 3; 1957, c. 1240, s. 2.)

§ 90-208. **Expenses and salaries of Board.**—All expenses, salary, and per diem to members of this Board shall be paid from fees received under the provisions of this article, and shall in no manner be an expense to the State. All moneys received in excess of said per diem allowance and other expenses provided for shall be held by the secretary of said Board as a special fund for meeting expenses of said Board. (1901, c. 338, s. 11; Rev., s. 4389; C. S., s. 6783; 1957, c. 1240, s. 2.)

§ 90-209. **Unlawful practice; exceptions.**—It shall be unlawful for any person to engage in embalming or to represent himself to the public as an embalmer, undertaker or mortician, without first complying with the provisions of this article. When any funeral establishment is owned by a partnership or corporation, the person or persons in active charge of the operation of such establishment must be licensed as a funeral director and/or a licensed embalmer under the terms of this article and are subject to the provisions thereof.

The provisions of this article shall not apply to the preparation and burial of dead bodies of paupers or of inmates of State institutions when such paupers or inmates are buried at the expense of the State. (1957, c. 1240, s. 2.)

§ 90-210. **Grant of license to embalmers.**—No person shall engage in the practice of embalming without first obtaining the license herein provided. Every person not licensed as an embalmer, now engaged or desiring to engage in the practice of embalming dead human bodies, shall make written application to the Board for a license, accompanying the same with a fee of fifteen dollars (\$15.00) whereupon the applicant shall present himself before the Board at a time and place fixed by the Board, and if the Board shall find upon due examination that the applicant is a resident of North Carolina, a citizen of the United States, 21 years of age, of good moral character, as evidenced by at least two affidavits to that effect; possessed of high school education of not less than sixteen carnegie units or the equivalent thereof, such equivalence to be determined by the Board in its discretion, has completed a minimum of twenty-four months of service as an apprentice under the supervision of a licensed and practicing embalmer, who shall make affidavit upon the application that said applicant has

had such experience under him, possessed of skill and knowledge of said science of embalming and the care and disposition of the dead, and has a responsible knowledge of sanitation and the disinfection of bodies of deceased persons and the apartment, clothing, and bedding, in case of death from infectious or contagious disease, and has had a special course of at least nine months in embalming in an approved school in mortuary science, the Board shall issue to such applicant a license to practice the art of embalming and the care and disposition of the dead and shall register such applicant as a duly licensed embalmer, such license shall be signed by a majority of the Board and attested by its seal. (1901, c. 338, ss. 9, 10; Rev., s. 4388; 1917, c. 36; 1919, c. 88; C. S., s. 6781; 1949, c. 951, s. 4; 1951, c. 413; 1957, c. 1240, s. 2.)

§ 90-210.1. Renewal; registration; display of license.—All persons receiving a license as an embalmer under the provisions of this article shall register the fact at the office of the board of health of the city, and where there is no board of health, with the clerk of the superior court in the county or counties in which it is proposed to carry on said practice and shall display said license in a conspicuous place in the office of such licentiate. Every registered embalmer who desires to continue the practice of his profession shall annually, during the time he shall continue in such practice, on such day as the Board may determine, pay to the secretary of the Board, a fee not in excess of fifteen dollars (\$15.00) for the renewal registration, as determined by the Board. (1901, c. 338, ss. 9, 10; Rev., s. 4388; 1917, c. 36; 1919, c. 88; C. S., s. 6781; 1949, c. 951, s. 4; 1951, c. 413; 1957, c. 1240, s. 2.)

§ 90-210.2. Embalmers licensed prior to July 1, 1957.—Any person who having previously been licensed by the Board as an embalmer prior to July 1, 1957, shall not be required to take or pass an examination, or to serve the apprenticeship herein provided, but shall be entitled to have such license renewed upon making proper application therefor, and upon the payment of the renewal fee provided by the provisions of this article. (1957, c. 1240, s. 2½.)

§ 90-210.3. Apprentices. — (a) Each apprentice in embalming, upon commencing his apprenticeship as an embalmer, shall register as an apprentice with the secretary and pay such fee as may be fixed by the Board. He shall notify the Board immediately upon completion of his apprenticeship and as evidence thereof submit to the Board a sworn affidavit to that effect, signed by the licensed embalmer under whom such apprenticeship was served, or in case of his death or incapacity, then by some reputable person having knowledge of the facts.

(b) Whenever any person applying for a license under this article as an embalmer has served the whole or any part of the apprenticeship of practical experience required by this article, and his apprenticeship has been interrupted by service in any branch of the armed services of the United States, then in all such cases, the applicant shall be given credit for the time served in such apprenticeship as fully in all respects as if such service in the armed forces had not caused an interruption in the period of practical experience required under this section. (1957, c. 1240, s. 2.)

§ 90-210.4. Powers of Board.—(a) In furtherance of its purpose of regulating the practice of embalming in this State, the Board shall have the power and it shall be its duty to prescribe rules and regulations governing the qualifications, fitness and practices of those engaged in and who may engage in embalming in this State and the care and disposition of dead human bodies; governing the standards of sanitation to be observed in the embalming and care of dead human bodies; and governing the proper administration of the provisions of this article including defining any provision not specifically defined in this article. The Board shall specifically have the power to fix and prescribe

rules and regulations as to the procedure to be followed in making of applications for licenses, in the issuance and renewals of licenses, and the conduct of examinations. It shall fix fees to be paid for the registration of apprentices.

(b) The Board may refuse to issue or may refuse to renew, or suspend or revoke any license to engage in embalming, or may place the holder thereof on a term of probation or suspension after proper hearing upon finding the holder of such license to be guilty of any of the following acts or commissions:

- (1) Conviction of a crime involving moral turpitude,
- (2) Conviction of a felony,
- (3) Unprofessional conduct which is hereby defined to include:
 - a. Misrepresentation or fraud in the conduct of the business or the profession of an embalmer;
 - b. False or misleading advertising as an embalmer;
 - c. Solicitation of dead human bodies by the licensee, his agents, assistants, or employees, provided that this subsection shall not be deemed to prohibit general advertising;
 - d. Employment by the licensee of persons known as "cappers", or "steerers" or "solicitors", or other such persons to obtain embalming;
 - e. Employment directly or indirectly of any apprentice, agent, assistant, embalmer, or other persons, on part or full time, or on commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular embalmer;
 - f. The direct or indirect giving of certificates of credit, the payment or offer of payment of a commission by the licensee, his agents, assistants, or employees for the purpose of securing business;
 - g. Gross immorality;
 - h. Aiding or abetting an unlicensed person to practice embalming;
 - i. Using profane, indecent or obscene language in the presence of a dead human body, and within the immediate hearing of the family or relatives of a deceased person whose body has not yet been interred or otherwise disposed of;
 - j. Solicitation or acceptance by a licensee of any commission or bonus or rebate in consideration of recommending or causing a dead human body to be disposed of in any cemetery, mausoleum, or crematory;
 - k. Violation of any of the provisions of this article;
 - l. Violation of any State law or municipal ordinance or regulations affecting the handling, custody, care or transportation of dead human bodies;
 - m. Fraud or misrepresentation in obtaining a license;
 - n. Refusing to promptly surrender the custody of a dead human body, upon the express order of the person lawfully entitled to the custody thereof;
 - o. Failure to secure permit for removal or burial of a dead human body prior to interment or disposal;
 - p. Knowingly making any false statement on a certificate of death;
 - q. Indecent exposure or exhibition of a dead human body while in the custody or control of an embalmer.

(4) Failure to pay the license renewal fee on the date designated by the Board and continuing to practice without paying said fee.

(c) In addition to the above specific grounds for refusal or suspension of a license or the placing of a licensee on probation, whenever the Board shall have reason to believe that any person to whom a license has been issued has

become unfit to practice embalming, or has violated any of the provisions of this article or any rule or regulation prescribed pursuant thereto, it shall be the duty of the Board to conduct an investigation, and from such investigation if it shall appear to the Board that there is reasonable ground for belief that the accused may have been guilty of the violation charged, a time and place shall be set by the Board for a hearing to show cause whether or not the license of the accused shall be revoked, or suspended. (1957, c. 1240, s. 2.)

§ 90-210.5. **Funeral home; embalmer; preparation room.** — (a) Every established funeral home or firm must employ and maintain a licensed embalmer or embalmers as may be necessary to operate the business under the terms of this article.

(b) Every such establishment or funeral home shall maintain a preparation room containing at least 64 square feet in area for the preparation of dead human bodies. This room shall be strictly private. No one shall be allowed in the preparation room while a dead human body is being prepared, except the licensed embalmer, their duly registered apprentices, public officials in the discharge of their duties, accredited nurse employed in the case or members of the medical profession, next of kin of the deceased or officials of the funeral home or other legally authorized persons. The room shall contain the following equipment:

- (1) One modern standard type sanitary operating table;
- (2) Slop sink with adequate drainage;
- (3) Sanitary waste receptacle;
- (4) An approved type instrument sterilizer.

(c) The floor shall have tile or concrete or other waterproof materials covering the floor from wall to wall and the room shall be kept in sanitary condition at all times subject to inspection by the Board or their designated agents at any and all times. (1957, c. 1240, s. 2.)

§ 90-210.6. **Acting as embalmer without license.**—If any person shall practice or hold himself out as practicing the art of embalming without having complied with the licensing provisions of this article, and with the provisions of G. S. 90-210.5, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than two hundred fifty dollars (\$250.00) or imprisonment for not less than six months, or both, in the discretion of the court. (1901, c. 338, s. 14; Rev., s. 3644; C. S., s. 6782; 1957, c. 1240, s. 2.)

§ 90-210.7. **Suspicious circumstances surrounding death.**—It shall be unlawful and punishable, as provided in G. S. 90-210.6, for any person for any reason to remove or embalm a dead human body when any fact within his knowledge or brought to his attention, is sufficient to arouse suspicion of a crime in connection with the cause of death of the deceased, until the permission of the coroner or other official of competent jurisdiction, shall have first been obtained. (1957, c. 1240, s. 2.)

§ 90-210.8. **Embalming schools have same privileges of medical schools as to cadavers.**—Schools for teaching embalming shall have extended to them the same privileges as to the use of bodies for dissection while teaching, as those granted to medical colleges. (1901, c. 338, s. 15; Rev., s. 4390; C. S., s. 6784; 1957, c. 1240, s. 2.)

§ 90-210.9. **Funeral directors and funeral directing; definitions.**—As used in the following sections of this article, unless the context otherwise requires, the term

- (1) "Funeral director", means a person engaged for hire or profit in the profession of directing or supervising funerals or the preparing of dead bodies for burial, including the preparation of all external as-

pects of the human body, other than by the act of embalming, or the disposition of dead human bodies.

- (2) "Funeral directing", means engaging for hire or profit in the profession of directing or supervising funerals or the preparation of dead human bodies for burial other than by the act of embalming, or the disposition of dead human bodies, or the provision or maintenance of a place for the preparation for disposition of future care of dead human bodies; or the use in connection with a business of the words or terms "funeral director", "undertaker", "mortician", or similar words or terms.
- (3) "Board" means the North Carolina State Board of Embalmers and Funeral Directors.
- (4) "Secretary" means the secretary for the North Carolina State Board of Embalmers and Funeral Directors.
- (5) "Funeral establishment", for the purposes of G. S. 90-210.9 through G. S. 90-210.16, means a place of business used in the care and preparation for burial or transportation or other disposal of dead human bodies, or any place or premises at or from which any person or persons shall represent himself or themselves or hold out himself or themselves as being engaged in the profession of funeral directing.
- (6) "Apprentice" means a person who is engaged in learning the art of funeral directing under the instruction and personal supervision of a duly licensed funeral director under the provisions of this article, and who is duly registered as such with the Board. (1957, c. 1240, s. 2.)

§ 90-210.10. Grant of license to funeral directors.—No person shall engage in the practice of funeral directing without first obtaining the license herein provided. No person shall be issued a license as a funeral director unless he is at least twenty-one years of age; a resident of North Carolina, a citizen of the United States, of good moral character, as evidenced by at least two affidavits to that effect, possessed of a high school education of not less than sixteen carnegie units or the equivalent thereof, such equivalence to be determined by the Board in its discretion; and has passed to the satisfaction of the Board an examination as prescribed by the Board, of his qualifications and skill as a funeral director.

Every person having the above qualifications may make application to be licensed as a funeral director to the Board on blank applications furnished by the Board accompanied by a fee of fifteen dollars (\$15.00), whereupon the applicant shall present himself before the Board at a time and place to be fixed by the Board and if the Board shall find upon due examination that the applicant meets the requirements outlined above and makes an average of seventy-five per cent (75%) on his examination, such applicant shall be issued a license to practice funeral directing. (1957, c. 1240, s. 2.)

§ 90-210.11. Unlawful practice; exception.—It shall be unlawful for any person to engage in funeral directing, or to represent himself to the public as a funeral director without first complying with the provisions of this article. When any funeral establishment is owned by a partnership or corporation, the person or persons in active charge of a funeral must be licensed as a funeral director or embalmer, as the case may be, before engaging in practice as either. (1957, c. 1240, s. 2.)

§ 90-210.12. Renewal; registration; display of license.—All persons receiving a license as a funeral director under the provisions of this article shall register the fact at the office of the board of health of the city, and where there is no board of health, with the clerk of the superior court in the county or coun-

ties in which it is proposed to carry on said practice and shall display said license in a conspicuous place in the office of such licentiate. Every registered funeral director who desires to continue the practice of his profession shall annually, during the time he shall continue in such practice, on such day as the Board may determine, pay to the secretary of the Board, a fee not in excess of fifteen dollars (\$15.00) for the renewal registration, as determined by the Board, (1901, c. 338, ss. 9, 10; Rev., s. 4388; 1917, c. 36; 1919, c. 88; C. S., s. 6781; 1949, c. 951, s. 4; 1951, c. 413; 1957, c. 1240, s. 2.)

§ 90-210.13. **Funeral directors licensed prior to July 1, 1957.**— Any person who having previously been licensed by the Board as a funeral director prior to July 1, 1957, shall not be required to take or pass an examination, or to serve the apprenticeship herein provided, but shall be entitled to have such license renewed upon making proper application therefor, and upon the payment of the renewal fee provided by the provisions of this article. (1957, c. 1240, s. 2½.)

§ 90-210.14. **Powers of Board.**—(a) In furtherance of its purpose of regulating the practice of funeral directing in this State, the Board shall have the power and it shall be its duty to prescribe rules and regulations governing the qualifications, fitness and practices of those engaged in and who may engage in funeral directing in this State; and the care and disposition of dead human bodies; and governing the proper administration of the provisions of this article including defining any provision not specifically defined in this article. The Board shall specifically have the power to fix and prescribe rules and regulations as to the procedure to be followed in making of applications for licenses, in the issuance and renewals of licenses, and conduct of examinations. It shall fix fees to be paid for the registration of apprentices.

(b) The Board may refuse to issue or may refuse to renew, or suspend or revoke any license to act as a funeral director, or may place the holder thereof on a term of probation or suspension after proper hearing upon finding the holder of such license to be guilty of any of the following acts or omissions:

- (1) Conviction of a crime involving moral turpitude,
- (2) Conviction of a felony,
- (3) Unprofessional conduct which is hereby defined to include:
 - a. Misrepresentation or fraud in the conduct of the business or the profession of a funeral director;
 - b. False or misleading advertising as a funeral director;
 - c. Solicitation of dead human bodies by the licensee, his agents, assistants, or employees, provided that this subsection shall not be deemed to prohibit general advertising;
 - d. Employment by the licensee or persons known as "cappers", or "steerers" or "solicitors", or other such persons to obtain funeral directing;
 - e. Employment directly or indirectly of any apprentice, agent, assistant, embalmer, or other persons, on part or full time, or on commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular funeral director;
 - f. The direct or indirect giving of certificates of credit, the payment or offer of payment of a commission by the licensee, his agents, assistants, or employees for the purpose of securing business;
 - g. Gross immorality;
 - h. Aiding or abetting an unlicensed person to practice funeral directing;
 - i. Using profane, indecent or obscene language in the presence of

a dead human body, and within the immediate hearing of the family or relatives of a deceased person whose body has not yet been interred or otherwise disposed of;

- j. Solicitation or acceptance by a licensee of any commission or bonus or rebate in consideration of recommending or causing a dead human body to be disposed of in any cemetery, mausoleum, or crematory;
- k. Violation of any of the provisions of this article;
- l. Violation of any State law or municipal ordinance or regulations affecting the handling, custody, care or transportation of dead human bodies;
- m. Fraud or misrepresentation in obtaining a license;
- n. Refusing to promptly surrender the custody of a dead human body, upon the express order of the person lawfully entitled to the custody thereof;
- o. Failure to secure permit for removal or burial of a dead human body prior to interment or disposal;
- p. Knowingly making any false statement on a certificate of death;
- q. Indecent exposure or exhibition of a dead human body while in the custody or control of the funeral director.

(4) Failure to pay the license renewal fee on the date designated by the Board and continuing to practice without paying said fee.

(c) In addition to the above specific grounds for refusal or suspension of a license to practice funeral directing or the placing of such licensee on probation, whenever the Board shall have reason to believe that any person to whom a license has been issued has become unfit to practice funeral directing, or has violated any of the provisions of this article or any rule or regulation prescribed pursuant thereto, it shall be the duty of the Board to conduct an investigation, and from such investigation if it shall appear to the Board that there is reasonable ground for belief that the accused may have been guilty of the violation charged, a time and place shall be set by the Board for a hearing to show cause whether or not the license of the accused shall be revoked, or suspended. (1957, c. 1240, s. 2.)

§ 90-210.15. Funeral home; directors; preparation room. — (a) Every established funeral home or firm must employ such licensed funeral director or directors as may be necessary from time to time to operate the business under the terms of this article.

(b) Every such establishment or funeral home shall maintain a preparation room containing at least 64 square feet in area for the preparation of dead human bodies. This room shall be strictly private. No one shall be allowed in the preparation room while a dead human body is being prepared, except the licensed embalmer, their duly registered apprentices, public officials in the discharge of their duties, accredited nurse employed in the case or members of the medical profession, or officials of the funeral home, or other legally authorized persons. The room shall contain the following equipment:

- (1) One modern standard type sanitary operating table;
- (2) Slop sink with adequate drainage;
- (3) Sanitary waste receptacle;
- (4) An approved type instrument sterilizer.

(c) The floor shall have tile or concrete or other waterproof materials covering the floor from wall to wall and the room shall be kept in sanitary condition at all times subject to inspection by the Board or their designated agents at any and all times. (1957, c. 1240, s. 2.)

§ 90-210.16. Acting as funeral director without license. — If any

person shall practice or hold himself out as practicing the art of funeral directing, without having complied with the licensing provisions of this article, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine or imprisonment for not more than six months, or both, in the discretion of the court. (1957, c. 1240, s. 2.)

ARTICLE 14.

Cadavers for Medical Schools.

§ 90-213. **Autopsies unlawful without consent of Board.**—It is hereby declared unlawful to hold an autopsy on any dead human body subject to the provisions of this article without first having obtained the consent, in writing, of the chairman of the Board or of his accredited agent: Provided, that nothing in this article shall limit the coroner in the fulfillment of his duties: Provided, further, that nothing in §§ 90-211 through 90-216, inclusive, shall prevent a person from making testamentary disposition of his or her body after death. Provided, further, that nothing in this article shall restrict or limit the provisions of article 30 of the General Statutes entitled "Post-mortem Medicolegal Examinations." (1903, c. 666, s. 3; Rev., s. 4289; 1911, c. 188; C. S., s. 6787; 1943, c. 100; 1955, c. 972, s. 5.)

Editor's Note.—The 1955 amendment, *viso*, relating to article 30 of chapter 130 effective Jan. 1, 1956, added the last pro- of the General Statutes.

ARTICLE 14A.

Bequest of Body or Part Thereof.

§ 90-216.1. **Bequest for purposes of medical science or rehabilitation of the maimed authorized.**—Any person who may otherwise validly make a will in this State may by will dispose of the whole or any part of his or her body to a teaching institution, university, college, State Department of Health, legally licensed hospital or any other legally licensed hospital, agency or commission operating an eye bank, bone or cartilage bank, a blood bank or any other bank of a similar nature and kind designated for the rehabilitation of the maimed. (1951, c. 773, s. 1.)

§ 90-216.2. **Donee and purpose of bequest.**—Persons so donating or bequeathing the whole or any part of their bodies under the provisions of § 90-216.1 may designate the donee or may expressly designate the purpose for which his or her body, or any part thereof, is to be used, but such shall not be necessary. If no donee is named by the donor in his will, then any hospital in which the donor may depart this life or any available physician or surgeon shall be considered the donee and have full authority to take the body or the part thereof so donated and thereafter to use the body or the part thereof so donated for the purposes designated by the donor, or if no such purpose has been designated, then for purposes in accordance with the intention of this article. (1951, c. 773, s. 2.)

§ 90-216.3. **No particular form or words required; liberal construction.**—No particular form or words shall be necessary or required but any written statement or last will and testament or codicil shall be liberally construed to effectuate the intent and purpose of the persons wishing to donate their bodies or any part thereof for the purpose elaborated in this article. (1951, c. 773, s. 3.)

§ 90-216.4. **Provision effective immediately upon death.**—Any provision in any last will and testament or codicil which donates the body of the testator or any part thereof as provided by this article shall become effective immediately upon the death of the testator and the authority for any hospital, physician or surgeon to remove said body or any part thereof shall be such last will and testament or codicil. (1951, c. 773, s. 4.)

§ 90-216.5. **Co-operation of North Carolina State Commission for the Blind.**—The North Carolina State Commission for the Blind is hereby authorized to help and assist in the execution and furtherance of the purposes of this article insofar as it concerns any eye bank and may provide for the registration of the names of persons in need of having their eyesight restored. (1951, c. 773, s. 5.)

ARTICLE 17.

Dispensing Opticians.

§ 90-234. **Necessity for certificate of registration.**—On and after the first day of July, 1951, no person or combination of persons shall for pay, or reward, either directly or indirectly, practice as a dispensing optician as hereinafter defined in the State of North Carolina without a certificate of registration issued pursuant to the provisions of this article by the North Carolina State Board of Opticians hereinafter established. (1951, c. 1089, s. 1.)

§ 90-235. **Definition.**—Within the meaning of the provisions of this article, the term "dispensing optician" defines one who prepares and dispenses lenses, spectacles, eyeglasses and/or appurtenances thereto to the intended wearers thereof on written prescriptions from physicians or optometrists duly licensed to practice their professions, and in accordance with such prescriptions interprets, measures, adapts, fits and adjusts such lenses, spectacles, eyeglasses and/or appurtenances thereto to the human face for the aid or correction of visual or ocular anomalies of the human eye. The services and appliances related to ophthalmic dispensing shall be dispensed, furnished or supplied to the intended wearer or user thereof only upon prescription issued by a physician or an optometrist; but duplications, replacements, reproductions or repetitions may be done without prescription, in which event any such act shall be construed to be ophthalmic dispensing, the same as if performed on the basis of a written prescription. (1951, c. 1089, s. 2.)

§ 90-236. **What constitutes practicing as a dispensing optician.**—Any one or combination of the following practices when done for pay or reward shall constitute practicing as a dispensing optician: interpreting prescriptions issued by licensed physicians and/or optometrists; fitting glasses on the face; servicing glasses or spectacles; measuring of patient's face, fitting frames, compounding and fabricating lenses and frames, and any therapeutic device used or employed in the correction of vision, and alignment of frames to the face of the wearer. (1951, c. 1089, s. 3.)

Quoted in *In re Berman*, 245 N. C. 612,
96 S. E. (2d) 836 (1957).

§ 90-237. **Qualifications for dispensing optician.**—No person shall be issued a certificate of registration as a registered dispensing optician by the North Carolina State Board of Opticians hereinafter established:

- (a) Unless such person is qualified under the provisions of § 90-240;
- (b) Unless such person is at least twenty-one (21) years of age;
- (c) Unless such person has passed a satisfactory examination conducted by the Board to determine his fitness to engage in the practice of a dispensing optician. (1951, c. 1089, s. 4.)

§ 90-238. **North Carolina State Board of Opticians created; appointment and qualification of members.**—There is hereby created a North Carolina State Board of Opticians whose duty it shall be to carry out the purposes and enforce the provisions of this article. The Board shall be appointed by the Governor from a list of names submitted by the North Carolina Opticians Association on or before July 1, 1951, and shall consist of five (5) members, each of

whom shall have been engaged in the practice of a dispensing optician for at least five (5) years prior to the enactment of this article. The term of a member shall be as follows: One for one year, one for two years, one for three years, one for four years, and one for five years. The term of any member thereafter appointed shall be for five years. The members of the Board, before entering upon their duties, shall respectively take all oaths taken and prescribed for other State officers in the manner provided by law, which shall be filed in the office of the Secretary of State. The Governor, at his option, may remove any member of the Board for good cause shown and appoint members to fill unexpired terms. (1951, c. 1089, s. 5.)

§ 90-239. Organization, meetings and powers of Board.—Within thirty (30) days after appointment of the Board, the Board shall hold its first regular meeting, and at said meeting and annually thereafter shall choose one of its members as president and one as secretary and treasurer. The Board shall make such rules and regulations not inconsistent with the law as may be necessary to the proper performance of its duties, and each member may administer oaths and take testimony concerning any matter within the jurisdiction of the Board, and a majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the time and place of meeting to be designated by the president. The secretary of the Board shall keep a full and complete record of its proceedings, which shall at all reasonable times be open to public inspection. (1951, c. 1089, s. 6.)

§ 90-240. Examination for practice as a dispensing optician.—Every person, before beginning the practice of a dispensing optician, after July 1, 1951, shall pass the examination before the North Carolina State Board of Opticians. The examination shall be confined to such knowledge as is essential to practice as a dispensing optician and shall show proficiency in the following subjects:

- Ophthalmic lense surface grinding;
- Prescription interpretation;
- Practical anatomy of the eye;
- Theory of light;
- Edge grinding;
- Ophthalmic lenses;
- Measurements of face;
- Finishing, fitting and adjusting glasses and frames to face.

Every person, before taking an examination, must file with the Board an application showing his age, his training and experience, and must file with the Board a certificate of good moral character, signed by two reputable citizens of this State, but an applicant from another state may have such certificate signed by any state officer of the state from which he comes. (1951, c. 1089, s. 7.)

§ 90-241. Fees required.—The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered dispensing optician shall be twenty (\$20.00) dollars; and if he shall successfully pass the examination, he shall pay the further sum of five (\$5.00) dollars on the issuance to him of the certificate of registration. Provided, that any person holding a certificate or license to practice as a dispensing optician in another state where the qualifications prescribed are equal to the qualifications required in this State may be licensed without examination upon the payment of the same fees as required of other applicants. (1951, c. 1089, s. 8.)

§ 90-242. Persons practicing before passage of article.—Every person who has been engaged in the practice of a dispensing optician as defined in this article for a period of five (5) years or more, and who has been a resident of the State of North Carolina for two (2) years immediately prior to the date of the passage of this article, shall be eligible for and receive a license as a dis-

dispensing optician. Said person shall file an affidavit as proof of such practice with the Board. The secretary shall keep a record of such persons who shall be exempt from the provisions of § 90-240. Upon the payment of a fee of ten (\$10.00) dollars the secretary shall issue to each of such persons certificates of registration without the necessity of an examination. Failure on the part of persons so entitled within six (6) months of the passage of this article to make written application to the Board for a certificate of registration, accompanied by an affidavit duly signed and verified fully setting forth the grounds upon which he claims certificate and license, which shall be accompanied by a fee of ten (\$10.00) dollars, shall be deemed a waiver of his rights to a certificate and license under the provisions of this article. (1951, c. 1089, s. 9.)

Refusal of License Where Applicant Not Practicing for Five Years.—It is clear that the Board had the right to refuse an application for a license requested by virtue of this section if it appeared that the applicant had not been engaged in the practice of a dispensing optician as defined in this article for a period of five years or more. In *re Berman*, 245 N. C. 612, 96 S. E. (2d) 836 (1957).

And Mere Filing of Affidavit as to Requirement Practice Is Not Conclusive.—The mere filing of an affidavit with the State Board of Opticians as proof that the applicant had been engaged in the practice of a dispensing optician as defined in this article for a period of five years or more prior to the enactment of article 17, is not conclusive as to his right to receive a license, even though this section states the applicant shall file an affidavit as proof of such practice, since the essential fact for

the granting of such license is that the applicant was in fact engaged in the practice of a dispensing optician during the time required by this section. In *re Berman*, 245 N. C. 612, 96 S. E. (2d) 836 (1957).

Revocation of License Procured by Misrepresentation in Affidavit.—There was competent, material and substantial evidence to support the order of the State Board of Opticians revoking a license to practice as a dispensing optician on the ground that the licensee procured it by a material misrepresentation, in that he stated in his affidavit that he had been engaged in the practice of a dispensing optician as defined in this article for a period of five years or more, whereas in truth and in fact he had not been so engaged in such practice for such a period of time. In *re Berman*, 245 N. C. 612, 96 S. E. (2d) 836 (1957).

§ 90-243. Certificates to be recorded.—Every recipient of a certificate of registration shall present the same for recording to the clerk of the superior court of the county in which he resides and practices, and shall pay a fee of fifty (50c) cents for recording the same. The clerk shall record the certificate in a book to be provided by him for that purpose. Any failure, neglect or refusal on the part of persons holding certificates to file the same of record for thirty (30) days after the issuance thereafter shall forfeit the certificate and the same shall become null and void. Upon the request of any person to whom a certificate has been issued the Board shall issue a certified copy thereof, and upon the proof of the loss of the original being made to appear, the certified copy shall be recorded in lieu of the original. The Board shall be entitled to a fee of one (\$1.00) dollar for the issuance of a certified copy. (1951, c. 1089, s. 10.)

Editor's Note.—The word "thereafter" ably read "thereof", although "thereafter" in line seven of this section should prob- is the enacted word.

§ 90-244. Posting of certificates.—Every person to whom a certificate of registration has been granted under this article shall display the same in a conspicuous part of the office or establishment wherein he is engaged as a dispensing optician. (1951, c. 1089, s. 11.)

§ 90-245. Collection of fees.—The secretary to the Board is hereby authorized and empowered to collect in the name and on behalf of this Board the fees prescribed by this article and shall turn over to the State Treasurer all funds collected or received under this article, which funds shall be credited to the North Carolina State Board of Opticians, and said funds shall be held and expended under the supervision of the Director of the Budget of the State of North Carolina

exclusively for the administration and enforcement of the provisions of this article. The secretary to the Board shall, before entering upon the duties of the office, execute a satisfactory bond with a duly licensed surety or other surety approved by the Director of the Budget, said bond to be in the penal sum of not less than two thousand (\$2,000.00) dollars and conditioned upon the faithful performance of the duties of the office and the true and correct accounting of all funds received by such secretary by virtue of such office. Nothing in this article shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from the fees collected under the provisions of this article and received by the State Treasurer in the manner aforesaid. (1951, c. 1089, s. 12.)

§ 90-246. Yearly license fees.—For the use of the Board in performing its duties under this article, every registered dispensing optician shall in each year after the year 1951 pay to the North Carolina State Board of Opticians a sum not exceeding twenty-five (\$25.00) dollars, the amount to be fixed by the Board, as a license fee for the year. Such payment shall be made prior to the first day of April in each year and in case of default in payment by a registered dispensing optician, his certificate of registration may be revoked by the Board at the next regular meeting of the Board, after notice as herein provided. But no license shall be revoked for nonpayment if the person so notified shall, before or at the time of consideration, pay his fee and such penalty as may be imposed by the Board. A penalty imposed on any one person so notified as a condition of allowing his license to stand shall not exceed five (\$5.00) dollars. The Board may collect any dues or fees provided in this section by suit in the name of the Board. The notice hereinbefore mentioned shall be in writing addressed to the persons in default of the payments of dues herein mentioned at the last address shown by the records of the Board and shall be sent by the secretary of the Board by registered mail with proper postage attached at least twenty (20) days before the date upon which revocation of the license is to be considered, and the secretary shall keep a record of the fact and the date of such mailing. The notice herein provided for shall state the time and place of consideration of revocation of license of persons to whom such notice is addressed. (1951, c. 1089, s. 13.)

§ 90-247. Meeting of the Board.—The Board shall meet at least once each year for the purpose of transacting all business of the Board and to conduct examinations of applicants for certificates of registration as herein provided and at such other times as may be necessary, said meetings to be held at such time and place as the president of the Board may determine. Special meetings of the Board shall be called by the president upon the written request of three (3) members thereof. (1951, c. 1089, s. 14.)

§ 90-248. Compensation and expenses of Board members and secretary.—Each member of the Board shall receive for his services for the time actually in attendance upon board meetings the sum of ten (\$10.00) dollars per day and shall be reimbursed for actual necessary expenses incurred in the discharge of such duties not to exceed five (\$5.00) dollars per day for subsistence plus the actual traveling expenses or an allowance of five (5¢) cents per mile while such member uses his personally owned automobile. The compensation of the secretary shall be fixed by the Board in an amount not to exceed three hundred dollars (\$300.00) per annum. (1951, c. 1089, s. 15; 1953, c. 894.)

Editor's Note.—The 1953 amendment added the second sentence.

§ 90-249. Powers of the Board.—The Board shall have the power to make such rules and regulations not inconsistent with the laws of the State of North Carolina as may be necessary and proper for the regulation of the practice

of dispensing optician and for the performance of its duties. The Board shall have the power to revoke any certificate of registration granted by it under this article for conviction of crime, habitual drunkenness, gross incompetency, for contagious or infectious disease.

The Board shall likewise have the power to revoke licenses and certificates of registration upon the finding by the Board that the holder of such certificate has been guilty of unethical methods of practice. It shall be considered unethical practice to advertise in any manner by words or phrases or similar import which convey or which are calculated to convey the impression to the public that the eyes are examined by persons licensed under this article or by the use of words and phrases of a character tending to deceive or mislead the public or in the nature of price or baiting advertising; use of advertising directly or indirectly by any method or nature which seeks or solicits on any installment plan; house to house canvassing or peddling directly or through any agent or employee for the purpose of selling, fitting or supplying frames, mountings, lenses or other ophthalmic materials.

Any person whose certificate has been revoked for any cause may, after the expiration of ninety (90) days, and within two (2) years from the date of revocation, apply to the Board to have the same reinstated, and upon a showing satisfactory to the Board and in the discretion of the Board, the certificate of registration or license may be restored to such person.

The procedure for revocation and suspension of a license shall be in accordance with the provisions of chapter 150 of the General Statutes. (1951, c. 1089, s. 16; 1953, c. 1041, s. 19.)

Cross Reference.—As to judicial review of decisions of Board, see note to § 150-27.

Editor's Note.—The 1953 amendment, effective July 1, 1953, added the last paragraph and made other changes.

Board May Revoke License Procured by Fraud or Misrepresentations. — Certain grounds for revocation of a license issued by the Board are set forth in this section. Fraud or misrepresentation, which is material, in the procurement of the license is not one of them, but the Board has inherent power, independent of statutory authority, to revoke a license it improperly

issued by reason of material fraud or misrepresentation in its procurement. In re Berman, 245 N. C. 612, 96 S. E. (2d) 836 (1957).

The crucial findings of fact of the State Board of Opticians being supported by the evidence, it was error for the superior court on appeal to reverse the judgment of the Board revoking the license theretofore granted to the applicant under § 90-242 on the ground that its issuance was procured by misrepresentations. In re Berman, 245 N. C. 612, 96 S. E. (2d) 836 (1957).

§ 90-250. Sale of optical glasses. — No optical glass or other kindred products or instruments of vision shall be dispensed, ground or assembled in connection with a given formula prescribed by a licensed physician or optometrist except under the supervision of a licensed dispensing optician and in a registered optical establishment or office. Provided, however, that the provisions of this section shall not prohibit persons or corporations from selling completely assembled spectacles without advice or aid as to the selection thereof as merchandise from permanently located or established places of business. (1951, c. 1089, s. 17.)

§ 90-251. Licensee allowing unlicensed person to use his certificate or license.—Each licensee licensed under the provisions of this article who shall rent, loan or allow the use of his registration certificate or license to an unlicensed person for any unlawful use shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred (\$100.00) dollars or imprisoned for not more than twelve (12) months, or both, in the discretion of the court, and shall forfeit his license. (1951, c. 1089, s. 18.)

§ 90-252. Necessity for dispensing optician to supervise place of business; false and deceptive advertising.—Any person, firm or corporation owning, managing or conducting a store, shop or place of business and not having

in its employ a licensed dispensing optician for the supervision of such store, office, place of business or optical establishment, or including an advertisement, whether in newspaper, radio, book, magazine or other printed matter the words, "optician, licensed optician, optical establishment, optical office," or any combination of such terms within or without such store as to mislead the public, that the same is a legally established optical place of business duly licensed as such or managed or conducted by persons holding a dispensing optician's license, when in fact such license or permit is not held by such person, firm or corporation, or some person in the employ and in charge of such optical business, shall upon conviction be fined not less than one hundred (\$100.00) dollars or be imprisoned for not more than twelve (12) months, or both, in the discretion of the court. (1951, c. 1089, s. 19.)

§ 90-253. **Exemptions from article.**—Nothing in this article shall be construed to apply to a licensed physician or optometrist, nor to any individual, partnership or corporation who is now and shall in the future engage in supplying ophthalmic prescriptions and supplies to physicians, optometrists, dispensing opticians or optical scientists. (1951, c. 1089, s. 20.)

§ 90-254. **General penalty for violation.**—Any person, firm or corporation who shall violate any provision of this article for which no other penalty has been provided shall, upon conviction, be fined not more than two hundred (\$200.00) dollars or imprisoned for a period of not more than twelve (12) months, or both, in the discretion of the court. (1951, c. 1089, s. 21.)

§ 90-255. **Gifts, premiums or discounts unlawful; refund of fees; illegal advertising.**—It shall be unlawful for any person, firm or corporation to offer or give any gift or premium or discount, directly or indirectly, or in any form or manner participate in the division, assignment, rebate or refund of fees or parts thereof or to engage in advertising in any form or manner that would urge the public to seek the services of any specific professional person or group of persons engaged in the field of refraction and visual care. (1951, c. 1089, s. 23.)

ARTICLE 18.

Physical Therapy.

§ 90-256. **Definitions.**—In this article, unless the context otherwise requires:

(1) "Physical therapy" means the treatment of any bodily or mental conditions of any person by the use of the physical, chemical and other properties of heat, light, water, electricity, massage and therapeutic exercise, which includes posture and rehabilitation procedures. The use of Roentgen rays and radium for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term "physical therapy" as used in this article.

(2) "Physical therapist" means a person who practices physical therapy as defined in this article under the prescription, supervision and direction of a person licensed in this State to practice medicine and surgery.

(3) Words importing the masculine gender may be applied to females. (1951, c. 1131, s. 1.)

§ 90-257. **Examining committee.**—The State examining committee of physical therapists is hereby created. The examining committee shall consist of five members, including at least one doctor and four physical therapists, who shall be appointed by the Governor from a list submitted to him by the North Carolina Physical Therapy Association, Inc., for terms as provided in this article. Each physical therapy member of said examining committee shall be registered, a resident of this State, and shall have not less than three years' experience in the practice of

physical therapy immediately preceding his appointment and shall be actively engaged in the practice of physical therapy during his incumbency. On or before January 1, 1952, five members shall be appointed by the Governor, whose terms of office shall commence on January 1, 1952, one member to serve for one year, two for two years, and two for three years respectively, to serve until their successors are appointed. On January 1, 1953, and triennially thereafter, one member shall be appointed for three years; on January 1, 1954, and triennially thereafter, two members shall be appointed for three years; on January 1, 1955, and triennially thereafter, two members shall be appointed for three years. In the event that a member of the examining committee for any reason cannot complete his term of office, another appointment shall be made by the Governor in accordance with the procedure stated above to fill the remainder of the term. No member may serve for more than two successive three-year terms. The committee shall designate one of its members as chairman, and one as secretary-treasurer.

The examining committee shall have the power to make such rules not inconsistent with the law which may be necessary for the performance of its duties. The North Carolina Physical Therapy Association, Inc., shall furnish such clerical and other assistance as the examining committee may require. Each member of the examining committee shall, in addition to necessary travel expenses, receive compensation in an amount for each day actually engaged in the discharge of his duties: Provided, however, that such compensation shall not exceed \$10.00 per diem.

It shall be the duty of the examining committee to pass upon the qualifications of applicants for registration, prepare the necessary lists of examination questions, conduct all examinations and determine the applicants who successfully pass examination. (1951, c. 1131, s. 2.)

§ 90-258. Qualifications of applicants for examination; application; subjects of examination; fee.—A person who desires to be registered as a physical therapist and who

- (a) Is at least twenty-one years old;
- (b) Is of good moral character;
- (c) Has obtained a high school education or its equivalent as determined by the examining committee; and
- (d) Has been graduated by a school of physical therapy approved for training physical therapists by the appropriate sub-body of the American Medical Association, if any, at the time of his graduation, or if graduated prior to 1936, the school or course was approved by the American Physical Therapy Association at the time of his graduation;

may make application, on a form furnished by the examining committee, for examination for registration as a physical therapist by the examining committee as defined in this article. Such examination shall embrace the following subjects: The applied sciences of anatomy, neuroanatomy, kinesiology, physiology, pathology, psychology, physics, physical therapy, as defined in this article, applied to medicine, neurology, orthopedics, pediatrics, psychiatry, surgery; medical ethics; technical procedures in the practice of physical therapy as defined in this article. At the time of making such application, the applicant shall pay to the secretary-treasurer of the committee twenty-five dollars (\$25.00), no portion of which shall be returned. (1951, c. 1131, s. 3.)

§ 90-259. Certificates of registration for successful examinees.—The examining committee shall furnish a certificate of registration to each applicant who successfully passes the examination for registration as a physical therapist. (1951, c. 1131, s. 4.)

§ 90-260. Certificates of registration for persons qualified at time of passage of article.—The examining committee shall furnish a certificate of registration to any person who applies for such registration on or before July 1,

1952, and who on April 14, 1951, meets the qualifications for a physical therapist as set forth by the American Physical Therapy Association and for a senior member of the American Registry of Physical Therapists, and who, at the time of application is practicing physical therapy in the State of North Carolina. At the time of making such application, such applicant shall pay to the secretary-treasurer of the committee a fee of twenty-five dollars (\$25.00). (1951, c. 1131, s. 5.)

§ 90-261. **Certificates of registration for persons registered in other states or territories.**—The examining committee shall furnish a certificate of registration to any person who is a physical therapist registered under the laws of another state or territory, if the applicable requirements for registration of physical therapists were at the date of his registration substantially equal to the requirements under this article, and if the state or territory whence applicant comes accords a similar privilege of registration without examination to holders of certificates as registered physical therapists under this article. If such reciprocity is not in effect, the applicant shall be registered by successfully passing the examination. At the time of making application, such applicant shall pay to the secretary-treasurer of the committee a fee of twenty-five dollars (\$25.00). (1951, c. 1131, s. 6.)

§ 90-262. **Renewal of registration; lapse; revival.**—Every registered physical therapist shall, during the month of January, 1953, and during the month of January every year thereafter, apply to the examining committee for an extension of his registration and pay a fee of five dollars (\$5.00) to the secretary-treasurer. Registration that is not so extended in the first instance before February 1, 1953, and thereafter before February 1 of every successive year, shall automatically lapse. The examining committee shall revive and extend a lapsed registration on the payment of all past unpaid extension fees not to exceed twenty-five dollars (\$25.00). (1951, c. 1131, s. 7.)

§ 90-263. **Grounds for refusing registration.**—The examining committee shall refuse to grant registration to any physical therapist or shall revoke the registration of any physical therapist if he

- (a) Is habitually drunk or is addicted to the use of narcotic drugs;
- (b) Has been convicted of violating any State or federal narcotic law;
- (c) Has obtained or attempted to obtain registration by fraud or material misrepresentation;
- (d) Is guilty of any act derogatory to the standing and morals of the profession of physical therapy, including the treatment or undertaking to treat ailments of human beings otherwise than by physical therapy and as authorized by this article, and undertaking to practice independent of the prescription, direction and supervision of a person licensed in this State to practice medicine and surgery. (1951, c. 1131, s. 8.)

§ 90-264. **Unregistered person not to represent himself as registered physical therapist.**—A person who is not registered with the examining committee as a physical therapist shall not represent himself as being so registered and shall not use in connection with his name the words or letters "R. P. T.," "Registered Physical Therapist," "Physical Therapist" or "Physiotherapist," or any other letters, words or insignia indicating or implying that he is a registered physical therapist. Any person violating the provisions of this section after January 1, 1952, shall be guilty of a misdemeanor; provided, that nothing in this article shall prohibit any person who does not in any way assume or represent himself or herself to be a "Registered Physical Therapist," abbreviated "R. P. T.," or "Physical Therapist," or "Physiotherapist," from doing all types of therapy. (1951, c. 1131, s. 9.)

§ 90-265. **Fraudulently obtaining, etc., registration a misdemeanor.**—A person who obtains or attempts to obtain registration as a physical therapist

by a willful misrepresentation or any fraudulent representation shall be guilty of a misdemeanor. (1951, c. 1131, s. 10.)

§ 90-266. **Necessity for prescription, supervision and direction of licensed doctor.**—A person registered under this article as a physical therapist shall not treat human ailments by physical therapy or otherwise except under the prescription, supervision and direction of a person licensed in this State to practice medicine and surgery. Any person violating the provisions of this section shall be guilty of a misdemeanor. (1951, c. 1131, s. 11.)

§ 90-267. **Rules and regulations; records to be kept; copies of register.**—The examining committee is authorized to adopt reasonable rules and regulations to carry this article into effect and may amend and revoke such rules at its discretion. The examining committee shall keep a record of proceedings under this article and a register of all persons registered under it. The register shall show the name of every living registrant, his last known place of business and last known place of residence and the date and number of his registration and certificate as a registered physical therapist. Any interested person in the State is entitled to obtain a copy of that list on application to the examining committee and payment of such amount as may be fixed by them, which amount shall not exceed the cost of the list so furnished. (1951, c. 1131, s. 12.)

§ 90-268. **Disposition of fees.**—All fees collected pursuant to this article shall be expended, under the direction of said committee, for the purposes of defraying the expense of holding examinations and issuing licenses. (1951, c. 1131, s. 14.)

§ 90-269. **Title.**—This article may be cited as the “Physical Therapists Practice Act.” (1951, c. 1131, s. 15.)

§ 90-270. **Osteopaths, chiropractors and Y. M. C. A. Health Clubs not restricted.**—Nothing in this article shall restrict the practice of physical therapy by licensed osteopaths or chiropractors, or the operation of Y. M. C. A. Health Clubs. (1951, c. 1131, s. 15.1.)

Chapter 91.

Pawnbrokers.

§ 91-2. **License; business confined to municipalities.**

Local Modification.—Cumberland: 1957,
c. 1155, s. 1.

§ 91-3. **Municipal authorities to grant and control license; bond.**

Local Modification.—Cumberland: 1957,
c. 1155, s. 2.

§ 91-5. **Pawn ticket.**

Local Modification.—Cumberland: 1957,
c. 1155, s. 3.

Chapter 93.
Public Accountants.

<p>Sec. 93-1. Definitions. 93-6. Practice as accountants permitted; use of misleading titles prohibited.</p>	<p>Sec. 93-8. Public practice of accounting by corporations prohibited. 93-12. Board of Certified Public Accountant Examiners.</p>
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§ 93-1. **Definitions.**—As used in this chapter certain terms are defined as follows:

(1) **Public Practice of Accountancy.**—A person is engaged in the public practice of accountancy who holds himself out to the public as an accountant and in consideration of compensation received or to be received offers to perform or does perform, for other persons, services which involve the auditing or verification of financial transactions, books, accounts, or records, or the preparation, verification or certification of financial, accounting and related statements intended for publication or renders professional services or assistance in or about any and all matters of principle or detail relating to accounting procedure and systems, or the recording, presentation or certification and the interpretation of such service through statements and reports.

(2) A certified public accountant is a person engaged in the public practice of accountancy who holds a certificate as a certified public accountant issued to him under the provisions of this chapter.

(3) A public accountant is a person engaged in the public practice of accountancy who is registered as a public accountant under the provisions of this chapter.

(4) An accountant is a person engaged in the public practice of accountancy who is neither a certified public accountant nor a public accountant as defined in this chapter.

(5) Board means the Board of Certified Public Accountant Examiners as provided in this chapter.

(6) Nothing in this chapter shall be construed as authorizing certified public accountants, public accountants or accountants to engage in the practice of law, and such person shall not engage in the practice of law unless duly licensed so to do. (1925, c. 261, s. 1; 1929, c. 219, s. 1; 1951, c. 844, s. 1.)

Editor's Note.—

The 1951 amendment rewrote this section.

§ 93-6. **Practice as accountants permitted; use of misleading titles prohibited.**—It shall be unlawful for any person to engage in the public practice of accountancy in this State who is not a holder of a certificate as a certified public accountant issued by the Board, or is not registered as a public accountant under the provisions of this chapter, unless such person uses the term "accountant" and only the term "accountant" in connection with his name on all reports, letters of transmittal, or advice, and on all stationery and documents used in connection with his services as an accountant, and refrains from the use in any manner of any other title or designation in such practice. (1925, c. 261, ss. 6, 8; 1951, c. 844, s. 2.)

Editor's Note. — The 1951 amendment rewrote this section.

§ 93-8. **Public practice of accounting by corporations prohibited.**—On and after July 1, 1951, it shall be unlawful for any corporation to engage in the public practice of accountancy in this State. (1925, c. 261, s. 6; 1951, c. 844, s. 3.)

Editor's Note.—The 1951 amendment rewrote this section.

§ 93-12. **Board of Certified Public Accountant Examiners.**— The name of the State Board of Accountancy is hereby changed to State Board of Certified Public Accountant Examiners and said name State Board of Certified Public Accountant Examiners is hereby substituted for the name State Board of Accountancy wherever the latter name appears or is used in chapter 93 of the General Statutes. Said Board is created as an agency of the State of North Carolina and shall consist of four persons to be appointed by the Governor, all of whom shall be holders of valid and unrevoked certificates as certified public accountants issued under the provisions of this chapter. Members of the Board shall hold office for the term of three years and until their successors are appointed. Appointments to the Board shall be made under the provisions of this chapter as and when the terms of the members of the present State Board of Accountancy expire; provided, that all future appointments to said Board shall be made for a term of three years expiring on the 30th day of June. The powers and duties of the Board shall be as follows:

(2) To employ legal counsel, clerical and technical assistance and to fix the compensation therefor, and to incur such other expenses as may be deemed necessary in the performance of its duties and the enforcement of the provisions of this chapter. Upon request the Attorney General of North Carolina will advise the Board with respect to the performance of its duties and will assign a member of his staff, or approve the employment of counsel, to represent the Board in any hearing or litigation arising under this chapter. The Board may, in the exercise of its discretion, co-operate with similar boards of other states, territories and the District of Columbia in activities designed to bring about uniformity in standards of admission to the public practice of accountancy by certified public accountants, and may employ a uniform system of preparation of examinations to be given to candidates for certificates as certified public accountants, including the services and facilities of the American Institute of Accountants, or of any other persons or organizations of recognized skill in the field of accountancy, in the preparation of examinations and assistance in establishing and maintaining a uniform system of grading of examination papers, provided however, that all examinations given by said Board shall be adopted and approved by the Board and that the grade or grades given to all persons taking said examinations shall be determined and approved by the Board.

(5) To issue certificates of qualification admitting to practice as certified public accountants, each applicant who, having the qualifications herein specified, shall have passed examinations to the satisfaction of the Board, in "theory of account", "practical accounting", "auditing", "commercial law", and other related subjects.

From and after April 12, 1951, and until July 1, 1955, any person shall be eligible to take the examinations given by the Board who is a citizen of the United States, or has declared his intention of becoming such citizen, and has resided for at least one year within the State of North Carolina, is twenty-one years of age or over and of good moral character, submits evidence satisfactory to the Board that he is a graduate of an accredited high school, or possesses an equivalent education and shall have had at least two years' experience next preceding the date of his application on the field staff of a certified public accountant or public accountant, one year of which experience shall have been as a senior or accountant in charge, and shall receive the endorsement of three certified public accountants as to his eligibility; or who, in lieu of the two years' experience or its equivalent, above mentioned, shall have had one year's experience after graduating from a recognized school of accountancy, or has served two years or more as field agent under an internal revenue agent in charge or special agent in charge of the Bureau of Internal Revenue, or has been engaged in the public practice of accountancy in the State of North Carolina continuously for at least three years prior to his application. The requirement of one year's residence in the State of North Carolina shall not apply to any person who, prior to

the date of this chapter, shall have passed an examination on one or more subjects theretofore given by the Board.

After July 1, 1955, all applicants for examination for certificates as certified public accountants, in addition to meeting the foregoing requirements as to age, good moral character, citizenship, and residence within this State, shall have a two years' college education, or its equivalent, and shall have completed a course of study in accountancy in a college or a school of accountancy or of business administration approved by the Board. Such applicant, in addition to passing satisfactorily the examinations given by the Board, shall have had at least two years' experience next preceding the date of his application on the field staff of a certified public accountant or public accountant or on the field staff of an accounting firm of which at least one member is a certified public accountant or public accountant, one year of which experience shall have been as a senior or accountant in charge or shall have served two or more years as field agent under an internal revenue agent in charge or special agent in charge of the Bureau of Internal Revenue, and shall have the endorsement of three certified public accountants as to his eligibility. Provided, however, that any person, who on July 1, 1955, shall have passed an examination on some of the subjects required by the Board, or, who prior to said date qualified of record with the Board to sit for said examinations, shall be permitted to take the examinations given by the Board at any time prior to July 1, 1958. The Board may permit persons otherwise eligible to take its examinations and withhold certificates until such persons shall have had the required experience.

(6) In its discretion to grant certificates of qualification admitting to practice as certified public accountants such applicants who shall be the holders of valid and unrevoked certificates as certified public accountants, or the equivalent, issued by or under the authority of any state, or territory of the United States or the District of Columbia; or who shall hold valid and unrevoked certificates or degrees as certified public accountants, or the equivalent, issued under authority granted by a foreign nation; when in the judgment of the Board the requirements for the issuing or granting of such certificates or degrees are substantially equivalent to the requirements established by this chapter: Provided, however, that such applicant has been a bona fide resident of this State for not less than one year or, if a nonresident, he has maintained or has been a member of a firm that has maintained for not less than one year a bona fide office within this State for the public practice of accounting and, provided further, that the state or political subdivision of the United States upon whose certificate the reciprocal action is based grants the same privileges to holders of certificates as certified public accountants issued pursuant to the provisions of this chapter. The Board, by general rule, may grant temporary permits to applicants under this subsection pending their qualification for reciprocal certificates.

(9) Adoption of Rules of Professional Conduct; Disciplinary Action. — The Board shall have the power to adopt rules of professional ethics and conduct to be observed by certified public accountants and public accountants engaged in the public practice of accountancy in this State. The rules so adopted shall be publicized and a certified copy filed in the office of the Secretary of State of North Carolina within sixty (60) days after adoption. The Board shall have the power to revoke, either permanently or for a specified period, any certificate issued under the provisions of this chapter to a certified public accountant or public accountant or to censure the holder of any such certificate for any one or combination of the following causes:

(a) Conviction of a felony under the laws of the United States or of any state of the United States.

(b) Conviction of any crime, an essential element of which is dishonesty, deceit or fraud.

(c) Fraud or deceit in obtaining a certificate as a certified public accountant.

(d) Dishonesty, fraud or gross negligence in the public practice of accountancy.

(e) Violation of any rule of professional ethics and professional conduct adopted by the Board.

Any disciplinary action taken shall be in accordance with the provisions of chapter 150 of the General Statutes.

(12) To submit annually on or before the first day of May to the Commissioner of Revenue the names of all persons who have qualified under this chapter as certified public accountants or public accountants. Privilege license issued under G. S. section 105-41 shall designate whether such license is issued to a certified public accountant, a public accountant, or an accountant. (1951, c. 844, ss. 4-9; 1953, c. 1041, s. 20.)

Editor's Note.—

The 1951 amendment rewrote the first paragraph of this section and also subsections (2), (5), (6), (9) and (12). The 1953 amendment, effective July 1, 1953,

rewrote the last paragraph of subsection (9). As the other subsections were not changed by the amendments they are not set out.

Chapter 93A.

Real Estate Brokers and Salesmen.

- Sec.
93A-1. License required of real estate brokers and real estate salesmen.
- 93A-2. Definitions and exceptions.
- 93A-3. Licensing Board created; compensation; organization.
- 93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal of license; power to enforce provisions.
- 93A-5. Register of applicants; roster of

- Sec.
brokers and salesmen; financial report to Secretary of State.
- 93A-6. Revocation of licenses; hearings; grounds; powers of Board.
- 93A-7. Power of courts to revoke.
- 93A-8. Penalty for violation of chapter.
- 93A-9. Licensing nonresidents.
- 93A-10. Nonresident licensees; filing of consent as to service of process and pleadings.

§ 93A-1. **License required of real estate brokers and real estate salesmen.**—From and after July 1, 1957, it shall be unlawful for any person, partnership, association or corporation in this State to act as a real estate broker or real estate salesman, or directly or indirectly to engage or assume to engage in the business of real estate broker or real estate salesman without first obtaining a license issued by the North Carolina Real Estate Licensing Board (hereinafter referred to as the Board), under the provisions of this chapter. (1957, c. 744, s. 1.)

§ 93A-2. **Definitions and exceptions.**—(a) A real estate broker within the meaning of this chapter is any person, partnership, association, or corporation, who for a compensation or valuable consideration or promise thereof sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others, as a whole or partial vocation.

(b) The term real estate salesman within the meaning of this chapter shall mean and include any person who, for a compensation or valuable consideration is associated with or engaged by or on behalf of a licensed real estate broker to do, perform or deal in any act, acts or transactions set out or comprehended by the foregoing definition of real estate broker.

(c) The provisions of this chapter shall not apply to and shall not include any person, partnership, association or corporation, who, as owner or lessor,

shall perform any of the acts aforesaid with reference to property owned or leased by them, where such acts are performed in the regular course of or as an incident to the management of such property and the investment therein; nor shall the provisions of this chapter apply to persons acting as attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation of performance of any contract for the sale, lease or exchange of real estate, nor shall this chapter be construed to include in any way the acts or services rendered by an attorney at law; nor shall it be held to include, while acting as such, a receiver, trustee in bankruptcy, guardian, administrator or executor or any such person acting under order of any court, nor to include a trustee acting under a trust agreement, deed of trust or will, or the regular salaried employees thereof, and nothing in this chapter shall be so construed as to require a license for the owner, personally, to sell or lease his own property. (1957, c. 744, s. 2.)

§ 93A-3. Licensing Board created; compensation; organization. —

(a) There is hereby created the North Carolina Real Estate Licensing Board for issuing licenses to real estate brokers and real estate salesmen, hereinafter called the Board. The Board shall be composed of five (5) members to be appointed by the Governor: Provided, that only two (2) members of said Board shall be a licensed real estate broker or salesman. One member shall be appointed for one year, two for two years and two for three years. Members appointed on the expiration of such term of office shall serve for three years. The members of the Board shall elect one of their members to serve as chairman of the Board. The Governor may remove any member of the Board for misconduct, incompetency, or willful neglect of duty. The Governor shall have the power to fill all vacancies occurring on said Board.

(b) Members of the Board shall each receive as full compensation for each day accordingly spent on work for the Board, the sum of fifteen dollars (\$15.00) per day plus ten dollars (\$10.00) per day for subsistence plus travel expense, such per diem allowance for the whole Board not to exceed an aggregate amount of twenty-five hundred dollars (\$2500.00) for any fiscal year. The total expense of the administration of this chapter shall not exceed the total income therefrom; and none of the expenses of said Board or the compensation or expenses of any office thereof or any employee shall ever be paid or payable out of the treasury of the State of North Carolina; and neither the Board nor any office or employee thereof shall have any power or authority to make or incur any expense, debt or other financial obligation binding upon the State of North Carolina. After all expenses of operation, the Board may set aside an expense reserve each year not to exceed ten per cent (10%) of the previous year's gross income; then any surplus shall go to the general fund of the State of North Carolina.

(c) The Board shall have power to make such bylaws, rules and regulations as it shall deem best, that are not inconsistent with the provisions of this chapter and the laws of North Carolina; provided, however, the Board shall not make rules or regulations regulating commissions, salaries, or fees to be charged by licensees under this chapter. The Board shall adopt a seal for its use, which shall bear thereon the words "North Carolina Real Estate Licensing Board." Copies of all records and papers in the office of the Board duly certified and authenticated by the seal of the Board shall be received in evidence in all courts and with like effect as the originals.

(d) The Board may employ a secretary-treasurer and such clerical assistance as may be necessary to carry out the provisions of this chapter and to put into effect such rules and regulations as the Board may promulgate. The Board shall fix salaries and shall require employees to make good and sufficient surety bond for the faithful performance of their duties.

(e) The Board shall be entitled to the services of the Attorney General of

North Carolina, in connection with the affairs of the Board or may on approval of the Attorney General, employ an attorney to assist or represent it in the enforcement of this chapter, as to specific matters, but the fee paid for such service shall be approved by the Attorney General. The Board may prefer a complaint for violation of this chapter before any court of competent jurisdiction, and it may take the necessary legal steps through the proper legal offices of the State to enforce the provisions of this chapter and collect the penalties provided therein. (1957, c. 744, s. 3.)

§ 93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal of license; power to enforce provisions. — (a) Any person, partnership, association, or corporation hereafter desiring to enter into business of and obtain a license as a real estate broker or real estate salesman shall make written application for such license to the Board on such forms as are prescribed by the Board. Each application for a license as real estate broker shall be accompanied by twenty-five dollars (\$25.00). Each application for license as a real estate salesman shall be accompanied by fifteen dollars (\$15.00), and shall state the name and address of the real estate broker with whom the applicant is to be associated.

(b) Any person who files such application to the Board in proper manner for a license as real estate broker or a license as real estate salesman shall be required to take an oral or written examination to determine his qualifications with due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant. If the results of the examination shall be satisfactory to the Board, then the Board shall issue to such a person a license, authorizing such person to act as a real estate broker or real estate salesman in the State of North Carolina, upon the payment of privilege taxes now required by law or that may hereafter be required by law. Anyone failing to pass an examination may be re-examined without payment of additional fee, under such rules as the Board may adopt in such cases.

Provided, however, that any person who, at the time of the passage or at the effective date of this chapter, has a license to engage in, and is engaged in business as a real estate broker or real estate salesman and who shall file a sworn application with the Board setting forth his qualifications, including a statement that such applicant has not within 5 years preceding the filing of the application been convicted of any felony or any misdemeanor involving moral turpitude, shall not be required to take or pass such examination, but all such persons shall be entitled to receive such license from the Board under the provisions of this chapter on proper application therefor and payment of a fee of ten dollars (\$10.00).

(c) All licenses granted and issued by the Board under the provisions of this chapter shall expire on the 30th day of June following issuance thereof, and shall become invalid after such date unless renewed. Renewal of such license may be effected at any time during the months of May or June preceding the date of expiration of such license upon proper application to the Board accompanied by the payment of a renewal fee of ten dollars (\$10.00) to the secretary-treasurer of the Board. Duplicate licenses may be issued by the Board upon payment of a fee of one dollar (\$1.00) by the licensee.

(d) The Board is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this chapter.

(e) Nothing contained in this chapter shall be construed as giving any authority to the Board nor any license of the Board as authorizing any licensee whether by examination or under the grandfather clause or by comity to engage in the practice of law or to render any legal service as specifically set out in G.

S. 84-2.1 or any other legal service not specifically referred to in said section. (1957, c. 744, s. 4.)

Editor's Note.—This chapter was passed on May 21, 1957, and became effective on July 1, 1957.

§ 93A-5. Register of applicants; roster of brokers and salesmen; financial report to Secretary of State.—(a) The secretary-treasurer of the Board shall keep a register of all applicants for license, showing for each the date of application, name, place of business, place of residence, and whether the license was granted or refused. Said register shall be prima facie evidence of all matters recorded therein.

(b) The secretary-treasurer of the Board shall also keep a roster showing the names and places of business and residence of all licensed real estate brokers and real estate salesmen, which roster shall be prepared during the month of July of each year. Such roster shall be printed by the Board and a copy thereof mailed to and placed on file in the office of the clerk of the superior court of each county in the State of North Carolina.

(c) On or before the first day of September of each year, the Board shall file with the Secretary of State a copy of the roster of real estate brokers and real estate salesmen holding certificates of license, and at the same time shall also file with the Secretary of State a report containing a complete statement of receipts and disbursements of the Board for the preceding fiscal year ending June 30th, attested by the affidavit of the secretary-treasurer of the Board. (1957, c. 744, s. 5.)

§ 93A-6. Revocation of licenses; hearings; grounds; powers of Board.—(a) The Board shall have power to revoke or suspend licenses as herein provided. The Board may upon its own motion, and shall upon the verified complaint in writing of any persons, provided such complaint with the evidence, documentary or otherwise, presented in connection therewith, shall make out a prima facie case, hold a hearing as hereinafter provided and investigate the actions of any real estate broker or real estate salesman, or any person who shall assume to act in either such capacity, and shall have power to suspend or revoke any license issued under the provisions of this chapter at any time where the licensee has by false or fraudulent representations obtained a license or where the licensee in performing or attempting to perform any of the acts mentioned herein is deemed to be guilty of:

- (1) Making any substantial and willful misrepresentations, or
- (2) Making any false promises of a character likely to influence, persuade, or induce, or
- (3) Pursuing a course of misrepresentation or making of false promises through agents or salesmen or advertising or otherwise, or
- (4) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts, or
- (5) Accepting a commission or valuable consideration as a real estate salesman for the performances of any of the acts specified in this chapter, from any person, except the licensed broker by whom he is employed, or
- (6) Representing or attempting to represent a real estate broker other than the broker by whom he is engaged or associated, without the express knowledge and consent of the broker with whom he is associated, or
- (7) Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others, or
- (8) Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public, or

- (9) Paying a commission or valuable consideration to any person for acts or services performed in violation of this chapter, or
- (10) Any other conduct whether of the same or a different character from that hereinbefore specified which constitutes improper, fraudulent or dishonest dealing.
- (11) For performing or undertaking to perform any legal service as set forth in G. S. 84-2.1 or any other such acts not specifically set forth in said section.

(b) Before revoking or suspending any license, however, the Board shall in all such cases set the matter down for a hearing and shall, at least ten (10) days prior to the date set for such hearing, notify in writing the accused licensee of the charges made or the question to be determined, including notice of time and place, when and where the charges will be heard, and afford such licensee an opportunity to be present and to be heard in person or by counsel, and an opportunity to offer evidence orally or by affidavit or depositions in reference thereto. The Board shall have power to administer oaths and to prescribe all necessary and reasonable rules for the conduct of such a hearing. The Board shall have power to subpoena and bring before it any person in this State or take testimony of any such person by deposition, with the same fees and mileage and in the same manner as prescribed by law in judicial procedure of courts of this State in civil cases. Such fees and mileage shall be paid by the party at whose request such witness is subpoenaed. If the Board shall determine that the licensee is guilty under the provisions of this chapter, his or its license may be suspended or revoked; but in the event of such adverse decision, the accused shall have the right within thirty (30) days to appeal therefrom to the superior court, where he shall be entitled to a trial de novo. The venue of the trial de novo in the superior court shall be in the county of the residence of the licensee. The venue of an appeal to the superior court for a nonresident licensee shall be in the county in which the alleged violation occurred. The affirmative vote of a majority of the Board shall be necessary to revoke or suspend a license. (1957, c. 744, s. 6.)

§ 93A-7. **Power of courts to revoke.**—Whenever any person, partnership, association or corporation claiming to have been injured or damaged by the gross negligence, incompetency, fraud, dishonesty or misconduct on the part of any licensee following the calling or engaging in the business herein described and shall file suit upon such claim against such licensee in any court of record in this State and shall recover judgment thereon, such court may as part of its judgment or decree in such case, if it deem it a proper case in which so to do, order a written copy of the transcript of record in said case to be forwarded by the clerk of court to the chairman of the said Board with a recommendation that the licensee's certificate of license be revoked. (1957, c. 744, s. 7.)

§ 93A-8. **Penalty for violation of chapter.** — Any person violating the provisions of this chapter shall upon conviction thereof be deemed guilty of a misdemeanor and shall be punished by a fine or imprisonment, or by both fine and imprisonment, in the discretion of the court. (1957, c. 744, s. 8.)

§ 93A-9. **Licensing nonresidents.** — A nonresident may become a real estate broker or real estate salesman by conforming to all of the provisions of this chapter. Any nonresident real estate broker or real estate salesman regularly engaged in the real estate business as a vocation maintaining a definite place of business in another state, and who has been licensed as a real estate salesman or broker in such state, which offers the same privileges to licensed brokers or salesmen of this State, shall, by reason of such foreign license and upon payment of the license fee fixed by this chapter, be authorized to transact the business of a real estate broker or real estate salesman in this State during the period for which his original license shall be in force. (1957, c. 744, s. 9.)

§ 93A-10. **Nonresident licensees; filing of consent as to service of process and pleadings.**—Every nonresident applicant shall file an irrevocable consent that suits and actions may be commenced against such applicant in any of the courts of record of this State, by the service of any process or pleading authorized by the laws of this State in any county in which the plaintiff may reside, by serving the same on the secretary of the commission, said consent stipulating and agreeing that such service of such process or pleadings on said secretary shall be taken and held in all courts to be valid and binding as if due service had been made personally upon the applicant in this State. This consent shall be duly acknowledged, and, if made by a corporation, shall be authenticated by its seal. An application from a corporation shall be accompanied by a duly certified copy of the resolution of the board of directors, authorizing the proper officers to execute it. In all cases where process or pleadings shall be served, under the provisions of this chapter, upon the secretary of the commission, such process or pleadings shall be served in duplicate, one of which shall be filed in the office of the commission and the other shall be forwarded immediately by the secretary of the commission, by registered mail, to the last known business address of the nonresident licensee against which such process or pleadings are directed. (1957, c. 744, s. 10.)

Chapter 93B.

Occupational Licensing Boards.

Sec.

93B-1. Definitions.

93B-2. Annual reports required; contents; open to inspection.

93B-3. Register of persons licensed; information as to licensed status of individuals.

Sec.

93B-4. Annual audit of books and records; payment of cost; report of financial operations.

93B-5. Employment of members by board; secretary.

§ 93B-1. **Definitions.**—As used in this chapter:

“License” means any license (other than a privilege license), certificate, or other evidence of qualification which an individual is required to obtain before he may engage in or represent himself to be a member of a particular profession or occupation.

“Occupational licensing board” means any board, committee, commission, or other agency in North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within, a particular profession or occupation, and which is authorized to issue licenses; “occupational licensing board” does not include State agencies, staffed by full-time State employees, which as a part of their regular functions may issue licenses. (1957, c. 1377, s. 1.)

§ 93B-2. **Annual reports required; contents; open to inspection.**—Each occupational licensing board shall file with the Secretary of State an annual financial report, and an annual report containing the following information:

- (1) The address of the board, and the names of its members and officers;
- (2) The number of persons who applied to the board for examination;
- (3) The number who were refused examination;
- (4) The number who took the examination;
- (5) The number to whom initial licenses were issued;
- (6) The number who applied for licenses by reciprocity or comity;
- (7) The number who were granted licenses by reciprocity or comity;

- (8) The number of licenses suspended or revoked; and
- (9) The number of licenses terminated for any reason other than failure to pay the required renewal fee.

The reports required by this section shall be open to public inspection. (1957, c. 1377, s. 2.)

§ 93B-3. Register of persons licensed; information as to licensed status of individuals.—Each occupational licensing board shall prepare a register of all persons currently licensed by the board and shall supplement said register annually by listing the changes made in it by reason of new licenses issued, licenses revoked or suspended, death, or any other cause. The board shall, upon request of any citizen of the State, inform the requesting person as to the licensed status of any individual. (1957, c. 1377, s. 3.)

§ 93B-4. Annual audit of books and records; payment of cost; report of financial operations.—The books and records of each occupational licensing board shall be audited annually by the State Auditor, or under his direction and supervision by a person approved by him, or by an independent certified public accountant who shall certify the results of the audit to the State Auditor, and include such information as the State Auditor may direct. The cost of all audits shall be paid out of the funds of the board. The State Auditor shall issue annually a report containing a summary of the financial operations of each board. (1957, c. 1377, s. 4.)

§ 93B-5. Employment of members by board; secretary. — If members of an occupational licensing board are employed by the board to perform inspectional and similar ministerial tasks for the board, such employment shall not exceed thirty days for any one member in any year, and the compensation for such services shall not exceed the per diem and allowances authorized for boards and commissions of the State generally. The board may employ one of its members as secretary for such compensation as it deems reasonable. The secretary may perform, in addition to his other duties, inspectional and similar ministerial tasks, but without additional compensation, except the expense allowance authorized for boards and commissions of the State generally. The first sentence of this section does not apply to any board whose members are full-time employees of the board; but members of such boards may not receive additional compensation for such services, other than the expense allowance authorized for boards and commissions of the State generally. (1957, c. 1377, s. 5.)

Chapter 94. Apprenticeship.

§ 94-4. Powers and duties of Director of Apprenticeship.—The Director, under the supervision of the Commissioner of Labor and with the advice and guidance of the Apprenticeship Council is authorized to administer the provisions of this chapter; in co-operation with the Apprenticeship Council and local and State joint apprenticeship committees, to set up conditions and training standards for apprentice agreements, which conditions or standards shall in no case be lower than those prescribed by this chapter; to act as secretary of the Apprenticeship Council and of each State joint apprenticeship committee; to approve for the Council if in his opinion approval is for the best interest of the apprentice, any apprentice agreement which meets the standards established under this chapter; to terminate or cancel any apprentice agreement in accordance with the provisions of such agreement; to keep a record of apprentice agreements and their disposition; to issue certificates of completion of apprenticeship; and to perform such other duties as are necessary to carry out the intent of this chapter, including other on-

job training necessary for emergency and critical civilian production: Provided, that the administration and supervision of related and supplemental instruction for apprentices, co-ordination of instruction with job experiences, and the selection and training of teachers and co-ordinators for such instruction shall be the responsibility of State and local boards responsible for vocational education. (1939, c. 229, s. 4; 1951, c. 1031, s. 1.)

Editor's Note.—The 1951 amendment inserted the words "including other on-job training necessary for emergency and

critical civilian production" immediately preceding the proviso at the end of the section.

Chapter 95.

Department of Labor and Labor Regulations.

Article 4A.

- Voluntary Arbitration of Labor Disputes.**
 Sec.
 95-36.4. Voluntary arbitrators.
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- 95-64.1. Inspection of low pressure steam heating boilers, hot water heating and supply boilers and tanks.
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Article 7.

Board of Boiler Rules and Bureau of Boiler Inspection.

- 95-62. Special inspectors; certificate of competency; fees.

ARTICLE 1.

Department of Labor.

§ 95-2. Election of Commissioner; term; salary; vacancy. — The Commissioner of Labor shall be elected by the people in the same manner as is provided for the election of the Secretary of State. His term of office shall be four years, and he shall receive a salary of twelve thousand dollars (\$12,000.00) per annum, payable in equal monthly installments. Any vacancy in the office shall be filled by the Governor, until the next general election. The office of the Department of Labor shall be kept in the city of Raleigh and shall be provided for as are other public offices of the State. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; C. S., s. 7310; 1931, c. 312, s. 2; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 349; 1943, c. 499, s. 2; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1.)

Editor's Note.—

The 1953 amendment increased the salary from \$9,000.00 to \$10,000.00 from the time that the Commissioner took the oath of office and began serving the term for which he was elected in 1952.

The 1957 amendment increased the salary from \$10,000.00 to \$12,000.00 from the time the Commissioner took the oath of office and began serving the term for which he was elected in 1956.

ARTICLE 4A.

Voluntary Arbitration of Labor Disputes.

§ 95-36.1. Declaration of Policy.—It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prompt settlement of labor disputes; that strikes and lockouts and other forms

of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the State, while not direct parties to such disputes, should always be considered, respected and protected; and, where efforts at amicable settlement have been unsuccessful, that the voluntary arbitration of such disputes will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the State. To carry out such policies, the necessity for the enactment of the provisions of this article is hereby declared as a matter of legislative determination. (1945, c. 1045, s. 1; 1951, c. 1103, s. 1.)

Editor's Note. — The 1951 amendment, effective July 1, 1951, rewrote this article.

For note on labor arbitration in North Carolina, see 29 N. C. Law Rev. 460.

Remedy Provided by Article Is Cumulative.—The statutory methods of arbitration provide cumulative and concurrent rather than exclusive procedural remedies. *Lammonds v. Aleo Mfg. Co.*, 243 N. C. 749, 92 S. E. (2d) 143 (1956).

Effect on Employee's Right to Sue for Wages and Benefits Due under Labor Contract.—The fact that disputed provisions of a collective labor contract have

been arbitrated under the procedure outlined in the contract does not make the question of an accounting for an employee's wages and other benefits under the terms of the contract one of arbitration and award under the Uniform Arbitration Act, G. S. 1-544 et seq. Nor does the statutory procedure for the voluntary arbitration of labor disputes as contained in this article preclude maintenance of an action by the employee for such accounting. *Lammonds v. Aleo Mfg. Co.*, 243 N. C. 749, 92 S. E. (2d) 143 (1956).

§ 95-36.2. **Scope of article.**—The provisions of this article shall apply only to voluntary agreements to arbitrate labor disputes including, but not restricted to, all controversies between employers, employees and their respective bargaining representatives, or any of them, relating to wages, hours, and other conditions of employment. (1945, c. 1045, s. 2; 1951, c. 1103, s. 1.)

§ 95-36.3. **Administration of article.**—(a) The administration of this article shall be under the general supervision of the Commissioner of Labor of North Carolina.

(b) There is hereby established in the Department of Labor an arbitration service. The Commissioner of Labor may appoint such employees as may be required for the consummation of the work under this article, prescribe their duties and fix their compensation, subject to existing laws applicable to the appointment and compensation of employees of the State of North Carolina. Any member of or employee in the arbitration service may be removed from office by the Commissioner of Labor, acting in his discretion.

(c) The Commissioner of Labor, with the written approval of the Attorney General as to legality, shall have power to adopt, alter, amend or repeal appropriate rules of procedure for selection of the arbitrator or panel and for conduct of the arbitration proceedings in accordance with this article: Provided, however, that such rules shall be inapplicable to the extent that they are inconsistent with the arbitration agreement of the parties. (1945, c. 1045, s. 3; 1951, c. 1103, s. 1.)

§ 95-36.4. **Voluntary arbitrators.**—(a) It shall be the duty of the Commissioner of Labor to maintain a list of qualified and public-spirited citizens who will serve as arbitrators. All appointments of a single arbitrator or member of an arbitration panel by the Commissioner of Labor shall be made from the list of qualified arbitrators maintained by him.

(b) No person named by the Commissioner of Labor to act as an arbitrator in a dispute shall be qualified to serve as such arbitrator if such person has any financial or other interest in the company or labor organization involved in the dispute. (1945, c. 1045, s. 4; 1951, c. 1103, s. 1.)

§ 95-36.5. **Fees and expenses.**—(a) All the costs of any arbitration proceeding under this article, including the fees and expenses of the arbitrator or ar-

bitration panel, shall be paid by the parties to the proceeding in accordance with any agreement between them. In the absence of such an agreement, the award in the proceeding shall normally require the payment of such fees, expenses and other proper costs by one or more of the parties: Provided, that if the Commissioner of Labor deems that the public interest so requires, he may provide for the payment to any arbitrator appointed by him of per diem compensation at the rate established by the Commissioner, and actual travel and other necessary expenses incurred while performing duties arising under this article.

(b) In cases where an arbitrator has been appointed by the Commissioner, the Department of Labor may furnish necessary stenographic, clerical and technical service and assistance to the arbitrator or arbitration panel.

(c) Expenditures of public funds authorized under this section shall be paid from funds appropriated for the administration of this article. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

§ 95-36.6. Appointment of arbitrators.—The parties may by agreement determine the method of appointment of the arbitrator or arbitration panel. If the parties have agreed upon arbitration under this article and have not otherwise agreed upon the number of arbitrators or the method for their appointment, the controversy shall be heard and decided by a single arbitrator designated in such manner as the Commissioner of Labor shall determine. Any person or agency selected by agreement or otherwise to appoint an arbitrator or arbitrators shall send by registered mail to each of the parties to the proposed proceeding notice of the demand for arbitration. The arbitrator or arbitration panel, as the case may be, shall have such powers and duties as are conferred by the voluntary agreement of the parties, and, if there is no agreement to the contrary, shall have power to decide the arbitrability as well as the merits of the dispute. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

§ 95-36.7. Arbitration procedure.—Upon the selection or appointment of an arbitrator or arbitration panel in any labor dispute, a statement of the issues or questions in dispute shall be submitted to said arbitrator or panel in writing, signed by one or more of the parties or their authorized agents. The arbitrator or panel shall appoint a time and place for the hearing, and notify the parties thereof, and may postpone or adjourn the hearing from time to time as may be necessary, subject to any time limits which are agreed upon by the parties. If any party neglects to appear before the arbitrator or panel after reasonable notice, the arbitrator or panel may nevertheless proceed to hear and determine the controversy. Unless the parties have otherwise agreed, the findings and decision of a majority of an arbitration panel shall constitute the award of the panel and, if a majority vote of the panel cannot be obtained, then the findings and decision of the impartial chairman of the panel shall constitute such award. To be enforceable, the award shall be handed down within sixty (60) days after the written statement of the issues or questions in dispute has been received by the arbitrator or panel, or within such further time as may be agreed to by the parties. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

§ 95-36.8. Enforcement of arbitration agreement and award.—(a) Written agreements to arbitrate labor disputes, including but not restricted to controversies relating to wages, hours and other conditions of employment, shall be valid, enforceable and irrevocable, except upon such grounds as exist in law or equity for the rescission or revocation of any contract, in either of the following cases:

(i) Where there is a provision in a collective bargaining agreement or any other contract, hereafter made or extended, for the settlement by arbitration of a controversy or controversies thereafter arising between the parties;

(ii) Where there is an agreement to submit to arbitration a controversy or controversies already existing between the parties.

(b) Any arbitration award, made pursuant to an agreement of the parties described in subsection (a) of this section and in accordance with this article, shall be final and binding upon the parties to the arbitration proceedings. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

§ 95-36.9. **Stay of proceedings.**—(a) If any action or proceeding be brought in any court upon any issue referable to arbitration under an agreement described in subsection (a) of G. S. 95-36.8, the court where the action or proceeding is pending or a judge of the superior court having jurisdiction in any county where the dispute arose shall stay the action or proceeding, except for any temporary relief which may be appropriate pending the arbitration award, until such arbitration has been had in accordance with the terms of the agreement. The application for stay may be made by motion in writing of a party to the agreement, but such motion must be made before answer or demurrer to the pleading by which the action or proceeding was begun.

(b) Any party against whom arbitration proceedings have been initiated may, within 10 days after receiving written notice of the issue or questions to be passed upon at the arbitration hearing, apply to any judge of the superior court having jurisdiction in any county where the dispute arose for a stay of the arbitration upon the ground that he has not agreed to the arbitration of the controversy involved. Any such application shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions generally, except that it shall be entitled to priority in the interest of prompt disposition. If no such application is made within said ten-day period, a party against whom arbitration proceedings have been initiated cannot raise the issue of arbitrability except before the arbitrator and in proceedings subsequent to the award.

(c) Any party against whom an arbitration award has been issued may, within 10 days after receiving written notice of such award, apply to any judge of the superior court having jurisdiction in any county where the dispute arose for a stay of the award upon the ground that it exceeds the authority conferred by the arbitration agreement. Any such application shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions generally, except that it shall be entitled to priority in the interest of prompt disposition. If no such application is made within said ten-day period, a party against whom arbitration proceedings have been initiated cannot raise the issue of arbitrability except before the arbitrator or arbitrators, or in proceedings to enforce the award. Any failure to abide by an award shall not constitute a breach of the contract to arbitrate, pending disposition of a timely application for stay of the award pursuant to this paragraph. (1951, c. 1103, s. 1.)

Applied in *Calvine Cotton Mills, Inc. v. Textile Workers Union*, 238 N. C. 719, 79 S. E. (2d) 181 (1953).

ARTICLE 7.

Board of Boiler Rules and Bureau of Boiler Inspection.

§ 95-54. **Board of Boiler Rules created; members, appointment, and qualifications; terms of office; vacancies; meetings.**—There is hereby created the North Carolina Board of Boiler Rules consisting of six members, of whom five shall be appointed to the Board by the Governor, one for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years and one for a term of five years. At the expiration of their respective terms of office, their successors shall be appointed for terms of five years each. Upon the death or incapacity of any member, the vacancy for the remainder of the term shall be filled with a representative of the same class.

Of these five appointed members, one shall be a representative of the owners and users of steam boilers within the State of North Carolina, one a representative of the boiler manufacturers or a boilermaker who has had not less than five years' practical experience as a boilermaker within the State of North Carolina, one a representative of a boiler inspection and insurance company licensed to do business within the State of North Carolina, one a representative of the operating steam engineers in the State of North Carolina, and one a licensed heating contractor. The sixth member shall be the Commissioner of Labor, who shall be chairman of the Board. The Board shall meet at least twice yearly at the State capital or other place designated by the Board. (1935, c. 326, s. 1; 1953, c. 569.)

Editor's Note.—The 1953 amendment rewrote this section.

§ 95-55. Formulation of rules and regulations.—The Board shall formulate rules and regulations for the safe and proper construction, installation, repair, use and operation of steam boilers, steam and hot water heating boilers, and hot water supply tanks and steam or hot water boilers fired or unfired in this State. The rules and regulations so formulated shall conform as nearly as possible to the boiler code of the American Society of Mechanical Engineers and amendments and interpretations thereto made and approved by the council of the Society. (1935, c. 326, s. 1; 1951, c. 1107, s. 1.)

Editor's Note.—The 1951 amendment inserted the words "steam and hot water heating boilers, and hot water supply tanks and steam or hot water boilers fired or unfired" in the first sentence. The amend-

tory act also provided: "Nothing in this act shall apply to vessels or equipment used in refrigeration, air conditioning or cooling systems."

§ 95-57. Compensation and expenses of Board.—The members of the Board of Boiler Rules, exclusive of the chairman thereof, shall serve without salary but shall be paid a subsistence and travel allowance in accordance with the general provisions of the biennial Appropriations Act, for not to exceed twenty days in any year while in the performance of their duties as members of the Board, to be paid in the same manner as in case of other State officers. The chairman of the Board of Boiler Rules shall countersign all vouchers for expenditures under this section. (1935, c. 326, s. 3; 1951, c. 1107, s. 11.)

Editor's Note.—The 1951 amendment rewrote the first sentence.

§ 95-58. Effect of article on boilers installed prior to enactment.—This article shall not be construed as in any way preventing the use or sale of steam boilers and steam and hot water heating boilers and hot water supply tanks and boilers in this State which shall have been installed or in use in this State prior to the taking effect of this article and which shall have been made to conform to the rules and regulations of the Board of Boiler Rules governing existing installations as provided in § 95-66. (1935, c. 326, s. 4; 1951, c. 1107, s. 2.)

Editor's Note.—The 1951 amendment inserted the words "and steam and hot water heating boilers and hot water supply tanks and boilers".

§ 95-60. Certain boilers excepted.—This article shall not apply to boilers under federal control or to stationary boilers used by railroads which are inspected regularly by competent inspectors, or to boilers used solely for propelling motor road vehicles; or to boilers of steam fire engines brought into the State for temporary use in times of emergency to check conflagrations; or to portable boilers used for agricultural purposes only or for pumping or drilling in the open field for water, gas or coal, gold, talc or other minerals and metals; or to hot water supply tanks and boilers fired or unfired, which are located in private residences or in apartment houses of less than six (6) families; or to steam boilers used for heating purposes carrying a pressure of not more than 15 pounds per square inch gauge, and which

are located in private residences or in apartment houses of less than six (6) families; or to hot water heating boilers carrying a pressure of not more than 30 pounds per square inch gauge, and which are located in private residences or in apartment houses of less than six (6) families. (1935, c. 326, s. 6; 1937, c. 125, s. 1; 1951, c. 1107, s. 3.)

Editor's Note.—

section following the semicolon in line seven.

The 1951 amendment rewrote all of this

§ 95-61. Powers of Commissioner of Labor; creation of Bureau of Boiler Inspection.

(b) To have free access for himself and his chief boiler inspector and deputies, during reasonable hours, to any premises in the State where a steam boiler or steam or hot water heating boiler or hot water supply tank or boiler fired or unfired is built or being built or is being installed or operated, for the purpose of ascertaining whether such boiler or tank is built, installed or operated in accordance with the provisions of this article.

(e) To enforce the laws of the State governing the use of steam boilers and steam and hot water heating boilers and hot water supply tanks and boilers fired and unfired and to enforce the rules and regulations of the Board of Boiler Rules.

(f) To keep a complete record of the type, dimensions, age, condition, pressure allowed upon, location and date of the last inspection of all steam boilers and steam and hot water heating boilers and hot water supply tanks and boilers fired and unfired to which this article applies.

(1951, c. 1107, s. 4.)

Editor's Note.— The 1951 amendment made subsections (b), (e) and (f) applicable to steam and hot water heating boilers, hot water supply tanks and boilers

fired and unfired. As the rest of the section was not changed, only these subsections are set out.

§ 95-62. Special inspectors; certificate of competency; fees.—In addition to the deputy boiler inspectors authorized by § 95-61, the Commissioner of Labor shall, upon the request of any company authorized to insure against loss from explosion of boilers in this State, issue commissions as special inspectors to any qualified boiler inspectors of said company who have certificates of competency. To be entitled to a certificate of competency a boiler inspector must either—

- (1) Have passed the examination for inspectors provided for by G. S. 95-63, or
- (2) Have passed an examination on boiler inspection in a state having standards therefor equal to this State, or
- (3) Hold a certificate from the National Board of Boiler and Pressure Vessel Inspectors.

The commission shall be in the form of a credential card for which a fee of \$2.00 must be paid. The commission remains in force until the next succeeding December 31, and must be renewed annually thereafter.

Such special inspectors shall receive no salary from, nor shall any of their expenses be paid by, the State, and the continuance of a special inspector's commission shall be conditioned upon his continuing in the employ of a boiler inspection and insurance company duly authorized as aforesaid and upon his maintenance of the standards imposed by this article. Such special inspectors shall inspect all steam boilers insured by their respective companies, and the owners of such insured boilers shall be exempt from the payment of the fees provided for in § 95-68. Each company employing such special inspectors shall, within 30 days following each annual internal inspection made by such inspectors, file a report of such inspection with the Commissioner of Labor. (1935, c. 326, s. 8; 1951, c. 544, s. 1.)

Editor's Note.—The 1951 amendment rewrote this section.

§ 95-63. Examination for inspectors; revocation of commission.—Application for examination as an inspector of boilers shall be in writing, and in

duplicate, upon forms furnished by the Department of Labor, and shall be accompanied by a fee of ten (\$10.00) dollars.

Examination for deputy or special inspectors shall be given by the Board of Boiler Rules or by at least two examiners to be appointed by said Board and must be written or part written and part oral recorded in writing and must be confined to questions the answers to which will aid in determining the fitness and competency of the applicant for the intended service and must be of uniform grade throughout the State. In case an applicant for an inspector's appointment or commission fails to pass this examination, he may appeal to the Board of Boiler Rules for a second examination which shall be given by said Board, or if by examiners appointed by said Board, then by examiners other than those by whom the first examination was given and these examiners shall be appointed forthwith to give said second examination. Upon the result of this examination on appeal, the Board shall determine whether the applicant be qualified. The record of any applicant's examination, whether original or on appeal, shall be accessible to him and his employer. If the applicant is successful in passing the said examination, he is entitled to a certificate of competency.

A commission may be revoked by the Commissioner of Labor upon the recommendation of the chief inspector of boilers, for the incompetence or untrustworthiness of the holder thereof or for willful falsification of any matter or statement contained in his application or in a report of any inspection. A person whose commission is revoked may appeal from the revocation to the Board of Boiler Rules which shall hear the appeal and either set aside or affirm the revocation and its decision shall be final. The person whose commission has been revoked shall be entitled to be present in person and by counsel on the hearing of the appeal. If a certificate or commission is lost or destroyed, a new certificate or commission shall be issued in its place without another examination. A person who has failed to pass the examination for a commission or whose commission has been revoked shall be entitled to apply for a new examination and commission after ninety days from such failure or revocation. (1935, c. 326, s. 9; 1951, c. 544, s. 2; c. 1107, s. 5.)

Editor's Note.—The first 1951 amendment added the first paragraph and the last sentence of the present second paragraph. The second 1951 amendment deleted

"steam" formerly appearing before the word "boilers" in the second line of the last paragraph.

§ 95-64.1. Inspection of low pressure steam heating boilers, hot water heating and supply boilers and tanks.—(a) This section applies only to low pressure steam heating boilers, hot water heating boilers, hot water supply boilers and hot water supply tanks, fired or unfired.

(b) On and after July 1, 1951, each boiler or tank used or proposed to be used within this State, except boilers or tanks exempt under G. S. 95-60, shall be thoroughly inspected as to their construction, installation, condition and operation as follows:

(1) Boilers and tanks shall be inspected both internally and externally biennially where construction will permit; provided that a grace period of two (2) months longer than the twenty-four (24) months' period may elapse between internal inspections of a boiler or tank while not under pressure or between external inspections of a boiler or tank while under pressure. The inspection herein required shall be made by the chief inspector, or by a deputy inspector or by a special inspector, provided for in this article.

(2) If at any time a hydrostatic test shall be deemed necessary, it shall be made, at the discretion of the inspector, by the owner or user thereof.

(3) All boilers or tanks to be installed in this State after the date upon which the rules and regulations of the Board relating to such boilers or tanks become effective shall be inspected during construction as required by the applicable rules and regulations of the Board by an inspector authorized to inspect boilers and tanks

in this State, or, if constructed outside the State, by an inspector holding a certificate from the National Board of Boiler and Pressure Vessel Inspectors, or a certificate of competency as an inspector of boilers for a state that has a standard of examination substantially equal to that of this State provided by G. S. 95-63.

(4) If upon inspection, a boiler or tank is found to comply with the rules and regulations of the Board, the owner or user thereof shall pay directly to the chief inspector, the sum of one dollar (\$1.00) and the chief inspector, or his duly authorized representative, shall issue to such owner or user an inspection certificate bearing the date of inspection and specifying the maximum pressure under which such boiler or tank may be operated. Such inspection certificate shall be valid for not more than twenty-six (26) months. Certificates shall be posted under glass in the room containing the boiler or tank inspected or in the case of a portable boiler or tank in a metal container to be fastened to the boiler or to be kept in a tool box accompanying the boiler.

(5) No inspection certificate issued for an insured boiler or tank inspected by a special inspector shall be valid after the boiler or tank for which it was issued shall cease to be insured by a company duly authorized by this State to carry such insurance.

(6) The chief inspector or his authorized representative may at any time suspend an inspection certificate when, in his opinion, the boiler or tank for which it was insured, cannot be operated without menace to public safety, or when the boiler or tank is found not to comply with the rules and regulations herein provided. A special inspector shall have corresponding powers with respect to inspection certificates for boilers or tanks insured by the company employing him. Such suspension of an inspection certificate shall continue in effect until such boiler or tank shall have been made to conform to the rules and regulations of the Board, and until said inspection certificate shall have been reinstated. (1951, c. 1107, s. 6.)

§ 95-65.1. Operation of unapproved low pressure steam heating boilers, or hot water heating and supply boilers and tanks prohibited.—On and after July 1, 1951, it shall be unlawful for any person, firm, partnership, or corporation to operate under pressure in this State a low pressure steam heating boiler, hot water heating boiler, hot water supply boiler or hot water supply tank, fired or unfired, to which this article applies without a valid inspection certificate as provided for in this article. The operation of any such boiler or tank without an inspection certificate shall constitute a misdemeanor on the part of the owner, user, or operator thereof and be punishable by a fine not exceeding one hundred dollars (\$100) or imprisonment not to exceed 30 days, or both in the discretion of the court. (1951, c. 1107, s. 7.)

§ 95-66. Installation of boilers not conforming to requirements prohibited; boilers now in use to conform.—No steam boiler or steam or hot water heating boiler or hot water supply tank or boiler, fired or unfired which does not conform to the rules and regulations formulated by the Board of Boiler Rules governing new installations shall be installed in this State after six months from the date upon which the said rules and regulations shall become effective by the approval of the Governor.

All boilers and tanks installed and ready for use, or being used, before the said six months shall have elapsed, shall be made to conform to the rules and regulations of the Board of Boiler Rules governing existing installations and the formula therein prescribed shall be used in determining the maximum allowable working pressure for such boilers and tanks. (1935, c. 326, s. 12; 1951, c. 1107, s. 8.)

Editor's Note.—The 1951 amendment re-wrote this section.

§ 95-67. Inspection of boilers during construction in State; outside State.—All steam boilers and steam and hot water supply tanks and boilers

to be installed after six months from the date upon which the rules and regulations of the Board of Boiler Rules shall become effective by the approval of the Governor shall be inspected during construction by an inspector authorized to inspect boilers in this State, or if constructed outside the State, by an inspector holding a certificate of authority from the Commissioner of Labor of this State, which certificate shall be issued by the said Commissioner of Labor to any inspector who holds a certificate of authority to inspect steam boilers issued by a state which shall have adopted boiler rules that require standards of construction and operation substantially equal to those of this State, or an inspector who holds a certificate of inspection issued by the National Board of Boiler and Pressure Vessel Inspectors. (1935, c. 326, s. 12; 1951, c. 1107, s. 9.)

Editor's Note.—The 1951 amendment inserted the words "steam boilers and steam and hot water supply tanks and boilers" in lieu of the word "boilers" formerly appearing in the first line.

§ 95-68. Fees for internal and external inspections.—The person using, operating or causing to be operated any boiler listed in this section, required by this article to be inspected by the chief boiler inspector or a deputy inspector, shall pay to the inspector, for the inspection of any such boiler, fees in accordance with the following schedule:

Miniature boilers, which do not exceed 18 inches inside diameter of shell, 100 pounds per square inch maximum allowable working pressure:	
General inspection	\$ 5.00
Fire tube boilers with hand holes only:	
Internal inspection	6.00
External inspection while under pressure	4.00
Fire tube boilers with man holes:	
Internal inspection	12.00
External inspection while under pressure	4.00
Water tube boiler (coil type):	
General inspection	6.00
Water tube boilers with not more than 500 square feet of heating surface:	
Internal inspection	6.00
External inspection while under pressure	4.00
Water tube boilers with more than 500 but not more than 3000 square feet of heating surface:	
Internal inspection	12.00
External inspection while under pressure	4.00
Water tube boilers with more than 3000 square feet of heating surface:	
Internal inspection	20.00
External inspection while under pressure	6.00

Provided, that one (\$1.00) dollar of each internal inspection fee shall be the fee for the certificate of inspection required by § 95-64. The inspector shall give receipts for said fees and shall pay all sums so received to the Commissioner of Labor, who shall pay the same to the Treasurer of the State. The Treasurer of the State shall hold the fees collected under this section and under § 95-64 in a special account to pay the salaries and expenses incident to the administration of this article, the surplus, with the approval of the Director of the Budget, to be added to the appropriation of the Division of Standards and Inspections of the Department of Labor for its general inspectional service. (1935, c. 326, s. 13; 1937, c. 125, s. 3; 1939, c. 361, s. 2; 1951, c. 544, s. 3.)

Editor's Note.—The 1951 amendment rewrote the first paragraph and the appended schedule.

§ 95-68.1. Other inspection fees.—The person using, operating or causing to be operated any low pressure steam heating boiler, hot water heating boiler,

hot water supply boiler, or hot water supply tank, fired or unfired, required by this article to be inspected by the chief boiler inspector or a deputy inspector, shall pay to the inspector for the biennial inspection of any such boiler or tank fees in accordance with the following schedule: Provided that one dollar (\$1.00) of each inspection fee shall be the fee for the certificate of inspection required by G. S. 95-64.1:

Low pressure steam and hot water boilers, equipped only with hand holes and washout plugs	\$3.00
Low pressure steam and hot water boilers, equipped with manhole	5.00
Hot water supply boilers	2.00
Tanks that are not equipped with manhole	2.00
Tanks equipped with manhole	4.00

(1951, c. 1107, s. 10.)

§ 95-69.1. **Appeals to Board.**—Any person aggrieved by an order or act of the Commissioner of Labor, or the chief inspector, under this article may, within 15 days after notice thereof, appeal from such order or act to the Board which shall, within 30 days thereafter, hold a hearing after having given at least 10 days' written notice to all interested parties. The Board shall, within 30 days after such hearing, issue an appropriate order either approving, modifying or disapproving said order or act. A copy of such order by the Board shall be delivered to all interested parties. (1951, c. 1107, s. 12.)

§ 95-69.2. **Court review of orders and decisions.**—(a) Any order or decision made, issued or executed by the Board shall be subject to review in the superior court of the county in which the inspection took place on petition by any person aggrieved filed within 30 days from the date of the delivery of a copy of the order or decision made by the Board to 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 chairman of the Board. If such petition for review is not filed within the said 30 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.

(b) The chairman of the Board shall within 30 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 (a) of this section, cause to be prepared and filed with the clerk of the superior court of Wake County a complete transcript of the record of the hearing, if any, had before the Board, and a true copy of the order or decision duly certified. The order or decision of the Board if supported by substantial evidence shall be presumed to be correct and proper. The court may change the place of hearing, (1) upon consent of the parties; or (2) when the convenience of witnesses and the end of justice would be promoted by the change; or (3) 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 chairman of the Board is incomplete, he may by appropriate order direct the chairman to certify any or all parts of the record so omitted.

(c) The trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Board and to restrain the enforcement thereof.

(d) Appeals from all final orders and judgments entered by the superior court in reviewing the orders and decisions of the Board may be taken to the Supreme Court of North Carolina by any party to the action as in other civil cases.

(e) The commencement of proceedings under this section shall not operate as a stay of the Board's order or decision, unless so ordered by the court.

(f) The following rights may be exercised by any party in lieu of the right of review provided by the above subsections (a) through (d):

The person aggrieved by any order or decision of the Board may, within 30 days after delivery to him of a copy of the Board's order or decision, file an appeal and a request for trial de novo and right to jury trial in the superior court of the county in which the inspection took place. Such right must be granted. However, unless such appeal and request for right to trial de novo and jury trial is filed as provided above, such right shall be deemed waived. In the event of such trial de novo, the Board shall file with the clerk of said superior court a certified copy of the Board's order or decision from which appeal is taken, and also, upon written request filed 10 days prior to the trial, furnish to the appealing party a copy of the transcript of the record of the hearing held before the Board. Any party to the action may take appeal to the superior court from any final order and judgment entered by the superior court after any such trial de novo or jury trial, which appeal shall be as in other civil actions. (1951, c. 1107, s. 12; 1953, c. 675, s. 10.)

Editor's Note.—The 1953 amendment inserted "as" in line three of subsection (d).

ARTICLE 10.

Declaration of Policy as to Labor Organizations.

§ 95-78. Declaration of public policy.

Provisions for a "closed shop" in agreements executed subsequent to the effective date of this article, and such provisions in extensions of prior contracts executed subsequent to that date, are contrary to public policy and void. In re Port Publishing Co., 231 N. C. 395, 57 S. E. (2d) 366, 14 A. L. R. (2d) 842 (1950).

Article Is in Force Except as Limited by National Labor Legislation.—Except to the extent Congress, in enacting labor legislation related to interstate commerce, has pre-empted the field, this article is in full force and effect. Hudson v. Atlantic Coast Line R. Co., 242 N. C. 650, 89 S. E. (2d) 441 (1955).

Union Shop Agreement Valid under Federal Railway Labor Act.—A union shop agreement, complying in all respects with the provisions of the Union Shop Amendment of 1951 to the Federal Rail-

way Labor Act is not void by virtue of this article. Hudson v. Atlantic Coast Line R. Co., 242 N. C. 650, 89 S. E. (2d) 441 (1955).

In an action to restrain alleged unlawful picketing pursuant to a conspiracy to force plaintiff to violate the State Right to Work Law, on motion to show cause why a temporary restraining order should not be continued, the facts were insufficient to show that continuance of the temporary restraining order enjoined the exercise of any rights of defendants protected by the Federal Labor Management Act, and the order would not be disturbed, the question being determinable upon the evidence to be offered upon the hearing upon the merits. J. A. Jones Constr. Co. v. Local Union 755, etc., 246 N. C. 481, 98 S. E. (2d) 852 (1957).

§ 95-79. Certain agreements declared illegal.

Void Agreement.—An agreement between an employer and its employees which makes union membership a prerequisite of employment is void in this jurisdiction. In re Port Publishing Co., 231 N. C. 395, 57 S. E. (2d) 366, 14 A. L. R. (2d) 842 (1950).

With Valid Severable Provisions.—While §§ 95-79 to 95-84 preclude "closed shop" agreements, these sections do not preclude

provisions relating to working conditions, hours, rates of pay, training of journeymen, overtime, vacation and severance pay, and such provisions are severable and may be sustained irrespective of the invalidity of a "closed shop" provision in the contract. In re Port Publishing Co., 231 N. C. 395, 57 S. E. (2d) 366, 14 A. L. R. (2d) 842 (1950).

§ 95-80. Membership in labor organization as condition of employment prohibited.

Cross Reference. — See note under § 95-79.

§ 95-81. Nonmembership as condition of employment prohibited.

Void Agreement. — An agreement between an employer and its employees which makes nonmembership in a labor union a prerequisite of employment is void in this jurisdiction. In re Port Publishing Co., 231 N. C. 395, 57 S. E. (2d) 366, 14 A. L. R. (2d) 842 (1950).

Chapter 96.

Employment Security.

Article 1.

Employment Security Commission.

Sec. 96-1.5. Change in names of Division, funds, etc.

96-6. Unemployment Insurance Fund.

Article 3.

Employment Service Division.

Sec. 96-28. [Repealed.]

ARTICLE 1.

Employment Security Commission.

§ 96-1.5. Change in names of Division, funds, etc.—The purpose of this section is to effectuate a change in the name of the “Unemployment Compensation Division” of the Employment Security Commission to “Unemployment Insurance Division”; to change the name of “Unemployment Compensation Fund” to “Unemployment Insurance Fund”; to change “unemployment compensation funds” to “unemployment insurance funds”; to change “unemployment compensation” to “unemployment insurance”; to provide that the program administered by the Employment Security Commission with reference to payment of benefits to unemployed individuals under the law be referred to as Unemployment Insurance Program rather than Unemployment Compensation Program. All moneys now in the “Unemployment Compensation Fund” shall automatically inure to the “Unemployment Insurance Fund”. (1953, c. 401, s. 1.)

Editor’s Note.—This section was codified from the second paragraph of Session Laws 1953, c. 401, s. 1, which in the first paragraph directed that “Unemployment Insurance” be substituted for “Unemployment Compensation” in certain designated sections of this chapter.

§ 96-3. Employment Security Commission.

(b) Divisions.—The Commission shall establish two co-ordinate divisions: the North Carolina State Employment Service Division, created pursuant to § 96-20, and the Unemployment Insurance Division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel and duties, except in so far as the Commission may find that such separation is impracticable.

(c) Salaries.—The chairman of the Employment Security Commission of North Carolina, appointed by the Governor, shall be paid from the Employment Security Administration Fund a salary payable on a monthly basis, which salary shall be fixed by the Governor subject to the approval of the Advisory Budget Commission; and the members of the Commission, other than the chairman, shall each receive ten dollars (\$10.00) per day including necessary time spent in traveling to and from his place of residence within the State to the place of

meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(1953, c. 401, s. 1; 1957, c. 541, s. 5.)

Editor's Note.—

The 1953 amendment substituted "Unemployment Insurance Division" for "Unemployment Compensation Division" in subsection (b).

The 1957 amendment substituted in subsection (c) the words "subject to the ap-

proval of the Advisory Budget Commission" for the words "with the approval of the Council of State."

As only subsections (b) and (c) were changed the rest of the section is not set out.

§ 96-4. Administration.

(g) Records and Reports.—(1) Each employing unit shall keep true and accurate employment records, containing such information as the Commission may prescribe. Such records shall be open to inspection and be subject to being copied by the Commission or its authorized representatives at any reasonable time and as often as may be necessary. Any employing unit doing business in North Carolina shall make available in this State to the Commission, such information with respect to persons, firms, or other employing units performing services for it which the Commission deems necessary in connection with the administration of this chapter. The Commission may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which the Commission deems necessary for the effective administration of this chapter. Information thus obtained shall not be published or be open to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the employing unit's identity, but any claimant at a hearing before an appeal tribunal or the Commission shall be supplied with information from such records to the extent necessary for the proper presentation of his claims. Any individual may be supplied with information as to his potential benefit rights from such records. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars (\$20.00) nor more than two hundred dollars (\$200.00), or imprisoned for not longer than ninety days, or both. All reports, statements, information and communications of every character so made or given to the Commission, its deputies, agents, examiners and employees, whether same be written, oral or in the form of testimony at any hearing, or whether obtained by the Commission from the employing unit's books and records shall be absolute privileged communications in any civil or criminal proceedings other than proceedings instituted pursuant to this chapter and proceedings involving the administration of this chapter: Provided, nothing herein contained shall operate to relieve any employing unit from disclosing any information required by this chapter or as prescribed by the Commission involving the administration of this chapter.

(2) If the Commission finds that any employer has failed to file any report or return required by this chapter or any regulation made pursuant hereto, or has filed a report which the Commission finds incorrect or insufficient, the Commission may make an estimate of the information required from such employer on the basis of the best evidence reasonably available to it at the time, and make, upon the basis of such estimate, a report or return on behalf of such employer, and the report or return so made shall be deemed to be prima facie correct, and the Commission may make an assessment based upon such report and proceed to collect contributions due thereon in the manner as set forth in § 96-10 (b) of this chapter: Provided, however, that no such report or return shall be made until the employer has first been given at least ten days' notice by registered mail to the last known address of such employer: Provided further, that no such report or return shall be used as a basis in determining whether such employing unit is an employer within the meaning of this chapter.

(k) State-Federal Co-Operation.—In the administration of this chapter, the Commission shall co-operate, to the fullest extent consistent with the provisions

of this chapter, with the federal agency, official or bureau fully authorized and empowered to administer the provisions of the Social Security Act approved August 14th, 1935, as amended, shall make such reports, in such form and containing such information as such federal agency, official or bureau may from time to time require, and shall comply with such provisions as such federal agency, official, or bureau may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by such agency, official, or bureau governing the expenditures of such sums as may be allotted and paid to this State under Title III of the Social Security Act for the purpose of assisting in the administration of this chapter. The Commission shall further make its records available to the Railroad Retirement Board, created by the Railroad Retirement Act and the Railroad Unemployment Insurance Act, and shall furnish to the Railroad Retirement Board at the expense of the Railroad Retirement Board, such copies thereof as the Board shall deem necessary for its purposes in accordance with the provisions of section three hundred three (c) of the Social Security Act as amended.

Upon request therefor, the Commission shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits, and such recipient's rights to further benefits under this chapter.

The Commission is authorized to make such investigations, secure and transmit such information, make available such services and facilities and exercise such of the other powers provided herein with respect to the administration of this chapter as it deems necessary or appropriate to facilitate the administration of any employment security or public employment service law, and in like manner, to accept and utilize information, services and facilities made available to this State by the agency charged with the administration of such other employment security or public employment service law.

The Commission shall fully co-operate with the agencies of other states and shall make every proper effort within its means to oppose and prevent any further action which would, in its judgment, tend to effect complete or substantial federalization of State unemployment insurance funds or State employment security programs.

(1) Reciprocal Arrangements.—(1) The Commission is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby:

(A) Services performed by an individual for a single employing unit for which services are customarily performed in more than one state shall be deemed to be services performed entirely within any one of the states (i) in which any part of such individual's service is performed or (ii) in which such individual has his residence or (iii) in which the employing unit maintains a place of business, provided there is in effect, as to such services, an election by the employing unit, approved by the agency charged with the administration of such state's employment security law, pursuant to which the services performed by such individual for such employing unit are deemed to be performed entirely within such state;

(B) Potential rights to benefits accumulated under the employment security laws of one or more states or under one or more such laws of the federal government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under terms which the Commission finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund;

(C) Wages or services, upon the basis of which an individual may become entitled to benefits under an employment security law of another state or of the federal government, shall be deemed to be wages for insured work for the purpose of determining his rights to benefits under this chapter, and wages for insured work, on the basis of which an individual may become entitled to benefits under

this chapter shall be deemed to be wages or services on the basis of which unemployment insurance under such law of another state or of the federal government is payable, but no such arrangement shall be entered into unless it contains provisions for reimbursements to the fund for such of the benefits paid under this chapter upon the basis of such wages or services, and provisions for reimbursements from the fund for such of the compensation paid under such other law upon the basis of wages for insured work, as the Commission finds will be fair and reasonable as to all affected interests; and

(D) Contributions due under this chapter with respect to wages for insured work shall for the purposes of § 96-10 be deemed to have been paid to the fund as of the date payment was made as contributions therefor under another state or federal employment security law, but no such arrangement shall be entered into unless it contains provisions for such reimbursement to the fund of such contributions as the Commission finds will be fair and reasonable as to all affected interests.

(E) The services of the Commission may be made available to such other agencies to assist in the enforcement and collection of judgments of such other agencies.

(F) The services on vessels engaged in interstate or foreign commerce for a single employer, wherever performed, shall be deemed performed within this State or within such other state.

(G) Services performed by an individual for a single employing unit which customarily operates in more than one state shall be deemed to be services performed entirely within any of the states (i) in which such individual has residence or (ii) in which the employing unit maintains a place of business; provided there is in effect as to such service an election approved by the agency charged with the administration of such state's employment security law, pursuant to which all the services performed by such individual for such employing unit are deemed to be performed entirely within such state; provided, further, that no such election shall apply to more than three such individuals.

(H) Wages earned by an individual in covered employment in more than one state which is less than the eligibility requirements of either of such states may be combined and constitute the basis for the payment of benefits through a single and appropriate agency under terms which the Commission finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund: Provided, that any benefits paid under the provisions of this subparagraph shall not be charged to the account of any employer as provided in § 96-9, subsection (c) (2) of this chapter: Provided further, that any such wages or services shall be deemed to be within the provisions of subparagraph (C) of this subsection.

(I) Benefits paid by agencies of other states may be reimbursed to such agencies in cases where services of the claimant were "employment" under this chapter and contributions have been paid by the employer to this agency on remuneration paid for such services; provided the amount of such reimbursement shall not exceed the amount of benefits such claimant would have been entitled to receive under the provisions of this chapter.

(J) Wages earned by an individual in covered employment in one state which are as much as the eligibility requirements of such state may be combined with wages earned by such individual in one or more other states which are less than the eligibility requirements of such other state or states and may constitute the basis for the payment of benefits through a single and appropriate agency under terms which the Commission finds will be fair and reasonable as to all affected interests; provided that any benefits paid based on wages earned in this State which are less than the eligibility requirements of this chapter shall not be charged to the account of the employer under the provisions of § 96-9 (c) (2).

(2) Reimbursements paid from the fund pursuant to clause (C), of paragraph (1) of this subsection shall be deemed to be benefits for the purpose of §§ 96-6, 96-9 and 96-12. The Commission is authorized to make to other states or federal

agencies and to receive from such other state or federal agencies, reimbursements from or to the fund, in accordance with arrangements entered into pursuant to paragraph (1) of this subsection.

(3) To the extent permissible under the laws and Constitution of the United States, the Commission is authorized to enter into or co-operate in arrangements whereby facilities and services provided under this chapter and facilities and services provided under the employment security law of any foreign government, may be utilized for the taking of claims and the payment of benefits under the Employment Security Law of this State or under a similar law of such government.

(m) The Commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any "employing unit" or "employer" as said terms are defined by § 96-8 (e) and § 96-8 (f) and subsections thereunder of this chapter. The Commission shall have the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Employment Security Law that may affect the rights, liabilities and status of any employing unit or employer as heretofore defined by the Employment Security Law including the right to determine the amount of contributions, if any, which may be due the Commission by any employer. Hearings before the Commission shall be conducted and held at the office of the Commission and shall be open to the public and shall be stenographically reported and the Commission shall provide for the preparation of a record of all hearings and other proceedings. The Commission shall provide for the taking of evidence by a hearing officer who shall be a member of the legal staff of the Commission. Such hearing officer shall have the same power to issue subpoenas, administer oaths, conduct hearings and take evidence as is possessed by the Commission and such hearings shall be stenographically reported, and he shall transmit all testimony and records of such hearings to the Commission for its determination. All such hearings conducted by such hearing officer shall be scheduled and held in any county in this State in which the employing unit or employer either resides, maintains a place of business, or conducts business; however, the Commission may require additional testimony at any hearings held by it at its office in Raleigh. From all decisions or determinations made by the Commission any party affected thereby shall be entitled to an appeal to the superior court. Before such party shall be allowed to appeal, he shall within ten days after notice of such decision or determination, file with the Commission exceptions to the decision or the determination of the Commission, which exceptions will state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled then such party may appeal from the order overruling the exceptions, and shall, within ten days after the decision overruling the exceptions, give notice of his appeal. When an exception is made to the facts as found by the Commission, the appeal shall be to the superior court in term time but the decision or determination of the Commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by any competent evidence. When an exception is made to any rulings of law, as determined by the Commission, the appeal shall be to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the Commission exceptions to the decision or determination overruling the exception which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the Commission shall, within thirty days, transmit all the papers and evidence considered by it, together with the assignments of errors filed by the appellant to a judge of the superior court holding court or residing in some district in which such appellant either resides, maintains a place of business or conducts business: Provided, however, the thirty-day period specified herein may be extended by agreement of parties. If there be no exceptions to any facts as found by the Commission the facts so found shall be binding upon the court and it shall be

heard by the judge at chambers at some place in the district, above mentioned, of which all parties shall have ten days' notice.

(1951, c. 332, ss. 1, 18; 1953, c. 401, ss. 1-4; 1955, c. 385, ss. 1, 2; c. 479; 1957, c. 1059, s. 1.)

Editor's Note.—

The 1951 amendment substituted "Secretary of Labor" for "Social Security Administration" in subsection (k), and added subparagraph (I) of paragraph (1) of subsection (1).

The 1953 amendment inserted the third sentence in paragraph (1) of subsection (g). It changed subsection (k) by substituting "federal agency, official, or bureau" for "Secretary of Labor" in the first paragraph, "Unemployment Insurance Fund" for "Unemployment Compensation Fund" in the fourth paragraph, and "unemployment insurance" for "unemployment compensation" in the fifth paragraph. The amendment also substituted "unemployment insurance" for "unemployment compensation" in paragraph (1) (C) of subsection (l), and inserted the third, fourth, fifth and sixth sentences of subsection (m) in lieu of the former third and fourth sentences.

The first 1955 amendment rewrote the first proviso to subsection (l), paragraph (1), subparagraph (H), and added subparagraph (J) to subsection (l), paragraph (1). The second 1955 amendment corrected a typographical error in act inserting the first 1955 amendment.

The 1957 amendment struck out the former paragraph of subsection (k) authorizing and directing the Commission to apply for an advance to the Unemployment Insurance Fund and to accept responsibility for its repayment in accordance with conditions specified in the Social Security Act.

As the rest of the section was not changed by the amendments, only subsections (g), (k), (l) and (m) are set out.

Conclusiveness of Findings of Fact on Review.—

See *State v. Kermon*, 232 N. C. 342, 60 S. E. (2d) 580 (1950).

In accord with 1st paragraph in original. See *Employment Security Comm. v. Mon-*

sees, 234 N. C. 69, 65 S. E. (2d) 887 (1951); *State v. Coe*, 239 N. C. 84, 79 S. E. (2d) 177 (1953); *In re Stutts*, 245 N. C. 405, 95 S. E. (2d) 919 (1957).

The procedure for hearings before the Commission and incident to appeal to the superior court is set forth in detail in this section. The steps in the procedure are these: 1. Order for and notice of hearing at which testimony is taken. 2. Notice of hearing by Commission (or chairman), upon transcript of evidence (when Commission may require additional evidence), after which the Commission (or chairman) shall make findings of fact and its determinations predicated thereon. 3. Exceptions to the decision of Commission (or chairman), stating the grounds of objection thereto, must be filed with the Commission within ten days after notice of such decision. 4. Commission (or chairman), at a second hearing, passes upon the exceptions so filed; and if any exception is overruled then an appeal may be taken, within ten days after such decision, to the superior court, this appeal being from the order overruling the exceptions. *State v. Skyland Crafts, Inc.*, 240 N. C. 727, 83 S. E. (2d) 893 (1954).

Scope of Review in Superior Court.—

Review of exceptions to the findings of the Employment Security Commission is limited to determine whether the findings are supported by any competent evidence, and the superior court may not disregard a finding and substitute its own finding in lieu thereof. *State v. Kermon*, 232 N. C. 342, 60 S. E. (2d) 580 (1950).

Applied, as to subsection (m), in *Employment Security Comm. v. Smith*, 235 N. C. 104, 69 S. E. (2d) 32 (1952); *State v. Simpson*, 238 N. C. 296, 77 S. E. (2d) 718 (1953).

Cited in *In re Employment Security Comm.*, 234 N. C. 651, 68 S. E. (2d) 311 (1951).

§ 96-5. Employment Security Administration Fund.—(a) Special Fund.—There is hereby created in the State treasury a special fund to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this chapter, and shall not lapse at any time or be transferred to any other fund. The Employment Security Administration Fund, except as otherwise provided in this chapter, shall be subject to the provisions of the Executive Budget Act (§ 143-1 et seq.) and the Personnel Act (§ 143-35 et seq.). All moneys in this fund which are received

from the federal government or any agency thereof or which are appropriated by this State for the purpose described in § 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of this chapter. The fund shall consist of all moneys appropriated by this State, all moneys received from the United States of America, or any agency thereof, including the Secretary of Labor, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this chapter: Provided, any interest collected on contributions and/or penalties collected pursuant to this chapter subsequent to June 30th, 1947, shall be paid into the Special Employment Security Administration Fund created by subsection (c) of this section. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Employment Security Administration Fund provided for under this chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in said fund.

(b) Replacement of Funds Lost or Improperly Expended. — If any moneys received after June 30th, 1941, from the Secretary of Labor under Title III of the Social Security Act, or any unencumbered balances in the Employment Security Administration Fund as of that date, or any moneys granted after that date to this State pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by this State or its political subdivisions and matched by such moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, are found by the Secretary of Labor, because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Secretary of Labor for the proper administration of this chapter, it is the policy of this State that such moneys, not available from the Special Employment Security Administration Fund established by subsection (c) of this section, shall be replaced by moneys appropriated for such purpose from the general funds of this State to the Employment Security Administration Fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Secretary of Labor, the Commission shall promptly pay from the Special Employment Security Administration Fund such sum if available in such fund; if not available, it shall promptly report the amount required for such replacement to the Governor and the Governor shall, at the earliest opportunity, submit to the legislature a request for the appropriation of such amount. This subsection shall not be construed to relieve this State of its obligation with respect to funds received prior to July 1st, 1941, pursuant to the provisions of Title III of the Social Security Act.

(c) There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this chapter subsequent to June 30th, 1947, shall be paid into this fund. No part of said fund shall be expended or available for ex-

penditure in lieu of federal funds made available to the Commission for the administration of this chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Secretary of Labor not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source, and also shall be used by the Commission for incidental extensions, repairs, enlargements or improvements. Refunds of interest allowable under § 96-10, subsection (e), shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to § 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Insurance Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this chapter, shall be subject to the provisions of the Executive Budget Act (§ 143-1 et seq.) and the Personnel Act (§ 143-35 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this section.

(d) The other provisions of this section and § 96-6, to the contrary notwithstanding, the Commission is authorized to requisition and receive from its account in the unemployment trust fund in the treasury of the United States of America, in the manner permitted by federal law, such moneys standing to its credit in such fund, as are permitted by federal law to be used for expense of administering this chapter and to expend such moneys for such purpose, without regard to a determination of necessity by a federal agency. The State Treasurer shall be treasurer and custodian of the amounts of money so requisitioned. Such moneys shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the State treasury. (Ex. Sess., 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2; 1951, c. 332, s. 18; 1953, c. 401, ss. 1, 5.)

Editor's Note.—

The 1951 amendment substituted "Secretary of Labor" for "Social Security Administration."

The 1953 amendment substituted "Unemployment Insurance Fund" for "Unem-

ployment Compensation Fund" in subsection (c). It also added the words "and also shall be used by the Commission for incidental extensions, repairs, enlargements or improvements" at the end of the fourth sentence of the subsection.

§ 96-6. Unemployment Insurance Fund.—(a) Establishment and Control.—There is hereby established as a special fund, separate and apart from all public moneys or funds of this State, an Unemployment Insurance Fund, which shall be administered by the Commission exclusively for the purposes of this chapter. This fund shall consist of:

(1) All contributions collected under this chapter, together with any interest earned upon any moneys in the fund;

(2) Any property or securities acquired through the use of moneys belonging to the fund;

(3) All earnings of such property or securities;

(4) Any moneys received from the federal unemployment account in the unemployment trust fund in accordance with Title XII of the Social Security Act as amended.

All moneys in the fund shall be commingled and undivided.

(d) Management of Funds upon Discontinuance of Unemployment Trust Fund.—The provisions of subsections (a), (b), and (c), to the extent that they relate to the unemployment trust fund, shall be operative only so long as such unemployment trust fund continues to exist, and so long as the Secretary of the Treasury of the United States of America continues to maintain for this State a separate book account of all funds deposited therein by this State for benefit purposes, together with this State's proportionate share of the earnings of such unemployment trust fund, from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the Unemployment Insurance Fund of this State shall be transferred to the treasurer of the Unemployment Insurance Fund, who shall hold, invest, transfer, sell, deposit, and release such moneys, properties, or securities in a manner approved by the Commission, in accordance with the provisions of this chapter: Provided, that such moneys shall be invested in the following readily marketable classes of securities: Bonds or other interest-bearing obligations of the United States of America or such investments as are now permitted by law for sinking funds of the State of North Carolina; and provided further, that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the Unemployment Insurance Fund only under the direction of the Commission.

(e) Benefits shall be deemed to be due and payable under this chapter only to the extent provided in this chapter and to the extent that moneys are available therefor to the credit of the Unemployment Insurance Fund, and neither the State nor the Commission shall be liable for any amount in excess of such sums. (Ex. Sess. 1936, c. 1, ss. 9, 18; 1939, c. 27, s. 7; c. 52, s. 4; c. 208; 1941, c. 108; 1945, c. 522, s. 4; 1947, c. 326, s. 6; 1953, c. 401, ss. 1, 6.)

Editor's Note.—

The 1953 amendment substituted "Unemployment Insurance Fund" for "Unemployment Compensation Fund" in subsections (a), (d) and (e). It also rewrote the last paragraph of subsection (a). As the

rest of the section was not affected by the amendment only subsections (a), (d) and (e) are set out.

Applied in *State v. Skyland Crafts, Inc.*, 240 N. C. 727, 83 S. E. (2d) 893 (1954).

ARTICLE 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

(d) "Contributions" means the money payments to the State Unemployment Insurance Fund required by this chapter.

(e) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has, on or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments

within this State shall be deemed to be employed by a single employing unit for all the purposes of this chapter. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter unless such agent or employee is an employer subject to the tax imposed by the Federal Unemployment Tax Act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work: Provided, however, that nothing herein, on or after July first, one thousand nine hundred thirty-nine, shall be construed to apply to that part of the business of such "employers" as may come within the meaning of that term as it is defined in section one (a) of the Railroad Unemployment Insurance Act.

(f) "Employer" means:

(1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has, or had in employment, eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week): Provided, with respect to employment during the calendar year 1956, "employer" means any employing unit which in each of twenty different weeks within such calendar year (whether or not such weeks are or were consecutive) has, or had in employment, four or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), and with respect to employment on and after January 1, 1957, "employer" means any employing unit which in each twenty different weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive) has, or had in employment, four or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week): Provided further, for the purpose of this subsection, "week" means calendar week, and when a calendar week falls partly within each of two calendar years, such week shall be deemed to be within the calendar year within which such week ends: Provided further, that for purposes of this subsection "employment" shall include services which would constitute "employment" but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under an arrangement entered into by the Commission pursuant to subsection (1) of § 96-4, and an agency charged with the administration of any other state or federal employment security law.

(2) Any employing unit which acquired the organization, trade or business or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this chapter; provided, such other would have been an employer under paragraph (1) of this subsection, if such part had constituted its entire organization, trade, or business; provided further, that § 96-10, subsection (d), shall not be applicable to an individual or employing unit acquiring such part of the organization, trade or business. The provisions of § 96-11 (a), to the contrary notwithstanding, any employing unit which becomes an employer solely by virtue of the provisions of this paragraph shall not be liable for contributions based on wages paid or payable to individuals with respect to employment performed by such individuals for such employing unit prior to the date of acquisition of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this chapter. The provisions of this paragraph shall not be applicable if the successor within sixty days from the date of the acquisition of the organization, trade, or business, or substantially all the assets of the pred-

cessor, or a part thereof as provided herein, files a written request with the Commission to be relieved from the provisions of this paragraph, and the Commission finds the predecessor was an employer at the time of such acquisition only because such predecessor had failed to make application for termination of coverage as provided in § 96-11 of this chapter.

(3) Any employing unit which acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection.

(4) Any employing unit which, having become an employer under paragraphs (1), (2), or (3), has not, under § 96-11, ceased to be an employer subject to this chapter; or

(5) For the effective period of its election pursuant to § 96-11 (c) any other employing unit which has elected to become fully subject to this chapter.

(6) Any employing unit not an employer by reason of any other paragraph of this subsection, for which, within any calendar year, services in employment are or were performed with respect to which such employing unit is or was liable for any federal tax against which credit may or could have been taken for contributions required to be paid into a State Unemployment Insurance Fund; provided, that such employer, notwithstanding the provisions of § 96-11, shall cease to be subject to the provisions of this chapter during any calendar year if the Commission finds that during such period the employer was not subject to the provisions of the Federal Unemployment Tax Act and any other provision of this chapter.

(7) Any employing unit with its principal place of business located outside of the State of North Carolina, which engages in business within the State of North Carolina, and which, during any period of twelve consecutive months, has in employment eight or more individuals in as many as twenty different weeks shall be deemed to be an employer and subject to the other provisions of this chapter.

(8) Any employing unit which maintains an operating office within this State from which the operations of an American vessel operating on navigable waters within or within and without the United States are ordinarily and regularly supervised, managed, directed, and controlled: Provided, the employing unit would be an employer by reason of any other paragraph of this subsection.

(g) (1) "Employment" means service performed prior to January 1, 1949, which was employment as defined in this chapter prior to such date, and any service performed after December 31, 1948, including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules. An employee who is on paid vacation or is on paid leave of absence due to illness or other reason shall be deemed to be in employment irrespective of the failure of such individual to perform services for the employing unit during such period.

(2) The term "employment" shall include an individual's entire service, performed within or both within and without this State if:

(A) The service is localized in this State; or

(B) The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of

operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

(3) Services performed within this State but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.

(4) Services not covered under paragraph (2) of this subsection, and performed entirely without this State, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this chapter if the individual performing such service is a resident of this State and the Commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this chapter, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to subsection (1) of § 96-4 shall be deemed to be employment during the effective period of such election.

(5) Service shall be deemed to be localized within a state if

(A) The service is performed entirely within such state; or

(B) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the State; for example, is temporary or transitory in nature or consists of isolated transactions.

(6) The term "employment" shall include:

(A) Services covered by an election pursuant to § 96-11, subsection (c), of this chapter; and

(B) Services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to § 96-4, subsection (1), of this chapter during the effective period of such election.

(C) Any service of whatever nature performed by an individual for an employing unit on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if such individual is employed on and in connection with such vessel when outside the United States: Provided, such service is performed on or in connection with the operations of an American vessel operating on navigable waters within or within and without the United States and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State: Provided further, that this subparagraph shall not be applicable to those services excluded in subsection (g), paragraph (7), subparagraph (F) of this section.

(7) The term "employment" shall not include:

(A) Service performed in the employ of this State, or of any political subdivision thereof, or of any instrumentality of this State or its political subdivisions;

(B) Service performed in the employ of any other state or its political subdivisions, or of the United States government, or of an instrumentality of any other state or states or their political subdivisions or of the United States. From and after March 10, 1941, service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state employment security law, all of the provisions of this chapter shall be applicable to such instrumentalities, and to

services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services: Provided, that if this State shall not be certified for any year by the Secretary of Labor under section one thousand six hundred and three (c) of the Federal Internal Revenue Code, the payments required of such instrumentalities with respect to such year shall be refunded by the Commission from the fund in the same manner and within the same period as is provided in § 96-10 (e) with respect to contributions erroneously collected.

(C) Service with respect to which unemployment insurance is payable under an employment security system established by an act of Congress: Provided, that the Commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective ten days after publication thereof in the manner provided in § 96-4 (b) for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment insurance under act of Congress, or who have, after acquiring potential rights to unemployment insurance under such act of Congress, acquired rights to benefits under this chapter;

(D) Agricultural labor;

(E) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority;

(F) Service performed on or in connection with a vessel not an American vessel by an individual, if the individual is performing service on and in connection with such vessel when outside the United States; or, service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except (i) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (ii) service performed on or in connection with a vessel of more than ten net tons (determined in the manner provided for determining the registered tonnage of merchant vessels under the laws of the United States).

(G) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(H) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(I) Service performed on and after March 10, 1941, by an individual for an employing unit or an employer as an insurance agent or as an insurance solicitor or as a securities salesman if all such service performed by such individual for such employing unit or employer is performed for remuneration solely by way of commission;

(J) From and after March 10, 1941, service performed in any calendar quarter by any officer, individual or committeeman of any building and loan association organized under the laws of this State, or any federal savings and loan association, where the remuneration for such service does not exceed forty-five dollars in any calendar quarter;

(K) From and after March 10, 1941, service in connection with the collection of dues or premiums for a fraternal benefit society, order or association performed away from the home office, or its ritualistic service in connection with any such society, order or association;

(L) Services performed in employment as a newsboy, selling or distributing newspapers or magazines on the street or from house to house.

(M) Except as provided in paragraph (1) of subsection (f) of this section, service covered by an election duly approved by the agency charged with the administration of any other state or federal employment security law in accordance with an arrangement pursuant to subsection (1) of § 96-4 during the effective period of such election.

(N) Notwithstanding any of the other provisions of this subsection, services shall be deemed to be in employment if with respect to such services a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment insurance fund.

(O) Casual labor not in the course of the employing unit's trade or business.

(P) The term "employment" shall not include services performed in the employ of any nationally recognized veterans' organization chartered by the Congress of the United States.

(i) "Fund" means the Unemployment Insurance Fund established by this chapter, to which all contributions required and from which all benefits provided under this chapter shall be paid.

(k) "Total and partial unemployment."

(1) An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to him and during which he performs no services.

(2) An individual shall be deemed "partially unemployed" in any week in which, because of lack of work, he worked less than sixty per cent of the customary scheduled full time hours of the industry or plant in which he is employed, and with respect to which the wages payable to him are less than his weekly benefit amount plus two dollars (\$2.00): Provided, however, that the Commission may find the customary scheduled full time hours of any individual to be less or more than the customary scheduled full time hours of the industry or plant in which he is employed, if such individual customarily performs services in an occupation which requires that he customarily work a greater or smaller number of hours than the customary scheduled full time hours of the industry or plant in which he is employed.

(3) An individual shall be deemed "part totally unemployed" in any week in which his earnings from odd job or subsidiary work are less than his weekly benefit amount plus two dollars (\$2.00).

(4) An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission may by regulation otherwise prescribe.

(m) From and after March 10, 1941, "wages" means all remuneration for services from whatever source.

(n) (1) From and after March 10, 1941, "wages" shall include commissions and bonuses and any sums paid to an employee by an employer pursuant to an order of the National Labor Relations Board or by private agreement, consent or arbitration for loss of pay by reason of discharge and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash, and the reasonable amount of gratuities shall be estimated and determined in accordance with rules prescribed by the Commission: Provided, if the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to unemployment benefits only shall be determined in such manner as may by authorized regulations be prescribed. Such regulations shall, so far as possible, secure results reasonably similar to those which would prevail if the individual were paid his wages at regular intervals: Provided further, that the term "wages" shall not include the amount of any payment with respect to services performed on and after January 1, 1953,

to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death: Provided, further, wages shall not include payment by an employer without deduction from the remuneration of the employee of the tax imposed upon an employee under the Federal Insurance Contributions Act.

(2) "Wages" shall not include any payment made to, or on behalf of, an employee or his beneficiary from or to a trust which qualifies under the conditions set forth in section 401 (a) (1) and (2) of the Internal Revenue Code of 1954 or under or to an annuity plan which at the time of such payment meets the requirements of section 401 (a) (3), (4), (5) and (6) of such code and exempt from tax under section 501 (a) of such code at the time of such payment, unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as beneficiary of the trust.

(r) "Benefit year" with respect to any individual means the one-year period beginning with the first day of the first week with respect to which such individual first registers for work and files a valid claim for benefits, and after the termination of such benefit year the next benefit year shall be the next one-year period beginning with the first day of the first week with respect to which such individual registers for work and files a valid claim for benefits; a valid claim shall be deemed to have been filed if such individual, at the time the claim is filed, is unemployed and has been paid wages for employment amounting to at least the minimum of the qualifying base period wage as set forth in the applicable table in § 96-12: Provided, however, that any individual whose employment under this chapter prior to July first, one thousand nine hundred and thirty-nine, shall have been for an employer subject after July first, one thousand nine hundred and thirty-nine, to the Railroad Unemployment Insurance Act and some other employer subject to this chapter, such individual's benefit year, if established before July first, one thousand nine hundred and thirty-nine, shall terminate on that date and if again unemployed after July first, one thousand nine hundred and thirty-nine, he shall establish another benefit year after such date with respect to employment subject to this chapter.

(s) For benefit years established on and after July 1, 1953, the term "base period" shall mean the first four of the last six completed calendar quarters immediately preceding the first day of an individual's benefit year as defined in subsection (r) of this section. For benefit years established prior to July 1, 1953, the term "base period" shall be the same as heretofore defined in this chapter immediately prior to this enactment.

(v) The words "Employment Security Law" as used in this chapter mean any law enacted by this State or any other state or territory or by the federal government providing for the payment of unemployment insurance benefits. (Ex. Sess. 1936, c. 1, s. 19; 1937, c. 448, s. 5; 1939, c. 27, ss. 11-13; c. 52, ss. 6, 7; c. 141; 1941, cc. 108, 198; 1943, c. 377, ss. 31-34; c. 552, ss. 1, 2; 1945, c. 522 ss. 5-10; c. 531, ss. 1, 2; 1947, c. 326, ss. 7-12; c. 598, ss. 1, 5, 8; 1949, c. 424, ss. 3-8½; cc. 523, 863; 1951, c. 322, s. 1; c. 332, ss. 2, 3, 18; 1953, c. 401, ss. 1, 7-11; 1955, c. 385, ss. 3, 4; 1957, c. 1059, ss. 2-4.)

Editor's Note.—

The first 1951 amendment inserted in subsection (e) the words "unless such agent or employee is an employer subject to the tax imposed by the Federal Unemployment Tax Act." The second 1951 amendment substituted "(7)" for "(8)"

near the end of subparagraph (C) of paragraph (6) of subsection (g), and substituted "Secretary of Labor" for "Social Security Administration" in subparagraph (B) of paragraph (7), subsection (g). It also rewrote subparagraph (L) of paragraph (7), subsection (g), and substituted in subsec-

tion (r) the words "the minimum of the qualifying base period wage as set forth in the applicable table in § 96-12" for the words "two hundred dollars in the applicable base period".

The 1953 amendment substituted the words "unemployment insurance" for "unemployment compensation" at several places in the section. It also inserted the words "week means calendar week, and" in line six of subsection (f), added the last sentence of paragraph (1) of subsection (g), and deleted the former proviso in subsection (m). The amendment rewrote paragraph (1) of subsection (n), added paragraph (2) to subsection (n) and rewrote subsection (s).

The 1955 amendment added the first proviso to paragraph (1), subsection (f), and added "and any sums paid to an employee by an employer pursuant to an order of the National Labor Relations Board or by private agreement, consent or arbitration for loss of pay by reason of discharge" beginning in the second line of paragraph (1), subsection (n).

The 1957 amendment changed subsection (g) by adding to subparagraph (E) of paragraph (7) the words "local college club, or local chapter of a college fraternity or sorority." It changed subsection (k) by renumbering paragraph (3) as (4) and inserting a new paragraph (3). It also rewrote paragraph (2) of subsection (n).

As only subsections (d), (e), (f), (g), (i), (k), (m), (n), (r), (s) and (v) were affected by the amendments the rest of the section is not set out.

Employer Required to Pay Contributions.—Where, prior to the purchase of the business by defendant, there had been employed therein more than eight individuals for twelve weeks during the calendar year, and defendant, after purchasing the business, employs more than eight employees for sixteen weeks during the remainder of the year, defendant is an employer required to pay contributions upon the wages of his employees under the provisions of the Employment Security Act. *State v. Whitehurst*, 231 N. C. 497, 57 S. E. (2d) 770 (1950).

Purchase of Assets of Covered Employer.—Read in context, subsection (f) (2) of this section contemplates a transaction in which the purchaser, instead of buying physical assets as such, succeeds in some real sense to the organization, trade or business, or some part thereof, of a covered employer, ordinarily as a going concern. The underlying idea is that of

continuity, the new employing unit succeeding to and continuing the business or some part thereof of the former employing unit. *State v. Skyland Crafts, Inc.*, 240 N. C. 727, 83 S. E. (2d) 893 (1954).

Where defendant company was composed of new persons, engaged in a new business, under a new name, and did not purchase the predecessor's accounts receivable, customer lists, good will, right to use trade name, or any assets except the equipment and raw materials in the plant, there was no continuity of organization, trade or business such as is contemplated by subsection (f) (2) of this section. *State v. Skyland Crafts, Inc.*, 240 N. C. 727, 83 S. E. (2d) 893 (1954).

Former Burden of Proving Services Do Not Constitute Employment.—

In accord with original. See *State v. Coe*, 239 N. C. 84, 79 S. E. (2d) 177 (1953).

The employment contemplated by paragraph (g) (1) was to be one for personal services rendered for remuneration. *Employment Security Comm. v. Tinnin*. 234 N. C. 75, 65 S. E. (2d) 884 (1951).

Shoeshine Boy Held Employee of Barber Shop.—Findings were held sufficient to support the conclusions of the Employment Security Commission that a shoeshine boy "engaged" by a barber shop was an employee and not an independent contractor, so as to bring the employer within the coverage of the Employment Security Law during the period in question. *State v. Coe*, 239 N. C. 84, 79 S. E. (2d) 177 (1953).

Evidence Sustaining Finding That Purchaser of Timber from Municipal Corporation was Not Employee.—Evidence that a municipal corporation sold certain standing timber to defendant at a stipulated price per thousand board feet and that in connection with the purchase, and that defendant agreed to remove all sawdust, to keep the bushes down and to pile no brush on the premises of the corporation, supported the finding of the Employment Security Commission that the defendant was not in the employ of the municipal corporation, within the meaning of this section. *State v. Simpson*, 238 N. C. 296, 77 S. E. (2d) 718 (1953).

Evidence Showing Workmen Employees and Not Independent Contractors.— See *Employment Security Comm. v. Monsees*, 234 N. C. 69, 65 S. E. (2d) 887 (1951).

Cited in *State v. Kermon*, 232 N. C. 342, 60 S. E. (2d) 580 (1950).

§ 96-9. **Contributions.**—(a) **Payment.**—(1) On and after January first, one thousand nine hundred and thirty-six, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter, with respect to wages for employment (as defined in § 96-8 (g)). Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided that, on and after July first, one thousand nine hundred and forty-one, contributions shall be paid for each calendar quarter with respect to wages paid in such calendar quarter for employment after December thirty-first, one thousand nine hundred and forty. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the Commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this chapter will be jeopardized by delay, the Commission may, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by § 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.

(2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent. For the purposes of this section, the term "wages" shall not include that part of the remuneration which, after remuneration equal to \$3,000 has become payable to an individual by an employer with respect to employment during the calendar year 1940, becomes payable to such individual by such employer with respect to employment during such calendar year, and which, after remuneration equal to \$3,000 has been paid to an individual by an employer with respect to employment during the calendar year 1941, and during any calendar year thereafter, is paid to such individual by such employer with respect to employment occurring during such calendar year but after December 31, 1940: Provided, that from and after December 31, 1946, for the purpose of this section, the term "wages" shall not include that part of remuneration in excess of three thousand dollars (\$3,000.00) paid to an individual by an employer during any calendar year for employment, irrespective of the year in which such employment occurred.

From and after March 18, 1947, for the purposes of this section, "wages" shall not include, and no contributions shall be paid on that part of remuneration earned by an individual in this State, which, when added to wages previously earned by such individual in another state or states, exceeds the sum of three thousand dollars (\$3,000.00), and the employer has paid contributions to such other state or states on the wages earned therein by such individual during the calendar year applicable. This provision shall be applicable only to wages earned by such individual in the employ of one and the same employer.

From and after January 1, 1953, for the purposes of this section, "wages" shall

not include, and no contributions shall be paid on that part of remuneration earned by an individual in the employ of a successor employer, which when added to remuneration previously earned by such individual in the employ of the predecessor employer exceeds the sum of three thousand dollars (\$3,000.00) in the calendar year in which the successor acquired the organization, trade or business of the predecessor as provided in § 96-8 (f) (2); provided, however, such individual was an employee of the predecessor at the time of the acquisition of the business by the successor and was taken over by the successor as a part of the organization acquired; provided further that the predecessor employer has paid contributions on the earnings of such individual while in his employ during such year, and the account of the predecessor is transferred to the successor as provided in § 96-9 (c) (4) (A).

(b) Rate of Contributions.—(1) Each employer shall pay contributions with respect to employment during any calendar year prior to January 1, 1955, as required by this chapter prior to such January 1, 1955, and each employer shall pay contributions equal to two and seven-tenths (2.7) per cent of wages paid by him during the calendar year 1955 and each year thereafter with respect to employment occurring after December 31, 1954, which shall be deemed the standard rate of contributions payable by each employer except as provided herein.

(2) (A) No employer's contribution rate shall be reduced below the standard rate for any calendar year unless and until his account has been chargeable with benefits throughout the twelve consecutive calendar-month period ending July 31 immediately preceding the computation date and his credit reserve ratio meets the requirements of that schedule used in the computation.

(B) The Commission shall, for each year, compute a credit reserve ratio for each employer whose account has a credit balance and has been chargeable with benefits as set forth in G. S. 96-9 (b) (2) (A) of this chapter. An employer's credit reserve ratio shall be the quotient obtained by dividing the credit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the thirty-six calendar-month period ending June 30 preceding the computation date. Credit balance as used in this section means the total of all contributions paid and credited for all past periods together with all other lawful credits to the account of the employer less the total benefits charged to the account of the employer for all such past periods.

(C) The Commission shall for each year compute a debit ratio for each employer whose account shows that the total of all his contributions paid and credited for all past periods together with all other lawful credits is less than the total benefits charged to his account for all such periods. An employer's debit ratio shall be the quotient obtained by dividing the debit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the thirty-six calendar-month period ending June 30 preceding the computation date. The amount arrived at by subtracting the total amount of all contributions paid and credited for all past periods together with all other lawful credits of the employer from the total amount of all benefits charged to the account of the employer for such periods is the employer's debit balance.

(3) (A) The applicable schedule of rates for a calendar year shall be determined by the fund ratio resulting when the total amount available for benefits in the unemployment insurance fund, as of the computation date, is divided by the total amount of the taxable pay roll of all subject employers for the twelve-month period ending June 30 preceding such computation date. Schedule A, B, C, D, E, F, G, or H appearing on the line opposite such fund ratio in the table below shall be applicable in determining and assigning each eligible employer's contribution rate for the calendar year immediately following the computation date:

FUND RATIO SCHEDULES

When the Fund Ratio Is:		Applicable Schedule
As Much As	But Less Than	
	4.5%	A
4.5%	5.5%	B
5.5%	6.5%	C
6.5%	7.5%	D
7.5%	8.5%	E
8.5%	9.5%	F
9.5%	10.5%	G
10.5%	and in excess thereof	H

Variations from the standard rate of contributions shall be determined and assigned with respect to each calendar year, to employers whose accounts have a credit balance and who are eligible therefor according to each such employer's credit reserve ratio, and each such employer shall be assigned the contribution rate appearing in the applicable schedule A, B, C, D, E, F, G, or H on the line opposite his credit reserve ratio as set forth in the Experience Rating Formula below:

EXPERIENCE RATING FORMULA

When the Reserve Ratio Is:		Schedules							
As Much As	But Less Than	A	B	C	D	E	F	G	H
	1.4%	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7
1.4%	1.6%	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.5
1.6%	1.8%	2.7	2.7	2.7	2.7	2.7	2.7	2.5	2.3
1.8%	2.0%	2.7	2.7	2.7	2.7	2.7	2.5	2.3	2.1
2.0%	2.2%	2.7	2.7	2.7	2.7	2.5	2.3	2.1	1.9
2.2%	2.4%	2.7	2.7	2.7	2.5	2.3	2.1	1.9	1.7
2.4%	2.6%	2.7	2.7	2.5	2.3	2.1	1.9	1.7	1.5
2.6%	2.8%	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3
2.8%	3.0%	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1
3.0%	3.2%	2.3	2.1	1.9	1.7	1.5	1.3	1.1	0.9
3.2%	3.4%	2.1	1.9	1.7	1.5	1.3	1.1	0.9	0.7
3.4%	3.6%	1.9	1.7	1.5	1.3	1.1	0.9	0.7	0.5
3.6%	3.8%	1.7	1.5	1.3	1.1	0.9	0.7	0.5	0.4
3.8%	4.0%	1.5	1.3	1.1	0.9	0.7	0.5	0.4	0.3
4.0%	4.2%	1.3	1.1	0.9	0.7	0.5	0.4	0.3	0.2
4.2%	4.4%	1.1	0.9	0.7	0.5	0.4	0.3	0.2	0.1
4.4%	and in excess thereof	0.9	0.7	0.5	0.4	0.3	0.2	0.1	0.1

(B) New rates shall be assigned to eligible employers effective January 1, 1955, and each January 1 thereafter, in accordance with the foregoing Fund Ratio Schedule and Experience Rating Formula.

(C) Each employer whose account as of the computation date of any year shows a debit balance shall be assigned the rate of contributions appearing on the line opposite his debit ratio as set forth in the following Rate Schedule For Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS

When the Debit Ratio Is:		Assigned Rate:
As Much As	But Less Than	
....	0.2%	2.8%
0.2%	0.4%	2.9%
0.4%	0.6%	3.0%
0.6%	0.8%	3.1%
0.8%	1.0%	3.2%
1.0%	1.2%	3.3%
1.2%	1.4%	3.4%
1.4%	1.6%	3.5%
1.6%	1.8%	3.6%
1.8% and over		3.7%

The above rates for employers with overdrawn accounts shall first be assigned with respect to contributions payable for the calendar year 1958.

(D) The computation date for all contribution rates shall be August 1 of the calendar year preceding the calendar year with respect to which such rates are effective.

(E) Any employer may at any time make a voluntary contribution, additional to the contributions required under this chapter, to the fund to be credited to his account, and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as said term is used in G. S. 96-8 (i). Any voluntary contributions so made by an employer within thirty days after the date of mailing by the Commission, pursuant to G. S. 96-9 (c) (3) herein, of notification of contribution rate contained in cumulative account statement and computation of rate, shall be credited to his account as of the previous July 31. Provided, however, any voluntary contribution made as provided herein after July 31 of any year shall not be considered a part of the balance of the unemployment insurance fund for the purposes of G. S. 96-9 (b) (3) until the following July 31. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of such voluntary contribution by any employer.

(F) If within the calendar month next following the computation date the Commission finds that any employing unit has failed to file any report required in connection therewith, or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report, as the case may be, within fifteen days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

(c) (1) The Commission shall maintain a separate account for each employer and shall transfer to such account such employer's reserve account balance as of July 31, 1952, and shall credit his account with all the contributions which he has paid or is paid on his own behalf subsequent to July 31, 1952. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar

quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.

(2) Charging of benefit payments.—(A) Benefits paid shall be charged against the account of each base period employer in the proportion that the base period wages paid to an eligible individual by each such employer bears to the total wages paid him by all base period employers during the base period except as provided in subparagraph (B) of this subsection: Provided for the purposes of this subparagraph the terms "wages paid" and "total wages paid" as used herein shall not include wages in excess of three thousand dollars (\$3,000.00) paid by the employer to such individual in any calendar quarter subsequent to June 30, 1957. Benefits paid on and after August 1, 1952, shall be charged to employers' accounts upon the basis of benefits paid to claimants whose maximum total benefits have been exhausted or whose benefit years have expired during each twelve-months period ending on the July 31 preceding the computation date.

(B) Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this subparagraph and based on wages earned prior to the date of (a) the voluntary leaving of work by the claimant without good cause attributable to the employer, or (b) the discharge of claimant for misconduct in connection with his work, shall not be charged to the account of the employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding the separation of the individual from work as are or may be required by the regulations of the Commission.

(3) As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each employer's account and shall furnish him with a statement of all charges and credits thereto. At the same time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination prior to May 1 following the effective date of such rates. The Commission may redetermine on its own motion within the same period of time.

(4) Transfer of account.—(A) Whenever any individual, group of individuals, or employing unit, who or which, in any manner, succeeds to or acquires substantially all or a distinct and severable portion of the organization, trade, or business of another employing unit as provided in § 96-8, subsection (f), paragraph (2), the account or that part of the account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition of the business to the successor employer for use in the determination of his rate of contributions, provided application for transfer is made within sixty days after the Commission notifies the successor of his right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which

such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of subparagraph (B) of this paragraph. This provision shall not be retroactive with respect to the transfer of a part of an account of the predecessor in those cases in which an employing unit succeeds to or acquires a distinct and severable portion of the organization, trade, or business of another employing unit as provided in § 96-8, subsection (f), paragraph (2), and shall apply only when the transfer of such distinct and severable portion of the organization, trade, or business of another occurred after March 31, 1949.

(B) Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this chapter prior to the date of acquisition of the business, his rate of contribution for the period from such date to the end of the then current contribution year shall be the same as his rate in effect on the date of such acquisition. If the successor was not an employer prior to the date of the acquisition of the business he shall be assigned a standard rate of contribution set forth in § 96-9 (b) (1) for the remainder of the year in which he acquired the business of the predecessor; however, if such successor makes application for the transfer of the account within sixty days after notification by the Commission of his right to do so and the account is transferred, he shall be assigned for the remainder of such year the rate applicable to the predecessor employer or employers on the date of acquisition of the business, provided there was only one predecessor or if more than one and the predecessors had identical rates. In the event the rates of the predecessor were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of acquisition of the business.

Irrespective of any other provisions of this chapter, when an account is transferred in its entirety by an employer to a successor, the transferring employer shall thereafter pay the standard rate of contributions of two and seven-tenths per cent (2.7%) and shall continue to pay at such rate until he qualifies for a reduction, or is subject to an increase in rate under the conditions prescribed in § 96-9 (b) (2) and (3).

(C) In those cases where the organization, trade, or business of a deceased person, or insolvent debtor is taken over and operated by an administrator, administratrix, executor, executrix, receiver, or trustee in bankruptcy, such employing units shall automatically succeed to the account and rate of contribution of such deceased person, or insolvent debtor without the necessity of the filing of a formal application for the transfer of such account.

(5) In the event any employer subject to this chapter ceases to be such an employer, his account shall be closed and the same shall not be used in any future computation of such employer's rate nor shall any period prior to the effective date of the termination of such employer during which benefits were chargeable be considered in the application of § 96-9 (b) (2) of this chapter.

(d) In order that the Commission shall be kept informed at all times on the circumstances and conditions of unemployment within the State and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the Commission may deem necessary shall be made. (Ex. Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17, c. 881, s. 3; 1949, c. 424, ss.

9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11.)

Editor's Note.—

The first 1951 amendment substituted the words "prior to May first following the effective date of such rates" for the words "within thirty days after the effective date of such rates" at the end of subsection (c), paragraph (3). The second 1951 amendment changed the date in subparagraph (B), paragraph (4), subsection (b), from "January 1, 1941" to "January 1, 1951," revised the table therein, and rewrote the second sentence in subparagraph (E). It also added the provisions following the semicolon after the word "accounts" in the next to last sentence of paragraph (1), subsection (c), and added the words appearing between "provided" and "that" in the first sentence of subparagraph (A) of paragraph (4) of the subsection.

The 1953 amendment changed subsection (a) by substituting "may" for "shall" in line twenty of paragraph (1), inserting the words "by an employer" in line four-

teen of paragraph (2), and adding that part of paragraph (2) beginning with line seventeen. The amendment also rewrote subsections (b) and (c).

The 1955 amendment rewrote subsection (b), making extensive changes in the tables, and added the last paragraph of subsection (c), paragraph (4), subparagraph (B).

The 1957 amendment changed paragraph (2) of subsection (b) by inserting "credit" in line four of subparagraph (A), rewriting subparagraph (B) and adding subparagraph (C); it also rewrote paragraph (3). The amendment changed subsection (c) by adding the proviso to the first sentence of subparagraph (A) of paragraph (2), and by making changes in subparagraphs (A) and (B) of paragraph (4).

Applied, as to subsection (a) and (b), in *State v. Skyland Crafts, Inc.*, 240 N. C. 727, 83 S. E. (2d) 893 (1954).

§ 96-10. Collection of contributions.

(b) Collection.—(1) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the Commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date, and shall be entitled to preference upon the calendar of the court over all other civil actions, except petitions for judicial review under this chapter and cases arising under the Workmen's Compensation Law of this State; or, if any contribution imposed by this chapter, or any portion thereof, and/or penalties duly provided for the nonpayment thereof shall not be paid within thirty days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the Commission, under the hand of its chairman, may certify the same to the clerk of the superior court of the county in which the delinquent resides or has property, and additional copies of said certificate for each county in which the Commission has reason to believe such delinquent has property located; such certificate and/or copies thereof so forwarded to the clerk of the superior court shall immediately be docketed and indexed on the cross index of judgment, and from the date of such docketing shall constitute a preferred lien upon any property which said delinquent may own in said county, with the same force and effect as a judgment rendered by the superior court. The clerk of superior courts shall charge a fee of one dollar (\$1.00) for indexing and docketing said certificates, which shall be in lieu of any other fee chargeable under the General Statutes of North Carolina or any Public, Local or Private Act. The Commission shall forward a copy of said certificate to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission, and when so forwarded and in the hands of such sheriff or agent of the Commission, shall have all the force and effect of an execution issued to such sheriff or agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, the Commission may in its discretion withhold the issuance of said certificate or execution to the sheriff or agent of the Commission for a period not exceeding one hundred and eighty days from the date upon which the origi-

nal certificate is certified to the clerk of superior court. The Commission is further authorized and empowered to issue alias copies of said certificate or execution to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission in all cases in which the sheriff or duly authorized agent has returned an execution or certificate unsatisfied; when so issued and in the hands of the sheriff or duly authorized agent of the Commission, such alias shall have all the force and effect of an alias execution issued to such sheriff or duly authorized agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing one written notice with the Commission, the sheriff of any county shall have the sole and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case no agent of the Commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution, or alias execution, shall be made to the Commission, together with all moneys collected thereunder, and when such order, execution, or alias is referred to the agent of the Commission for service the said agent of the Commission shall be vested with all the powers of the sheriff to the extent of serving such order, execution or alias and levying or collecting thereunder. The agent of the Commission to whom such order or execution is referred shall give a bond not to exceed three thousand dollars (\$3,000.00) approved by the Commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of executions. If any sheriff of this State or any agent of the Commission who is charged with the duty of serving executions shall willfully fail, refuse, or neglect to execute any order directed to him by the said Commission and within the time provided by law, the official bond of such sheriff or of such agent of the Commission shall be liable for the contributions, penalty, interest, and costs due by the employer.

(2) When the Commission furnishes the clerk of superior court of any county in this State a written statement or certificate to the effect that any judgment docketed by the Commission against any firm or individual has been satisfied and paid in full, and said statement or certificate is signed by the chairman of the Commission and attested by its secretary, with the seal of the Commission affixed, it shall be the duty of the clerk of superior court to file said certificate and enter a notation thereof on the margin of the judgment docket to the effect that said judgment has been paid and satisfied in full, and is in consequence canceled of record. Such cancellation shall have the full force and effect of a cancellation entered by an attorney of record for the Commission. It shall also be the duty of such clerk, when any such certificate is furnished him by the Commission showing that a judgment has been paid in part, to make a notation on the margin of the judgment docket showing the amount of such payment so certified and to file said certificate. This paragraph shall apply to judgments already docketed, as well as to the future judgments docketed by the Commission. For the filing of said statement or certificate and making new notations on the record, the clerk of superior court shall be paid a fee of fifty cents (50c) by the Commission.

(e) Refunds.—If not later than five years from the last day of the calendar year with respect to which a payment of any contribution or interest thereon was made, or one year from the date on which such payment was made, whichever shall be the later, an employer or employing unit who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund, and the Commission shall determine that such contributions or any portion thereof was erroneously collected, the Commission shall allow such employer or employing unit to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such an adjustment cannot be made

in the next succeeding calendar quarter after such application for such refund is received, or if said money which constitutes the overpayment has been in the possession of the Commission for six months or more, a cash refund may be made, without interest, from the fund: Provided, that any interest refunded under this subsection, which has been paid into the Special Employment Security Administration Fund established pursuant to § 96-5 (c), shall be paid out of such fund. For like cause and within the same period, adjustment or refund may be so made on the Commission's own initiative. Provided further, that nothing in this section or in any other section of this chapter shall be construed as permitting the refund of moneys due and payable under the law and regulations in effect at the time such moneys were paid. In any case where the Commission finds that any employing unit has erroneously paid to this State contributions or interest upon wages earned by individuals in employment in another state, refund or adjustment thereof shall be made, without interest, irrespective of any other provisions of this subsection, upon satisfactory proof to the Commission that the payment of such contributions or interest has been made to such other state.

(1951, c. 332, ss. 8, 20; 1953, c. 401, s. 15.)

Editor's Note.—

The 1951 amendment made changes in subsection (b) by revising paragraph (1) and inserting the third sentence of paragraph (2).

The 1953 amendment substituted "five years" for "three years" and "calendar year" for "period" near the beginning of subsection (e). It also inserted the words "or employing unit" at two places in the first sentence of the subsection.

As only subsections (b) and (e) were affected by the amendments the rest of the section is not set out.

Right to Raise Question of Constitu-

tionality.—In an action by the Employment Security Commission to determine liability of defendant for contributions under the act, the defendant may not raise the question of the constitutionality of the statute under which the Commission levied the assessment in question, it being required in order to raise this defense that he pay the contributions under protest and sue for recovery. *State v. Kermon*, 232 N. C. 342, 60 S. E. (2d) 580 (1950).

Applied, as to subsection (c), in *National Surety Corp. v. Sharpe*, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

§ 96-11. Period, election, and termination of employer's coverage.

(b) Except as otherwise provided in subsections (a), (c) and (d) of this section, an employing unit shall cease to be an employer subject to this chapter only as of the first day of January of any calendar year, if it files with the Commission prior to the first day of March of such year a written application for termination of coverage and the Commission finds that there were no twenty different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed eight or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week); provided that effective January 1, 1957, except as otherwise provided in subsections (a), (c) and (d) of this section, an employing unit shall cease to be an employer subject to this chapter only as of the first day of January of any calendar year, if it files with the Commission prior to the first day of March of such year a written application for termination of coverage and the Commission finds that there were no twenty different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed four or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week). For the purpose of this subsection, the two or more employing units mentioned in paragraphs two or three of § 96-8, subsection (f), of this chapter shall be treated as a single employment unit: Provided, however, that any employer whose liability covers a period of more than two years when first discovered by the Commission, upon filing a written application for termination of coverage within ninety days

after notification of his liability by the Commission, may be terminated as an employer effective January 1st of any calendar year, if the Commission finds that there were no twenty different weeks within the preceding calendar year (whether or not such weeks are or were consecutive), within which said employing unit employed eight or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week). In such cases a protest of liability shall be considered as an application for termination within the meaning of this provision where the decision with respect to such protest has not become final; provided further this provision shall not apply in any case of willful attempt in any manner to defeat or evade the payment of contributions becoming due under this chapter.

(d) An employer who has not had any individuals in employment for a period of five consecutive calendar years shall cease to be subject to this chapter. (Ex. Sess. 1936, c. 1, s. 8; 1939, c. 52, ss. 2, 3; 1941, c. 108, s. 9; 1945, c. 522, ss. 21-23; 1949, c. 424, ss. 17, 18; c. 522; 1951, c. 332, s. 9; c. 1147; 1953, c. 401, s. 16; 1955, c. 385, s. 10.)

Editor's Note.—

The first 1951 amendment added to subsection (d) a sentence which read: "The reserve account of such employer shall at the end of such five-year period revert to the partially pooled account established herein and the reserve account shall be closed, the provisions of § 96-9 (c) (5) to the contrary notwithstanding."

The second 1951 amendment added the provisos at the end of subsection (b).

The 1953 amendment deleted former second sentence of subsection (d).

The 1955 amendment added the proviso appearing at the end of the first sentence of subsection (b).

As only subsections (b) and (d) were affected by the amendments the rest of the section is not set out.

Employer Remains Covered Until Coverage Is Terminated as Provided by This Section.—Where employment within the meaning of the Employment Security Law is once established and the employer becomes covered thereunder, he remains so until coverage is terminated as provided by this section. *State v. Coe*, 239 N. C. 84, 79 S. E. (2d) 177 (1953).

Cited, as to subsection (a), in *State v. Skyland Crafts, Inc.*, 240 N. C. 727, 83 S. E. (2d) 893 (1954).

§ 96-12. **Benefits.**—(a) Payment of Benefits.—Twenty-four months after the date when contributions first accrue under this chapter benefits shall become payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the Commission may prescribe.

(b) (1) Each eligible individual whose benefit year begins on and after March 22, 1951, and prior to the first day of the month immediately following June 10, 1957, and who is totally unemployed in any week as defined by § 96-8 (k) (1) shall be paid benefits with respect to such week or weeks at the rate per week appearing in the following table in Column II opposite which in Column I appear the wages paid to such individual during his base period with respect to employment:

Column I Wages Paid During Base Period		Column II Weekly Benefit Amount
Less than \$250.00		Ineligible
\$ 250.00 to	\$ 329.99	\$ 7.00
330.00	409.99	8.00
410.00	489.99	9.00
490.00	569.99	10.00
570.00	669.99	11.00
670.00	769.99	12.00
770.00	869.99	13.00
870.00	969.99	14.00
970.00	1,079.99	15.00
1,080.00	1,189.99	16.00
1,190.00	1,309.99	17.00
1,310.00	1,429.99	18.00
1,430.00	1,549.99	19.00
1,550.00	1,679.99	20.00
1,680.00	1,809.99	21.00
1,810.00	1,939.99	22.00
1,940.00	2,079.99	23.00
2,080.00	2,219.99	24.00
2,220.00	2,369.99	25.00
2,370.00	2,519.99	26.00
2,520.00	2,679.99	27.00
2,680.00	2,839.99	28.00
2,840.00	2,999.99	29.00
3,000.00	and over	30.00

(2) Each eligible individual whose benefit year begins on and after the first day of the month immediately following June 10, 1957, and who is totally unemployed in any week as defined by § 96-8 (k) (1) shall be paid benefits with respect to such week or weeks at the rate per week appearing in the following table in Column II opposite which in Column I appear the wages paid to such individual during his base period with respect to employment:

Column I Wages Paid During Base Period	Column II Weekly Benefit Amount
Less than \$500.00	Ineligible
\$ 500.00 to \$ 609.99	\$11.00
610.00 719.99	12.00
720.00 829.99	13.00
830.00 949.99	14.00
950.00 1,069.99	15.00
1,070.00 1,189.99	16.00
1,190.00 1,309.99	17.00
1,310.00 1,429.99	18.00
1,430.00 1,549.99	19.00
1,550.00 1,669.99	20.00
1,670.00 1,789.99	21.00
1,790.00 1,909.99	22.00
1,910.00 2,029.99	23.00
2,030.00 2,149.99	24.00
2,150.00 2,269.99	25.00
2,270.00 2,389.99	26.00
2,390.00 2,505.99	27.00
2,510.00 2,629.99	28.00
2,630.00 2,749.99	29.00
2,750.00 2,869.99	30.00
2,870.00 2,999.99	31.00
3,000.00 and over	32.00

(c) Partial Weekly Benefit.—Each eligible individual who is not totally unemployed (as defined in § 96-8 (k)) in any week shall be paid with respect to such week a partial benefit. Such partial benefit shall be an amount figured to the nearest multiple of one dollar (\$1.00) which is equal to the difference between his weekly benefit amount and that part of the remuneration payable to him with respect to such week which is in excess of two dollars (\$2.00).

(d) Duration of Benefits.—The maximum amount of benefits payable to any eligible individual, whose benefit year begins on and after March 22, 1951, shall be twenty-six (26) times his weekly benefit amount during any benefit year. The Commission shall establish and maintain individual wage record accounts for each individual who earns wages in covered employment, until such time as such wages would not be necessary for benefit purposes. (Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339.)

Editor's Note.—

The 1951 amendment made changes in the amounts in subsection (b), added a proviso to subsection (c) and rewrote subsection (d).

The 1953 amendment deleted former subdivision (1) of subsection (b), which now consists of the provisions of former subdivision (2). The amendment substituted "one dollar" for "fifty cents" in line

four of subsection (c) and deleted the proviso added by the 1951 amendment. It also rewrote subsection (d).

The first 1957 amendment rewrote sub-

sections (b) and (c). The second 1957 amendment, effective June 10, 1957, rewrote the first amendment as to subsection (b).

§ 96-13. Benefit eligibility conditions.—An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that—

(a) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the Commission may prescribe;

(b) He has made a claim for benefits in accordance with the provisions of § 96-15 (a);

(c) He is able to work, and is available for work: Provided that no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work: Provided further, that an individual customarily employed in seasonal employment, shall during the period of nonseasonal operations, show to the satisfaction of the Commission that such individual is actively seeking employment which such individual is qualified to perform by past experience or training during such nonseasonal period: Provided further, that no individual shall be considered able and available for work for any week during the three-month period immediately before the expected birth of a child to such individual, and for any week during the three-month period immediately following the birth of a child to such individual; however, no individual shall be denied benefits by reason of this proviso in the event of the death of such child, if such individual is otherwise eligible: Provided further, however, that effective January 1, 1949, no individual shall be considered available for work for any week not to exceed two in any calendar year in which the Commission finds that his unemployment is due to a vacation. In administering this proviso, benefits shall be paid or denied on a payroll week basis as established by the employing unit. A week of unemployment due to a vacation as provided herein means any payroll week within which as much as sixty per cent of the full time working hours consist of a vacation period. For the purpose of this subsection, any unemployment which is caused by a vacation period and which occurs in the calendar year following that within which the vacation period begins shall be deemed to have occurred in the calendar year within which such vacation period begins. (Ex. Sess. 1936, c. 1, s. 4; 1939, c. 27, ss. 4, 5; c. 141; 1941, c. 108, s. 2; 1943, c. 377, s. 5; 1945, c. 522, ss. 27-28; 1947, c. 326, s. 22; 1949, c. 424, s. 22; 1951, c. 332, s. 13.)

Editor's Note.—

The 1951 amendment struck out former subsection (d) requiring a waiting period of one week.

Construed with § 96-14.—This section and § 96-14 as cognate statutes provide the over-all formula governing the right to unemployment compensation benefits. Being thus in *pari materia*, they are to be construed together. In *re Miller*, 243 N. C. 509, 91 S. E. (2d) 241 (1956).

The words "available for work" in this section mean "available for suitable work" in the same sense as the words "suitable work" are used in § 96-14. In *re Miller*, 243 N. C. 509, 91 S. E. (2d) 241 (1956).

A claimant refusing to consider employment during her Sabbath did not render herself unavailable for work within the meaning of this section. In *re Miller*, 243 N. C. 509, 91 S. E. (2d) 241 (1956).

§ 96-14. Disqualification for benefits.—An individual shall be disqualified for benefits:

(a) For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work

voluntarily without good cause attributable to the employer, and the maximum benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

(b) For not less than five, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work, and the maximum amount of benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

(c) For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual has failed without good cause (i) to apply for available suitable work when so directed by the employment office of the Commission; or (ii) to accept suitable work when offered him; or (iii) to return to his customary self-employment (if any) when so directed by the Commission and the maximum amount of benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

Provided, however, that in any case where any week or weeks of disqualification as provided in subsections (a), (b), and (c) of this section have not elapsed on account of the termination of an individual's benefit year, such remaining week or weeks of disqualification shall be applicable in the next benefit year at the then current benefit amount of such individual; provided such new benefit year is established by the individual within twelve months from the date of the ending of the preceding benefit year. When any individual who has been disqualified as provided in subsections (a), (b) and (c) of this section returns to employment before the disqualifying period has elapsed, the remaining week or weeks of disqualification shall be canceled and no deduction based on such weeks shall be made from the maximum amount of benefits of such individual; provided such individual shows the fact of employment to the satisfaction of the Commission.

(1) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

(2) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) if the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(e) For any week with respect to which he is receiving or has received remuneration in the form of remuneration in lieu of notice: Provided, that if such remuneration is less than the benefits which would otherwise be due under this chapter he shall be entitled to receive for such week, if otherwise eligible, the difference figured to the nearest multiple of one dollar (\$1.00) between the weekly benefit amount and such remuneration.

(h) For any week with respect to which he has received any sum from the employer pursuant to an order of the National Labor Relations Board or by private agreement, consent or arbitration for loss of pay by reason of discharge. When the amount so paid by the employer is in a lump sum and covers a period of more than one week, such amount shall be allocated to the weeks in the period on a pro rata basis; provided further that if the amount so prorated to a particular week is less than the benefits which would otherwise be due under this chapter, he shall be entitled to receive for such week, if otherwise eligible, benefits as provided under § 96-12 of this chapter. (Ex. Sess. 1936, c. 1, s. 5; 1937, c. 448, ss. 2, 3; 1939, c. 52, s. 1; 1941, c. 108, ss. 3, 4; 1943, c. 377, ss. 7, 8; 1945, c. 522, s. 29; 1947, c. 508, s. 10; c. 881, ss. 1, 2; 1949, c. 424, ss. 23-25; 1951, c. 332, s. 14; 1955, c. 385, ss. 7, 8.)

Editor's Note.—

The 1951 amendment struck out the parenthetical phrase "(in addition to the waiting period)", formerly appearing after the word "benefits" in line four of subsections (a), (b) and (c).

The 1955 amendment inserted "the difference figured to the nearest multiple of one dollar (\$1.00) between the weekly benefit amount and such remuneration" in lieu of "benefits reduced by the amount of such remuneration," formerly appearing at the end of subsection (e), and added subsection (h).

As subsection (d), (f) and (g) were not changed by the amendments, they are not set out.

For note on the geographical scope of the labor dispute disqualification under subsection (d), see 29 N. C. Law Rev. 472.

Section Construed with § 96-13.— See note to § 96-13.

Subsection (d) of this section is in plain unambiguous language, and needs only a literal interpretation to ascertain the legislative intent as expressed therein. In re Stevenson, 237 N. C. 528, 75 S. E. (2d) 520 (1953).

Whether the unemployment is due to a labor dispute, or whether it is not, is a question to be determined in each case. The line of demarcation is not the end of the strike but the end of work stoppage due to the strike. That test is applied to all alike, and there is no discrimination. In re Stevenson, 237 N. C. 528, 75 S. E. (2d) 520 (1953).

When Stoppage of Work Caused by Labor Dispute Begins and Ends.—A stoppage of work commences at the plant of the employer when a definite check in production operations occurs, and a stoppage of work ceases when operations are resumed on a normal basis; but the stoppage of work caused by a labor dispute must not exceed the time which is reasonably necessary and required to physically resume normal operations in such plant or establishment. In re Stevenson,

237 N. C. 528, 75 S. E. (2d) 520 (1953).

Notice That Due to Labor Dispute Employees Might Seek Other Employment.— A finding that after a strike which closed the plant and after the employer's attempt to resume operations had proved futile, the employer posted a notice stating that all operations at the mill would cease for an indefinite period and that employees were free to seek employment elsewhere, was held insufficient to support a conclusion of law by the Commission that subsequent to the posting of the notice the unemployment of claimants was not due to stoppage of work because of a labor dispute, G. S. 96-14 (d), since the notice merely signified the willingness of the employer to terminate its employment relationship with any worker who elected to withdraw from the existing labor dispute and seek work elsewhere, but did not alter the status of any employee who refrained from exercising this option. State v. Jarrell, 231 N. C. 381, 57 S. E. (2d) 403 (1950).

Employees Disqualified under Subsection (b).—Claimant was disqualified for a period of nine weeks for payment of unemployment benefits where the Commission found that he was discharged for misconduct connected with his work. In re Stutts, 245 N. C. 405, 95 S. E. (2d) 919 (1957).

Work which requires one to violate his moral standards is not ordinarily "suitable work" within the meaning of this section. In re Miller, 243 N. C. 509, 91 S. E. (2d) 241 (1956).

Burden of Proof.—

Each claimant is required to show to the satisfaction of the Commission that he was not disqualified for benefits under the Employment Security Law by this statute. State v. Jarrell, 231 N. C. 381, 57 S. E. (2d) 403 (1950).

Same—Work Stoppage Resulting from Labor Dispute.— Where the employer resists recovery of unemployment compensation on the ground that claimants' unemployment was due to a work stoppage re-

sulting from a labor dispute, each claimant is required to show to the satisfaction of the Commission that he is not disqualified for

benefits under subsection (d) of this section. *State v. Jarrell*, 231 N. C. 381, 57 S. E. (2d) 403 (1950).

§ 96-15. Claims for benefits.

(b) (1) Initial Determination.—A representative designated by the Commission shall promptly examine the claim and shall determine whether or not the claim is valid, and if valid, the week with respect to when benefits shall commence, the weekly benefit amount payable, and the potential maximum duration thereof. The claimant shall be furnished a copy of such initial or monetary determination showing the amount of wages paid him by each employer during his base period and the employers by whom such wages were paid, his benefit year, weekly benefit amount, and the maximum amount of benefits that may be paid to him for unemployment during the benefit year. When a claimant is ineligible due to lack of earnings in his base period, the determination shall so designate. The most recent and the base period employers shall be notified upon the filing of a claim which establishes a benefit year or an ineligible amount.

At any time within one year from the date of the making of an initial determination, the Commission on its own initiative may reconsider such determination if it finds that an error in computation or identity has occurred in connection therewith or that additional wages pertinent to the claimant's benefit status have become available, or if such determination of benefit status was made as a result of a nondisclosure or misrepresentation of a material fact.

(2) Hearings before Deputy.—When a question or issue is presented or raised as to the eligibility of a claimant for benefits under § 96-13 herein, or whether any disqualification shall be imposed by virtue of § 96-14 of this chapter, or benefits denied, or his account adjusted pursuant to § 96-18 of this chapter, the claim shall be referred to a deputy who, after due notice to the parties and affording them reasonable opportunity for a fair hearing, shall find facts and make his decision based thereon; provided the deputy shall not be required to issue notice of, or to hold a formal hearing in cases involving interstate claims filed by a claimant in another state against this State, or in cases involving the failure of a claimant to meet any procedural requirement pertaining to the filing of claims, or the denial of benefits or the adjustment of the account of a claimant under § 96-18 of this chapter. The Commission may remove to itself or transfer to another deputy or to an appeal tribunal the proceedings on any claim pending before a deputy. The deputy shall promptly notify the claimant and any other interested party of his decision and the reason therefor. Unless the claimant or any such interested party, within five calendar days after such notification was mailed to his last known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith, and for the purpose of this subsection, the Commission shall be deemed an interested party: Provided, however, that on claims filed outside of this State, the claimant, or such interested party, shall have ten calendar days from the date of mailing such notification to his last known address in which to file notice of appeal. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the Commission shall be paid only after such determination: Provided further, however, that if an appeal tribunal affirms a decision of a deputy, or the Commission affirms a decision of an appeal tribunal allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid.

(1951, c. 332, s. 15; 1953, c. 401, s. 19.)

Editor's Note.—

The 1951 amendment rewrote subsection (b).

The 1953 amendment deleted the word "reserve", immediately preceding the word

"account" near the end of paragraph (2) of subsection (b) and deleted the words "and such payments shall be charged to the pooled account" formerly appearing at the end of the paragraph.

As only subsection (b) was affected by the amendments the rest of the section is not set out.

The requirements of this section are mandatory and not directory. They are conditions precedent to obtaining a review by the courts and must be observed. Non-compliance therewith requires dismissal. In re Employment Security Comm., 234 N. C. 651, 68 S. E. (2d) 311 (1951).

The statement of the grounds of the appeal required by subdivision (i) must be filed within the time allowed for appeal. Its purpose is to give notice to the Commission and adverse parties of the alleged errors committed by the Commission and limit the scope of the hearing in the superior court to the specific questions of law raised by the errors assigned. It was intended, and must be construed, as a condition precedent to the right of appeal. Noncompliance therewith is fatal. In re Employment Security Comm., 234 N. C. 651, 68 S. E. (2d) 311 (1951).

Conclusiveness of Findings of Fact on Appeal.—

The findings of fact of the Employment Security Commission are conclusive when supported by evidence, and therefore review is limited to determining whether there was evidence before the Commission to support its findings and whether the facts found sustain its conclusions of law. State v. Jarrell, 231 N. C. 381, 57 S. E. (2d) 403 (1950).

As the findings of fact made by the Commission, when supported by competent evidence, are conclusive and binding on the reviewing courts, which are to hear the appeal on questions of law only, the dismissal of the appeal in the court below for failure to file a statement of grounds as required by subdivision (i) deprived the claimants of no substantial right to which, otherwise, they might have been entitled. In re Employment Security Comm., 234 N. C. 651, 68 S. E. (2d) 311 (1951).

Applied in In re Stevenson, 237 N. C. 528, 75 S. E. (2d) 520 (1953).

Cited in Employment Security Comm., v Smith, 235 N. C. 104, 69 S. E. (2d) 32 (1952).

§ 96-16. **Seasonal pursuits.**—(a) A seasonal pursuit is one which, because of seasonal conditions making it impracticable or impossible to do otherwise, customarily carries on production operations only within a regularly recurring active period or periods of less than an aggregate of thirty-six weeks in a calendar year. No pursuit shall be deemed seasonal unless and until so found by the Commission: Provided, however, that from March 27, 1953, any successor under § 96-8 (f) (2) to a seasonal pursuit shall be deemed seasonal unless such successor shall within one hundred and twenty (120) days after the acquisition request cancellation of the determination of status of such seasonal pursuit; provided further that this provision shall not be applicable to pending cases nor retroactive in effect.

(f) (1) A seasonal worker shall be eligible to receive benefits based on seasonal wages only for a week of unemployment which occurs, or the greater part of which occurs within the active period or periods of the seasonal pursuit or pursuits in which he earned base period wages.

(2) A seasonal worker shall be eligible to receive benefits based on nonseasonal wages for any week of unemployment which occurs during any active period or periods of the seasonal pursuit in which he has earned base period wages provided he has exhausted benefits based on seasonal wages. Such worker shall also be eligible to receive benefits based on nonseasonal wages for any week of unemployment which occurs during the inactive period or periods of the seasonal pursuit in which he earned base period wages irrespective as to whether he has exhausted benefits based on seasonal wages.

(3) The maximum amount of benefits which a seasonal worker shall be eligible to receive based on seasonal wages shall be an amount, adjusted to the nearest multiple of one dollar (\$1.00), determined by multiplying the maximum benefits payable in his benefit year, as provided in § 96-12 (d) of this chapter, by the percentage obtained by dividing the seasonal wages in his base period by all of his base period wages.

(4) The maximum amount of benefits which a seasonal worker shall be eligible to receive based on nonseasonal wages shall be an amount, adjusted to the nearest multiple of one dollar (\$1.00), determined by multiplying the maximum benefits

payable in his benefit year, as provided in § 96-12 (d) of this chapter, by the percentage obtained by dividing the nonseasonal wages in his base period by all of his base period wages.

(5) In no case shall a seasonal worker be eligible to receive a total amount of benefits in a benefit year in excess of the maximum benefits payable for such benefit year, as provided in § 96-12 (d) of this chapter.

(1953, c. 401, ss. 20, 21; 1957, c. 1059, s. 14.)

Editor's Note.—

The 1953 amendment added the provisos at the end of subsection (a). It also changed the amount in paragraphs (3) and (4) of subsection (f) from "fifty cents" to "one dollar." The 1957 amendment rewrote paragraph (2) of subsection (f). As

only subsections (a) and (f) were affected by the amendments the rest of the section is not set out.

Cited in In re Employment Security Comm., 234 N. C. 651, 68 S. E. (2d) 311 (1951).

§ 96-18. Penalties.—(a) Any person who makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact to obtain or increase any benefit under this chapter or under an employment security law of any other state, the federal government, or of a foreign government, either for himself or any other person, shall be punished by a fine of not less than twenty dollars (\$20.00), nor more than fifty dollars (\$50.00), or by imprisonment for not longer than thirty days, and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

Records, with any necessary authentication thereof, required in the prosecution of any criminal action brought by another state or foreign government for misrepresentation to obtain benefits under the law of this State shall be made available to the agency administering the employment security law of any such state or foreign government for the purpose of such prosecution. Photostatic copies of all records of agencies of other states or foreign governments required in the prosecution of any criminal action under this section shall be as competent evidence as the originals when certified under the seal of such agency, or when there is no seal, under the hand of the keeper of such records.

(d) Any person who, by reason of the nondisclosure or misrepresentation by him or by another of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent), has received any sum as benefits under this chapter while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the Commission, either be liable to have such sum deducted from any future benefits payable to him under this chapter, or shall be liable to repay to the Commission for the Unemployment Insurance Fund a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in § 96-10 (b) for the collection of past-due contributions; provided this "chapter" and "unemployment insurance fund" shall also be deemed to mean the employment security law and the unemployment insurance fund of any other state or the federal government, or a foreign government for purposes of this subsection, when an interstate claim is involved.

(e) An individual shall not be entitled to receive benefits for one year beginning with the first day of any benefit week with respect to which he, or another in his behalf with his knowledge, has been found to have knowingly made a false statement or misrepresentation or who has knowingly failed to disclose a material fact to obtain or increase any benefit or other payment under this chapter.

(f) Any individual who becomes unemployed due to larceny or embezzlement in connection with his employment, if such individual is convicted thereof in a court of competent jurisdiction, or if the Commission finds that he has made a voluntary confession of guilt, shall not be entitled to receive any benefits based on wages earned by such individual prior to and including the quarter within which such unemployment occurred; provided the provisions of this subsection

shall not be effective as to any benefits accrued or paid under a claim filed by such individual prior to the date of such unemployment. (Ex. Sess. 1936, c. 1, s. 16; 1943, c. 319; c. 377, ss. 29, 30; 1945, c. 552, s. 34; 1949, c. 424, s. 26; 1951, c. 332, s. 16; 1953, c. 401, ss. 1, 22; 1955, c. 385, s. 9.)

Editor's Note.—

The 1951 amendment rewrote subsections (a) and (e) and added the proviso at the end of subsection (d).

The 1953 amendment substituted "unemployment insurance fund" for "unemployment compensation fund" in subsection (d). It also substituted the words "who becomes unemployed due to" for the words "discharged for" formerly appearing in the first line of subsection (f)

and substituted "unemployment" for "discharge" at the end of the subsection.

The 1955 amendment inserted "one year beginning with the first day of any benefit week with respect to" in lieu of "the remainder of any benefit year during," formerly appearing near the beginning of subsection (e).

As subsections (b) and (c) were not affected by the amendments they are not set out.

ARTICLE 3.

Employment Service Division.

§ 96-28: Repealed by Session Laws 1951, c. 332, s. 17.

Chapter 97.

Workmen's Compensation Act.

Article 1.

Workmen's Compensation Act.

- Sec.
 97-40. Commutation of benefit and payment on absence of dependents.
 97-40.1. Second Injury Fund.
 97-41. Total compensation not to exceed \$10,000.
 97-53. Occupational diseases enumerated; when due to exposure to chemicals.
 97-61. [Rewritten as §§ 97-61.1 to 97-61.7.]
 97-61.1. First examination of and report on having asbestosis or silicosis.
 97-61.2. Filing of first report; right of hearing; effect of report as testimony.

- Sec.
 97-61.3. Second examination and report.
 97-61.4. Third examination and report.
 97-61.5. Hearing after first examination and report; removal of employee from hazardous occupation; compensation upon removal from hazardous occupation.
 97-61.6. Hearing after third examination and report; compensation for disability and death from asbestosis or silicosis.
 97-61.7. Waiver of right to compensation as alternative to forced change of occupation.
 97-84. Determination of disputes by Commission or deputy.

ARTICLE 1.

Workmen's Compensation Act.

§ 97-1. Official title.

In General.—

In accord with original. See National Labor Relations Board v. Moss Planing Mill Co., 224 F. (2d) 702 (1955).

Purpose of Act.—

The underlying purpose of the Workmen's Compensation Act is to provide compensation for workmen who suffer disability by accident arising out of and in the course of their employment. Henry v. A. C. Lawrence Leather Co., 234 N. C. 126, 66 S. E. (2d) 693 (1951).

Construction.—

The Workmen's Compensation Act should be liberally construed to the end that the benefit thereof should not be denied upon technical, narrow and strict interpretation. Henry v. Lawrence Leather Co., 231 N. C. 477, 57 S. E. (2d) 760 (1950); Guest v. Brenner Iron & Metal Co., 241 N. C. 448, 85 S. E. (2d) 596 (1955).

The Workmen's Compensation Act is a radical and systematic change in the com-

mon law and must be liberally construed to accomplish its purposes. Its provisions are superior to the common law in all respects where it deals with the liabilities arising out of the relationship of employer and employee. *Essick v. Lexington*, 232 N. C. 200, 60 S. E. (2d) 106 (1950).

The rule of liberal construction cannot be employed to attribute to a provision of the act a meaning foreign to the plain and unmistakable words in which it is couched. *Henry v. Lawrence Leather Co.*, 231 N. C. 477, 57 S. E. (2d) 760 (1950); *Guest v. Brenner Iron & Metal Co.*, 241 N. C. 448, 85 S. E. (2d) 596 (1955); *Hatchett v. Hitchcock Corp.*, 240 N. C. 591, 83 S. E. (2d) 539 (1954).

The Workmen's Compensation Act eliminates the question of negligence as a basis for recovery thereunder, but it is not the equivalent of general accident or health insurance, and provides for compensation only for those injuries by accident which arise out of and in the course of the employment. *Vause v. Vause Farm Equipment Co.*, 233 N. C. 88, 63 S. E. (2d) 173 (1951).

The Workmen's Compensation Act Is

§ 97-2. Definitions.

(b) Employee.—The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term "employee" shall include all officers and employees of the State, except only such as are elected by the people, or by the General Assembly, or appointed by the Governor to serve on a per diem, part time or fee basis, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, except such as are elected by the people or elected by the council or other governing body of said municipal corporation or political subdivision, who act in purely administrative capacities, and to serve for a definite term of office. The term "employee" shall include members of the North Carolina National Guard, except when called into the service of the United States, and members of the North Carolina State Guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full time basis or a part time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representa-

Not an Accident and Health Insurance Act.—The legislative intent seems clear that our Workmen's Compensation Act is an industrial injury act, and not an accident and health insurance act. The court should not overstep the bounds of legislative intent, and make by judicial legislation our compensation act an accident and health insurance act. *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 706 (1952).

The Industrial Commission has exclusive jurisdiction, etc.—

In accord with original. See *Thomason v. Red Bird Cab Co.*, 235 N. C. 602, 70 S. E. (2d) 410 (1954).

Employer and employee held not to come within the provisions of the North Carolina Workmen's Compensation Act. *Pennsylvania Threshermen, etc., Ins. Co. v. Harrill*, 106 F. Supp. 332 (1952).

Cited in *Morris v. Wilkins*, 241 N. C. 507, 85 S. E. (2d) 892 (1955); *Whitlow v. Seaboard Air Line R. Co.*, 222 F. (2d) 57 (1955); *Tipton v. Barge*, 243 F. (2d) 531 (1957).

tive, dependents, and other persons to whom compensation may be payable: Provided, that the third and fourth sentences herein shall not apply to Alleghany, Avery, Bladen, Carteret, Caswell, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Union, Watauga and Wilkes counties: Provided, further, that any employee as herein defined of a municipality, county, or of the State of North Carolina while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality, county, or the State of North Carolina and while acting pursuant to authorization or instruction from any superior officer, shall have the same rights under this article as if such duty or activity were performed within the territorial boundary limits of his employer.

Every executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation, other than a charitable, religious, educational or other nonprofit corporation, shall be an employee of such corporation under this article.

Any such executive officer of a charitable, religious, educational, or other nonprofit corporation may, notwithstanding any other provision of this article, be brought within the coverage of its insurance contract by any such corporation by specifically including such executive officer in such contract of insurance and the election to bring such executive officer within the coverage shall continue for the period such contract of insurance is in effect, and during such period such executive officers thus brought within the coverage of the insurance contract shall be employees of such corporation under this article.

(c) Employer.—The term “employer” means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person. The board of commissioners of each county of the State, for the purposes of this law, shall be considered as “employer” of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the same extent it is authorized to insure other compensation liability for employees thereof: Provided, that the last two sentences herein shall not apply to Alleghany, Avery, Bladen, Carteret, Caswell, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Union, Watauga and Wilkes counties.

(e) Average Weekly Wages.—“Average weekly wages” shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to

the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

Where a minor employee, under the age of twenty-one years, sustains a permanent disability or dies, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon such other method as may be used to compute the average weekly wage as will most nearly approximate the amount which the injured employee would be earning as an adult if it were not for the accident. Compensation for temporary total disability shall be computed upon the average weekly wage at the time of the accident, unless the total disability extends more than fifty-two weeks and then the compensation may be increased in proportion to his expected earnings.

In case of disabling injury to a volunteer fireman under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman was earning in the employment wherein he principally earned his livelihood as of the date of injury.

(1953, c. 619; 1955, c. 644; c. 1026, s. 1; c. 1055; 1957, c. 95.)

I. IN GENERAL.

Editor's Note.—

The 1953 amendment inserted the words "to serve on a per diem, part time or fee basis" in line nine of the first paragraph of subsection (b) and added the second paragraph thereof.

The first 1955 amendment added "Alleghany" to the list of counties in subsection (b) and (c). The second 1955 amendment, effectively July 1, 1955, added the last paragraph of subsection (e) and the third 1955 amendment substituted the last two paragraphs of subsection (b) for the former last paragraph.

The 1957 amendment deleted "Ashe" from the lists of counties in subsections (b) and (c).

As only subsections (b), (c) and (e) were affected by the amendments the rest of the section is not set out.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 451.

Burden of Proving Claim Compensable.

—Claimant in a proceeding under the Workmen's Compensation Act has the burden of proving that his claim is compensable under the act. *Henry v. Lawrence Leather Co.*, 231 N. C. 477, 57 S. E. (2d) 760 (1950).

Applied, as to subsection (r), in *Rice v. Thomasville Chair Co.*, 238 N. C. 121, 76 S. E. (2d) 311 (1953); as to subsection (b), in *McNair v. Ward*, 240 N. C. 330, 82 S. E. (2d) 85 (1954); as to subsection (e), in *Harris v. Asheville Contracting Co.*, 240 N. C. 715, 83 S. E. (2d) 802 (1954).

Quoted in part in *Duncan v. Carpenter*,

233 N. C. 422, 64 S. E. (2d) 410 (1951); as to subsection (i), in *Brinkley v. United Feldspar & Minerals Corp.*, 246 N. C. 17, 97 S. E. (2d) 419 (1957).

Stated, as to subsections (f), (j) and (k), in *Fields v. Hollowell*, 238 N. C. 614, 78 S. E. (2d) 740 (1953).

Cited, as to subsection (f), in *Sweatt v. Rutherford County Board of Education*, 237 N. C. 653, 75 S. E. (2d) 738 (1953); as to subsections (l), (m), (n) and (o), in *Fields v. Hollowell*, 238 N. C. 614, 78 S. E. (2d) 740 (1953); as to subsection (i), in *Watts v. Brewer*, 243 N. C. 422, 90 S. E. (2d) 764 (1956); *Smith v. Mecklenburg County Chapter American Red Cross*, 245 N. C. 116, 95 S. E. (2d) 559 (1956).

II. EMPLOYMENT; EMPLOYEE; EMPLOYER.

Employees and Independent Contractors.—

In accord with 1st paragraph in original. See *McCraw v. Calvine Mills, Inc.*, 233 N. C. 524, 64 S. E. (2d) 658 (1951).

When one undertakes to do a specific job under contract and the manner of doing it, including employment, payment and control of persons working with or under him, is left entirely to him, he will be regarded as an independent contractor unless the person for whom the work is being done has retained the right to exercise control in respect to the manner in which the work is to be executed. *McCraw v. Calvine Mills, Inc.*, 233 N. C. 524, 64 S. E. (2d) 658 (1951).

Whether a person is an independent contractor or an employee within the meaning of the Workmen's Compensation Act is to be determined in accordance with the common law. *Scott v. Waccamaw Lbr. Co.*, 232 N. C. 162, 59 S. E. (2d) 425 (1950).

Compensation is recoverable only against the employer of the injured workman, and therefore if the workman is an employee of an independent contractor, the employer of the independent contractor cannot be held liable for compensation. *Scott v. Waccamaw Lbr. Co.*, 232 N. C. 162, 59 S. E. (2d) 425 (1950).

Evidence tending to show that defendant lumber company operated a sawmill as a part of its general business, that it owned the saw mill, controlled the premises where the work was performed, determined the amount of work to be done thereat, gave directions on occasion as to dimensions of the lumber to be sawed, and that the person directing the sawmill operations worked exclusively for the lumber company, which had the power to discharge him at any time with or without cause, was held sufficient to support a finding that the director of the sawmill operations was a supervisory employee and not an independent contractor. *Scott v. Waccamaw Lbr. Co.*, 232 N. C. 162, 59 S. E. (2d) 425 (1950).

Test of Employer Is Right of Control.—The test is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has right of control, it is immaterial whether he actually exercises it. *McCraw v. Calvine Mills, Inc.*, 233 N. C. 524, 64 S. E. (2d) 658 (1951); *Hinkle v. Lexington*, 239 N. C. 105, 79 S. E. (2d) 220 (1953).

Claimant Must Be Employee of Employer from Whom Compensation Is Claimed.—An injured person is entitled to compensation under our Workmen's Compensation Act only if he is an employee of the party from whom compensation is claimed at the time of his injury. *Hart v. Thomasville Motors, Inc.*, 244 N. C. 84, 92 S. E. (2d) 673 (1956).

Assistant Driver Employed by Owner-Lessor of Truck under Trip-Lease Agreement.—Where the owner of a truck drives same on a trip in interstate commerce for an interstate carrier under a trip-lease agreement providing that the carrier's I. C. C. license plates should be used and the carrier retain control and direction over the truck, an assistant driver employed by the owner-lessee is an employee

of the carrier within the coverage of the North Carolina Compensation Act. Further, if the owner-lessee be considered an independent contractor, but had less than five employees and no compensation insurance coverage, the carrier would still be liable under G. S. 97-19. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

Employee of Partnership and Not of Partner.—Evidence was sufficient to support a finding of the Commission that deceased, the driver of a tractor-tank, was an employee of defendant oil company, a partnership, and not of a separate transportation business operated by one of the partners. *Moses v. Bartholomew*, 238 N. C. 714, 78 S. E. (2d) 923 (1953).

III. AVERAGE WEEKLY WAGES.

Earnings Control "Average Weekly Wages."—Under subsection (e), "average weekly wages" of the employee "in the employment in which he was working at the time of the injury" are based on his earnings rather than his earning capacity. *Liles v. Faulkner Neon & Elec. Co.*, 244 N. C. 653, 94 S. E. (2d) 790 (1956).

When Special Method, etc.—

In accord with original. See *Liles v. Faulkner Neon & Elec. Co.*, 244 N. C. 653, 94 S. E. (2d) 790 (1956).

Where Employment Extended over Period of Less than Fifty-Two Weeks.—The average weekly wages of a college student working part time for a period of eleven weeks in which he worked from 17½ hours to 51 hours a week should be computed by the method provided in the second sentence of subsection (e) of this section, where the evidence did not warrant a finding of fact or conclusion of law that such method would not obtain results fair and just to both parties. *Liles v. Faulkner Neon & Elec. Co.*, 244 N. C. 653, 94 S. E. (2d) 790 (1956).

Where the employer does not contend that plaintiff's employment was casual and offers no evidence as to the amount of wages earned by others engaged in similar employment in that community during the 52 weeks previous to plaintiff's injury, the employer may not object that the Commission, in view of the fact that the employee had worked for the employer less than 40 hours at the time of his injury, fixed the employee's average weekly wage in accordance with the compensation under the contract of employment at the time of the injury, G. S. 97-2 (e), there being evidence that the employee had theretofore earned wages in excess of this sum for appreciable periods in other em-

ployments of like nature. *Harris v. Asheville Contr. Co.*, 240 N. C. 715, 83 S. E. (2d) 802 (1954).

Same—"Results Fair and Just" to Both Parties.—Results fair and just, within the meaning of the proviso to the second sentence of subsection (e), consist of such "average weekly wages" as will most nearly approximate the amount which the injured employee would be earning were it not for the injury, in the employment in which he was working at the time of his injury. *Liles v. Faulkner Neon & Elec. Co.*, 244 N. C. 653, 94 S. E. (2d) 790 (1956).

It is true that all provisions of subsection (e) must be considered in order to ascertain the legislative intent; and the dominant intent is that results fair and just to both parties be obtained. Ordinarily, whether such results will be obtained by the second method is a question of fact, and in such case a finding of fact by the Commission controls decision. However, this does not apply if the finding of fact is not supported by competent evidence or is predicated on an erroneous construction of the statute. *Liles v. Faulkner Neon & Elec. Co.*, 244 N. C. 653, 94 S. E. (2d) 790 (1956).

Same — Consideration of Amounts Earned by Other Persons in Same Employment.—In a proceeding for compensation for the death of a college student employed part-time during vacation and after school for a period of eleven weeks in which he worked from 17½ to 51 hours a week, there was no factual basis for the application of the method of determining average weekly wages provided in the third sentence of subsection (e), where there was no evidence as to average weekly amount being earned during the fifty-two weeks previous to decedent's injury by a person of the same grade and character employed in the same class of employment, and no evidence as to the average weekly amount a part-time worker in the same employment had earned during the fifty-two weeks previous to decedent's injury, while working for the particular employer or any other employer in the same locality or community. *Liles v. Faulkner Neon & Elec. Co.*, 244 N. C. 653, 94 S. E. (2d) 790 (1956).

It was improper for the Commission, in undertaking to apply the method of computing average weekly wages provided in the third sentence of subsection (e), to determine the average weekly wages of a part-time employee to be the amount he would have earned had he been a full-

time employee. *Liles v. Faulkner Neon & Elec. Co.*, 244 N. C. 653, 94 S. E. (2d) 790 (1956).

Employer's Report of Accident as Evidence of Average Wage.—While the employer's report of an accident to the Industrial Commission does not constitute a claim for compensation, a statement therein as to the employee's average weekly wage is competent upon the hearing after the filing of claim. *Harris v. Asheville Contr. Co.*, 240 N. C. 715, 83 S. E. (2d) 802 (1954).

IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

A. In General.

Threefold Conditions Antecedent to Right to Compensation.—

In accord with 1st paragraph in original. See *Anderson v. Northwestern Motor Co.*, 233 N. C. 372, 64 S. E. (2d) 265 (1951).

To make out a valid claim for compensation under the Workmen's Compensation Act the claimant is required to show (1) injury by accident, (2) suffered in the course of decedent's employment, and (3) arising out of his employment by the defendant corporation. *Matthews v. Carolina Standard Corp.*, 232 N. C. 29, 60 S. E. (2d) 93 (1950).

To establish his claim for the death of decedent, plaintiff must show (1) death resulting from an injury by accident, (2) arising out of and in the course of decedent's employment by the defendant, and (3) not including a disease in any form, except where it results naturally and unavoidably from the accident. *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 410 (1954).

A compensable death is one, etc.

In accord with 2nd paragraph in original. See *Poteete v. North State Pyrophyllite Co.*, 240 N. C. 561, 82 S. E. (2d) 693 (1954).

Injury Aggravating Pre-existing Infirmary or Disease. — When an employee afflicted with a pre-existing disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the pre-existing disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable, even though it would not have caused death or disability to a normal person. *Anderson v. Northwestern Motor Co.*, 233 N. C. 372, 64 S. E. (2d) 265 (1951).

B. Accident.

Death of a fireman from heart failure, etc.

In accord with original. See *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 410 (1954).

"Accident" Defined.—

In accord with 1st paragraph in original. See *Hensley v. Farmers Federation Cooperative*, 246 N. C. 274, 98 S. E. (2d) 289 (1957).

Death from injury by accident, etc.—

In accord with original. See *Hensley v. Farmers Federation Cooperative*, 246 N. C. 274, 98 S. E. (2d) 289 (1957).

Electric Shock.—The record disclosed competent evidence sufficient to support the Industrial Commission in finding death was caused by electric shock by accident arising out of and in the course of employment. *Blalock v. Durham*, 244 N. C. 208, 92 S. E. (2d) 758 (1956).

Hernia.—

Where the evidence showed that a hernia occurred while the employee was performing his work in the customary and usual manner, and there was no evidence of any unusual condition or any slipping or falling by the employee, there was no evidence to justify a finding that the hernia resulted from an accident, and an award of compensation must be reversed. *Hensley v. Farmers Federation Cooperative*, 246 N. C. 274, 98 S. E. (2d) 289 (1957).

C. Arising Out of and in the Course of Employment.

Rule of Causal Relation.—An injury to be compensable must be shown to have resulted from an accident arising out of and in the course of the employment. This principle has come to be known and referred to as the rule of causal relation, i. e., that injury to be compensable must spring from the employment. This rule of causal relation is the very sheet anchor of the Workmen's Compensation Act. It has kept the Act within the limits of its intended scope—that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits. *Duncan v. Charlotte*, 234 N. C. 86, 66 S. E. (2d) 22 (1951).

Injuries by Accident Arising Out of and in the Course of Employment.—

In order for an injury to an employee to be compensable under the Workmen's Compensation Act it must result from an accident arising out of and in the course of employment. *Berry v. Colonial Furniture Co.*, 232 N. C. 303, 60 S. E. (2d) 97 (1950).

In order to entitle the claimant to com-

penation the evidence must show that the injury by accident arose out of and in the course of his employment by the defendant. Both are necessary to justify an award of compensation under the Workmen's Compensation Act. *Bell v. Dewey Bros.*, 236 N. C. 280, 72 S. E. (2d) 680 (1952).

Where an employee, while about his work, suffers an injury in the ordinary course of his employment, the cause of which is unexplained but which is a natural and probable result of a risk thereof, and the Commission finds from all the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained. If, however, the cause is known and is independent of, unrelated to, and apart from the employment, compensation will not be allowed. *Vause v. Vause Farm Equipment Co.*, 233 N. C. 88, 63 S. E. (2d) 173 (1951).

Test for Determining Whether Accidental Injury Arises Out of Employment.—

While there must be some causal connection between the employment and the injury, nevertheless it is sufficient if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which should have been foreseen or expected. *Vause v. Vause Farm Equipment Co.*, 233 N. C. 88, 63 S. E. (2d) 173 (1951); *Hinkle v. Lexington*, 239 N. C. 105, 79 S. E. (2d) 220 (1953).

"Out of" and "in the Course of" Distinguished.—

In accord with 1st paragraph in original. See *Bell v. Dewey Bros.*, 236 N. C. 280, 72 S. E. (2d) 680 (1952); *Sweatt v. Rutherford County Board of Education*, 237 N. C. 653, 75 S. E. (2d) 738 (1953); *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 410 (1954); *Zimmerman v. Elizabeth City Freezer Locker*, 244 N. C. 628, 94 S. E. (2d) 813 (1956).

The phrase "in course of" refers to the time, place and circumstance under which the injury by accident occurred, while the words "out of the employment" refer to the origin or cause of the accident, as springing from the work the employee is to do or out of the service he is to perform. *Matthews v. Carolina Standard Corp.*, 232 N. C. 229, 60 S. E. (2d) 93 (1950); *Berry v. Colonial Furniture Co.*, 232 N. C. 303, 60 S. E. (2d) 97 (1950).

In interpreting and applying the meaning of the expression, "arising out of and in the course of the employment," as it appears in the Workmen's Compensation Act, it has been uniformly held that the phrases "arising out of" and "in the course of" are not synonymous but involve two

ideas and impose a double condition, both of which must be satisfied in order to bring a case within the Act. *Sweatt v. Rutherford County Board of Education*, 237 N. C. 653, 75 S. E. (2d) 738 (1953).

In interpreting and applying the meaning of the complete expression, "arising out of and in the course of the employment," it must be kept in mind that while an accident arising out of an employment usually occurs in the course of it, it does not necessarily or invariably do so. Nor does an accident which occurs in the course of an employment necessarily or inevitably arise out of it. Therefore proof that an employee was at his place of employment and was doing his usual work at the time of the injury, without more, is insufficient to support an award of compensation. *Sweatt v. Rutherford County Board of Education*, 237 N. C. 653, 75 S. E. (2d) 738 (1953).

"In the Course of" the Employment.—

The words "in the course of" as used in the Workmen's Compensation Act refer to the time, place, and circumstances under which the injury occurs. *Guest v. Brenner Iron & Metal Co.*, 241 N. C. 448, 85 S. E. (2d) 596 (1955); *Alford v. Quality Chevrolet Co.*, 246 N. C. 214, 97 S. E. (2d) 869 (1957).

Mixed Question of Law and Fact.—

Whether an accident arose out of the employment is not exclusively a question of fact. It is a mixed question of law and fact, but there must be some causal relation between the employment and the injury. *Matthews v. Carolina Standard Corp.*, 232 N. C. 229, 60 S. E. (2d) 93 (1950); *Poteete v. North State Pyrophyllite Co.*, 240 N. C. 561, 82 S. E. (2d) 693 (1954); *Alford v. Quality Chevrolet Co.*, 246 N. C. 214, 97 S. E. (2d) 869 (1957).

"Arising Out of" Defined.—

See *Vause v. Vause Farm Equipment Co.*, 233 N. C. 88, 63 S. E. (2d) 173 (1951).

In accord with 1st paragraph in original. See *Hinkle v. Lexington*, 239 N. C. 105, 79 S. E. (2d) 220 (1953); *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 410 (1954).

The term "arising out of employment," is broad and comprehensive and perhaps not capable of precise definition. It must be interpreted in the light of the facts and circumstances of each case, and there must be some causal connection between the injury and the employment. *Berry v. Colonial Furniture Co.*, 232 N. C. 303, 60 S. E. (2d) 97 (1950).

"Arising out of" means arising out of the work the employee is to do, or out of the service he is to perform. The risk

must be incidental to the employment. *Bell v. Dewey Bros.*, 236 N. C. 280, 72 S. E. (2d) 680 (1952); *Hinkle v. Lexington*, 239 N. C. 105, 79 S. E. (2d) 220 (1953); *Poteete v. North State Pyrophyllite Co.*, 240 N. C. 561, 82 S. E. (2d) 693 (1954).

The words "out of" as used in the Workmen's Compensation Act refer to the origin or cause of the accident and import that there must be some causal relation between the employment and the injury, but not that the injury ought to have been foreseen or expected. *Guest v. Brenner Iron & Metal Co.*, 241 N. C. 448, 85 S. E. (2d) 596 (1955).

In order for an accident to arise out of the employment it is not required that a hazard of the employment be the sole cause of the accident, but it is sufficient if the physical aspects of the employment contribute in some reasonable degree toward bringing about or intensifying the condition which renders the employee susceptible to the accident and consequent injury. *Vause v. Vause Farm Equipment Co.*, 233 N. C. 88, 63 S. E. (2d) 173 (1951).

Injury Must Be Fairly Traceable to Employment as Contributing Proximate Cause.—

It is settled law that where an injury cannot fairly be traced to the employment as a contributing proximate cause, it does not arise out of the employment. *Poteete v. North State Pyrophyllite Co.*, 240 N. C. 561, 82 S. E. (2d) 693 (1954).

Where the death cannot fairly be traced to the employment as a contributing proximate cause, it does not arise out of the employment. *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 410 (1954).

Where Cause of Injury Not Explained.—

Where an employee, while about his work suffers an injury in the ordinary course of an employment, the cause of which is not explained, but which is a natural and probable result of a risk thereof, and the Commission finds from the evidence that the injury arose out of the employment, an award will be sustained. *Poteete v. North State Pyrophyllite Co.*, 240 N. C. 561, 82 S. E. (2d) 693 (1954).

Where Employer Makes Allowances to Cover Cost of Transportation.—

Injuries sustained in an automobile accident by employees while on their way to or from their work in an automobile owned by one of them arise out of and in the course of their employment when, under the terms of the employment and as an incident to the contract of employment, allowances are made by the employer to cover the cost of

such transportation. *Puett v. Bahnson Co.*, 231 N. C. 711, 58 S. E. (2d) 633 (1950).

Injury during Vacation Pleasure Trip Furnished by Employer.—An accidental injury received by an employee while riding in a truck on a vacation pleasure trip does not arise out of the employment notwithstanding that the employer furnished the vacation trip as a matter of good will and personal relations among the employees and paid the entire expenses of the trip in accordance with its agreement entered into at the time of the employment as a part of the remuneration and inducement to its employees. *Berry v. Colonial Furniture Co.*, 232 N. C. 303, 60 S. E. (2d) 97 (1950).

Employee Suffered Going to or Returning from Work.—

An employee is not engaged in the prosecution of his employer's business while operating his personal car to the place where he is to perform the duties of his employment, nor while leaving his place of employment to go to his home. *Ellis v. American Service Co.*, 240 N. C. 453, 82 S. E. (2d) 419 (1954).

When travel is contemplated as part of the work the rule is that the employment included not only the actual doing of the work but also a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done, when the latter is expressly or impliedly included in the terms of the employment. *Alford v. Quality Chevrolet Co.*, 246 N. C. 214, 97 S. E. (2d) 869 (1957).

Continuity between Employment and Travel.—If it be conceded the course of employment included the travel home, then certainly there must be reasonable continuity between the employment and the travel. *Alford v. Quality Chevrolet Co.*, 246 N. C. 214, 97 S. E. (2d) 869 (1957).

Findings to the effect that the deceased employee was furnished a car for transportation to and from his work, that he quit work about 7:00 p. m., met a friend for dinner, took repeated drinks throughout the evening, made several trips, on one of which he drove approximately 100 miles per hour, in search of a girl to join the party, and some five hours thereafter started for home in the employer's car, and was killed in a wreck occurring on the direct route from the employer's place of business to the employee's home, held to show an abandonment of employment rather than a deviation from it, and therefore the accident did not arise in the course of the employment. *Alford v. Quality Chevrolet Co.*, 246 N. C. 214, 97 S. E. (2d) 869 (1957).

Injury during Lunch Hour. — Findings to the effect that during lunch hour the employees were free to go as they pleased, that deceased employee had stopped his work for the lunch period and, in attempting to board a truck moving within the premises of the employer, fell and was fatally injured, with further evidence that the employee had been given no order and had no duty connected either with the truck or its contents, and was acting according to his own will, was held insufficient to show affirmatively that the injury resulted from a hazard incident to the employment, and supports the ruling of the Industrial Commission that it did not arise out of the employment. *Matthews v. Carolina Standard Corp.*, 232 N. C. 229, 60 S. E. (2d) 93 (1950).

An employee who was hit by a car while crossing highway to eat lunch on employer's parking lot did not sustain an injury arising out of and in the course of employment. *Horn v. Sandhill Furniture Co.*, 245 N. C. 173, 95 S. E. (2d) 521 (1956).

Cemetery Keeper Crossing Street on Way to Funeral Home.—When as an incident of his employment as cemetery keeper and in the performance of a duty connected therewith, as shown by the established custom, the decedent crossed the street en route to a funeral home, the hazard of the journey may properly be regarded as within the scope of the Compensation Act. *Hinkle v. Lexington*, 239 N. C. 105, 79 S. E. (2d) 220 (1953).

Employee Injured While at Plant after Hours on Private Business. — Where claimant, a foreman, returned to the employer's plant after his regular working hours, to attend to certain private business, but before entering upon such business he assisted with certain work of the employer, and then sat down on a wall to rest, whereupon he fell and was injured, it was held that the evidence was insufficient to sustain a finding that plaintiff's injury arose out of and in the course of his employment, since from the evidence it could not be held that the accident resulted from risk incidental to the employment. *Poteete v. North State Pyrophyllite Co.*, 240 N. C. 561, 82 S. E. (2d) 693 (1954).

Injury While Acting for Benefit of Third Persons.—Whether an injury to an employee received while performing acts for the benefit of third persons arises out of the employment depends upon whether the acts of the employee are for the benefit of the employer to any appreciable extent, or whether the acts are solely for the benefit or purpose of the employee or a

third person. *Guest v. Brenner Iron & Metal Co.*, 241 N. C. 448, 85 S. E. (2d) 596 (1955).

Assistance to Third Person in Reciprocity for Aid Requested for Employer's Benefit.—An employee sent to fix flat tires went to a filling station and requested free use of its air pump, but before inflation of the tires was completed, the filling station operator asked him to help push a stalled car, and while he was doing so he was struck by another car, resulting in permanent injury. It was held that the courtesies and assistance extended by the employee were in reciprocity for the courtesy of free air requested by the employee for the employer's benefit, so that the employee had reasonable ground to apprehend that refusal to render the assistance requested of him might well have resulted in like refusal of the courtesy requested by him, and therefore, the findings support the conclusion that the accident arose out of and in the course of employment. *Guest v. Brenner Iron & Metal Co.*, 241 N. C. 448, 85 S. E. (2d) 596 (1955).

Employee Injured While Washing His Personal Car. — Claimant, employed as a night watchman, was injured on the employer's premises during his hours of duty when his trouser leg was caught on the bumper of his car, causing him to fall, as he was washing his personal car for his own purposes with the implied consent of the employer. There was no causal relationship between his employment and the injury, and therefore the injury did not arise out of the employment and is not compensable. *Bell v. Dewey Bros.*, 236 N. C. 280, 72 S. E. (2d) 680 (1952).

Injury Caused by Epileptic Seizure.—The evidence tended to show that plaintiff employee was subject to epileptic fits, that while driving the employer's truck in the course of his employment he felt a seizure approaching, stopped the truck on the side of the road, opened the door and lay down on the seat of the truck with his head on the seat opposite the steering wheel and his feet hanging out of the truck, that he immediately suffered an epileptic seizure causing him to lose consciousness, and that when he "came to" his body was on the outside of the truck and his hands on the steering wheel. The expert medical testimony was to the effect that the employee had suffered broken bones caused by the fall from the seat of the truck and that the fall resulted from the epileptic seizure. It was held that the evidence disclosed that the sole cause of the employee's moving from a position of safety to his injury was the epileptic seizure, and therefore the fall

was independent of, unrelated to, and apart from the employment, and the evidence cannot support a finding of the Industrial Commission that the injury resulted from an accident arising out of the employment. *Vause v. Vause Farm Equipment Co.*, 233 N. C. 88, 63 S. E. (2d) 173 (1951).

Assault Arising from Dispute Over Work.—

Shooting of three employees by mentally disturbed co-employee while they were at work in locker plant arose out of and in the course of employment though shooting was "triggered" by a draft board incident, where shooter stated that reason for shooting was resentment of "domination" by co-employees. *Zimmerman v. Elizabeth City Freezer Locker*, 244 N. C. 628, 94 S. E. (2d) 813 (1956).

Injury Sustained While Taking Medical Test.—An injury sustained by an employee while taking a medical test or examination, which test or examination is required by law in order for the employee to continue to hold her job, does not constitute an accident arising out of and in the course of her employment within the meaning of this section. *King v. Arthur*, 245 N. C. 599, 96 S. E. (2d) 846 (1957).

Death of Policeman Held Compensable.—See *Andrews v. Princeville*, 245 N. C. 669, 97 S. E. (2d) 110 (1957).

D. Injury from Disease.

Ordinarily, heart disease is not an injury, in accord.

In accord with original. See *Duncan v. Charlotte*, 234 N. C. 86, 66 S. E. (2d) 22 (1951); *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 410 (1954).

Dilatation of the Heart, etc.—

In accord with original. See *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 410 (1954).

In heart cases the decisions require a showing that the exertion was in some way unusual or extraordinary. *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 410 (1954).

Injury Aggravating Heart Condition.—Findings to the effect that the employee suffered an injury arising out of and in the course of the employment, which injury aggravated a pre-existing heart condition and caused death, will support an award for compensation and burial expenses. *Wyatt v. Sharp*, 239 N. C. 655, 80 S. E. (2d) 762 (1954).

Death of Game Warden from Coronary Occlusion.—Where a game warden died of a coronary occlusion shortly after he had

arrested three persons for fishing without a license, and had taken them before a magistrate, where they were fined, the Industrial Commission denied recovery, for there was no evidence tending to show that the deceased died as the result of an injury by accident. *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 410 (1954).

Hernia. — Evidence held sufficient to sustain the finding of the Industrial Commission that the hernia was compensable under subsection (r) of this section. *Rice v. Thomasville Chair Co.*, 238 N. C. 121, 76 S. E. (2d) 311 (1953).

V. DISABILITY.

Cross Reference.—As to distinction between “disability” as regards ordinary accidents and the same term as regards occupational diseases, see note to § 97-54.

“Disability” Signifies Impairment of Wage-Earning Capacity.—

To obtain an award of compensation for an injury under the Workmen's Compensation Act, an employee must establish that his injury caused him disability, unless it is included in the schedule of injuries made compensable by § 97-31 without regard to loss of wage-earning power. As used here, the term “disability” signifies an impair-

ment of wage-earning capacity rather than a physical impairment. *Anderson v. Northwestern Motor Co.*, 233 N. C. 372, 64 S. E. (2d) 265 (1951).

How Disability Measured.—

In accord with original. See *Dail v. Kelley Corp.*, 233 N. C. 446, 64 S. E. (2d) 438 (1951); *Hill v. DuBose*, 234 N. C. 446, 67 S. E. (2d) 371 (1951).

Loss of earning capacity is the criterion. Compensation must be based upon loss of wage-earning power rather than the amount actually received. It was intended by this section to provide compensation only for loss of earning capacity. Hence, the finding that claimant had earned \$7 per week for the period from November 25, 1949, to July 18, 1950, was not the proper basis for determining the award. *Hill v. DuBose*, 234 N. C. 446, 67 S. E. (2d) 371 (1951).

VI. COMPENSATION.

Award Should Be Based on Capacity to Earn.—An award of compensation based upon a finding as to the amount the claimant had earned since the date on which total permanent disability had ceased, rather than upon his capacity or ability to earn is erroneous. *Hill v. Dubose*, 237 N. C. 501, 75 S. E. (2d) 401 (1953).

§ 97-3. Presumption that all employers and employees have come under provisions of chapter.

Applied in *McNair v. Ward*, 240 N. C. 330, 82 S. E. (2d) 85 (1954).

Cited in *Bame v. Palmer Stone Works*,

232 N. C. 267, 59 S. E. (2d) 812 (1950); *Vause v. Vause Farm Equipment Co.*, 233 N. C. 88, 63 S. E. (2d) 173 (1951).

§ 97-4. Notice of nonacceptance and waiver of exemption.

Common-Law Liability for Occupational Disease. — An employer who has elected not to operate under the provisions of the Workmen's Compensation Act may be held liable by the employee in an action at common law for an occupational disease when such disease is contracted as the result of negligence of the employer in failing to exercise ordinary care to provide a reason-

ably safe place in which to work, which proximately causes such occupational disease. Evidence in the case of such negligence and proximate cause held sufficient to take the case to the jury. *Bame v. Palmer Stone Works*, 232 N. C. 267, 59 S. E. (2d) 812 (1950).

Cited in *Muldrow v. Weinstein*, 234 N. C. 587, 68 S. E. (2d) 249 (1951).

§ 97-6. No special contract can relieve an employer of obligations.

Cited in *Jocie Motor Lines v. Johnson*, 231 N. C. 367, 57 S. E. (2d) 388 (1950).

§ 97-7. State or subdivision and employees thereof. — Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this article relative to payment and acceptance of compensation, and the provisions of §§ 97-4, 97-5, 97-14, 97-15, and 97-16 shall not apply to them: Provided, that all such corporations or subdivisions are hereby authorized to self-insure or purchase insurance to secure its liability under this article and to include thereunder the liability of such subordinate governmental agencies as the county board of

health, the school board, and other political and quasi-political subdivisions supported in whole or in part by the municipal corporation or political subdivision of the State, and to appropriate an amount sufficient for this purpose and levy a special tax if a special tax is necessary to pay the costs of same. (1929, c. 120, s. 8; 1931, c. 274, s. 1; 1945, c. 766; 1957, c. 1396, s. 1.)

Local Modification.—City of Raleigh: 1955, c. 1184.

Editor's Note.—

The 1957 amendment substituted in the proviso the words "such corporations or subdivisions" for the word "counties." It also substituted therein the words "municipal corporation or political subdivision of the State" for the word "county."

The death of highway patrolmen in a

plane crash while attempting to locate and arrest a person accused of a crime of violence was held compensable under the Workmen's Compensation Act, since the patrolmen had authority to make the arrest and did not exceed their authority in using an airplane in their attempted discharge of their duties. *Galloway v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799 (1950).

§ 97-9. Employer to secure payment of compensation.

This section manifests the legislative intent that the liability of the employer is to be limited to the compensation payable by him on account of the injury or death of his employee. *Hunsucker v. High Point Bending & Chair Co.*, 237 N. C. 559, 75 S. E. (2d) 768 (1953). See note to § 97-10.

Superiors of an injured employee are within the immunity of this section when their orders, upon which alleged liability is predicated, are given in the conduct of the employer's business, and such supervisory employees are improperly made additional parties defendant upon the motion of the original defendant in an action by the personal representative of a deceased employee against the third person tort-feasor. *Essick v. Lexington*, 232 N. C. 200, 60 S. E. (2d) 106 (1950).

As Is Fellow Employee Driving Automobile in Employer's Business.—Two employees, traveling in an automobile in the discharge of the employer's business, had a collision with another vehicle. In an action by the employee passenger against the owner and driver of such other vehicle, the employee driver is improperly joined as an additional defendant on motion of the original defendant for the purpose of contribution as a joint tort-feasor, since the employee driver is immune from liability

under the provisions of this section. *Bass v. Ingold*, 232 N. C. 295, 60 S. E. (2d) 114 (1950).

Employee Cannot Maintain Common-Law Action against Co-Employee.—An employee, subject to the provisions of the Workmen's Compensation Act, whose injury arose out of and in the course of his employment, cannot maintain an action at common law against his co-employee whose negligence caused the injury. *Warner v. Leder*, 234 N. C. 727, 69 S. E. (2d) 6 (1951), commented on in 30 N. C. Law Rev. 474.

An officer or agent of a corporation who is acting within the scope of his authority for and on behalf of the corporation, and whose acts are such as to render the corporation liable therefor, is among those conducting the business of the corporation, within the purview of this section, and entitled to the immunity it gives. *Warner v. Leder*, 234 N. C. 727, 69 S. E. (2d) 6 (1951), commented on in 30 N. C. Law Rev. 474.

Applied in *McNair v. Ward*, 240 N. C. 330, 82 S. E. (2d) 85 (1954).

Quoted in *Oehlhauser v. Narron*, 195 F. (2d) 676 (1952); *Johnson v. United States*, 133 F. Supp. 613 (1955).

§ 97-10. Other rights and remedies against employer excluded; employer or insurer may sue third party tort-feasor; attorney's fees; subrogation; amount of compensation as evidence; minors illegally employed.

Remedy against Employer Is Exclusive.—

Where, in a suit by a student nurse to recover damages for injuries sustained while being transported by the hospital which employed her, the plaintiff judicially admitted that her employment was within the coverage of the Workmen's Compensation Act except as to number of em-

ployees regularly employed and the uncontradicted evidence showed that more than five employees were regularly employed, a nonsuit was properly granted. *Powers v. Robeson County Memorial Hospital, Inc.*, 242 N. C. 290, 87 S. E. (2d) 510 (1955).

Suits against Third Persons Not Barred.—

See *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

In accord with 3rd paragraph in original. See *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

But Section Does Not Authorize Action against Those Conducting Business of Employer.—The provision of this section which gives the injured employee or his personal representative “a right to recover damages for such injury, loss of service, or death from any person other than the employer,” means any other person or party who is a stranger to the employment but whose negligence contributed to the injury. Such provision does not authorize the injured employee to maintain an action at common law against those conducting the business of the employer whose negligence caused the injury. *Warner v. Leder*, 234 N. C. 727, 69 S. E. (2d) 6 (1951), commented on in 30 N. C. Law Rev. 474.

Employee of Subcontractor May Maintain Action against Main Contractor.—

In accord with original. See *Tipton v. Barge*, 243 F. (2d) 531 (1957).

Right of Employer or Insurer to Bring Action within Six Months of Injury.—

Where an injured employee has accepted compensation under our Workmen's Compensation Act, no action instituted within six months from the date of the injury may be maintained against the third party in the name of the injured employee, unless the complaint discloses that the action was instituted in the name of such injured employee by either the employer or his carrier. *Taylor v. Hunt*, 245 N. C. 212, 95 S. E. (2d) 589 (1956).

Where neither employer nor insurance carrier has sued third person tort-feasor within six months from the date of the injury, the injured employee may maintain such action in her own name. *Jones v. Otis Elevator Co.*, 231 N. C. 285, 56 S. E. (2d) 684 (1949).

Neither the employer nor its insurance carrier are proper or necessary parties to an action instituted by an injured employee against a third person tort-feasor more than six months from the date of the injury, no action having been instituted by the employer or its insurance carrier. *Jones v. Otis Elevator Co.*, 231 N. C. 285, 56 S. E. (2d) 684 (1949).

The employer or insurance carrier who has paid or become obligated to pay compensation to the injured employee has initially the exclusive right to maintain an action in its own name or the name of the employee against the third person tort-feasor, but if neither institutes action with-

in six months from the date of the injury the right of action passes to the employee. *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 286 (1953); *Taylor v. Hunt*, 245 N. C. 212, 95 S. E. (2d) 589 (1956).

When the employer or his carrier is subrogated to the rights of an employee, the action may be brought in the name of the injured employee or his personal representative, and neither the employer nor his insurance carrier is a necessary or proper party to the action. *Jones v. Otis Elevator Co.*, 231 N. C. 285, 56 S. E. (2d) 684 (1949).

Where an employee of a subcontractor had claimed compensation for his injuries pursuant to the Compensation Act, and was paid by his immediate employer's insurance carrier, a common-law action for negligence against the principal contractor was properly instituted in the employee's name. Any recovery would be first applied to reimburse the insurance carrier. *Tipton v. Barge*, 243 F. (2d) 531 (1957).

Action Not Governed by Code of Civil Procedure.—An action in behalf of an injured employee against a third person tort-feasor is governed by this section and not by the Code of Civil Procedure. *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

Court May Not Join Unnecessary Additional Parties.—Where the plaintiff is the party authorized by this section to maintain the action against the tort-feasor, he is entitled to prosecute same to final judgment, and the court may not interfere with this privilege by the joinder of wholly unnecessary additional parties. *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 836 (1953).

Defendant Not Entitled to Joinder of Employer and Insurance Carrier.—In an action instituted by the employee alone more than six months after the injury, against the third person tort-feasor, defendant is not entitled to the joinder of the employer and the insurance carrier, except in extraordinary circumstances, since defendant may plead all available matters in defense and mitigation in regard to them notwithstanding that they are not parties. *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

Order Joining Employer and Insurance Carrier Is Appealable.—See *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

Third Person Cannot Hold Employer for Contribution or Indemnity.—This section abrogates all liability of the employer to the employee as a tort-feasor under the law of negligence for an injury by accident in the employment. In consequence,

the third party, who is sued for damages for negligently inflicting a compensable injury upon the employee, cannot hold the employer liable for contribution under the statute embodied in § 1-240 or for indemnity under the doctrine of primary and secondary liability even where the injury is the result of the joint or concurrent negligence of the employer and the third person. *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953); *Johnson v. United States*, 133 F. Supp. 613 (1955).

Since it relieves the employer of liability to his injured employee as a tort-feasor, the Workmen's Compensation Act abrogates both the statutory right of a negligent third party to claim contribution from a negligent employer in equal fault, and the common law right of a passively negligent third party to demand indemnity from an actively negligent employer. And this construction of the Workmen's Compensation Act is not invalidated by the mere circumstance that such construction may occasion hardship or injustice to a passively negligent third party. *Hunsucker v. High Point Bending & Chair Co.*, 237 N. C. 559, 75 S. E. (2d) 768 (1953).

There is no substance in the proposition that the North Carolina Workmen's Compensation Act confers no right whatever upon the passively negligent third party. It reduces his liability in tort for the injury to the employee by the amount of the workmen's compensation received by the employee from the actively negligent employer or his insurance carrier. *Hunsucker v. High Point Bending & Chair Co.*, 237 N. C. 559, 75 S. E. (2d) 768 (1953).

Unless There Is Express Contract of Indemnity between Third Person and Employer.—If there is an express contract of indemnity between third party and employer providing against loss to third party arising from the negligence of the employer, the third party if sued for damages by the employee may bring in the employer for contribution or indemnity. *Johnson v. United States*, 133 F. Supp. 613 (1955).

Action for Wrongful Death — Against Third Person.—

It is now settled in North Carolina that in a compensation case where the employee dies as a result of an accident arising out of and in the course of employment, any action against a third party, whose negligence may have contributed to the death of the employee, must be brought by the personal representative of the de-

ceased, and not by the employer or his carrier. *Taylor v. Hunt*, 245 N. C. 212, 95 S. E. (2d) 589 (1956).

Effect of Compromise and Settlement by Widow in Her Capacity as Administratrix.—The widow of a deceased employee, in her capacity as administratrix, executed a compromise and settlement with the employer on a common-law claim for wrongful death under the mistaken belief that the Compensation Act was not applicable. It was held that the compromise and settlement barred the widow in her capacity as a dependent from recovery under the Workmen's Compensation Act. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

Where the widow of a deceased employee executed a compromise and settlement of the common-law claim for wrongful death against the employer under mistake of law that the Workmen's Compensation Act was not applicable, the compromise and settlement did not bar claim under the Compensation Act of the deceased's child under 18 years of age without guardian, since the administratrix had no authority to act for the dependent child except in respect of claims or causes of action vested in the administratrix as such. However, the child's recovery under the Act should be diminished to the extent of the benefits ultimately received by the child from the compromise and settlement. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

Setting Up Employer's Negligence.—

When an award has been made and the employer has paid it, or is bound to do so, an action at common law may be brought by the employer, or the injured employee, or in case of death, by the personal representative of the deceased employee, in the manner set out in this section in which the employer may, on the principle of subrogation, become reimbursed pro tanto for the award so paid. And as against this right, the party thus sued may plead in bar of recovery by subrogation the negligence of the employer in producing the injury. *Essick v. Lexington*, 232 N. C. 200, 60 S. E. (2d) 106 (1950); *Essick v. Lexington*, 233 N. C. 600, 65 S. E. (2d) 220 (1951).

Independent negligence of the employer, as distinguished from negligence of the injured employee imputed to the employer under the doctrine of respondeat superior, may be pleaded and proved by the third person tort-feasor as a bar, complete if the sole proximate cause of the injury, or, if constituting concurring negligence, pro tan-

to against the recovery of compensation paid or payable by the employer or the insurance carrier, even though the action be prosecuted by the injured employee alone. *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953). See *Poindexter v. Johnson Motor Lines*, 235 N. C. 286, 69 S. E. (2d) 495 (1952).

Contributory Negligence of Injured Employee. — The contributory negligence of the injured employee cannot be made the basis of an independent plea in bar of the right of the employer to recover over against the original and primary wrongdoer. *Poindexter v. Johnson Motor Lines*, 235 N. C. 286, 69 S. E. (2d) 495 (1952).

Any alleged negligence of such employee who has received, or whose estate has received compensation from the employer under the Workmen's Compensation Act, must be pleaded, if at all, as a bar to the whole action without reference to any rights of the employer to share in the recovery. *Poindexter v. Johnson Motor Lines*, 235 N. C. 286, 69 S. E. (2d) 495 (1952).

Contributory negligence of the injured employee constitutes a complete defense to an action against a third person tort-feasor, and may be pleaded and proved by such third person irrespective of whether the action is instituted by the employer, the insurance carrier, or the employee. *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

Injury to Minor Employed Contrary to Law. — Where the evidence discloses that the infant plaintiff was one of five or more employees in a business owned by two of defendants and conducted by the third defendant as general manager, and that he was injured in the performance of the duties of his employment, nonsuit is proper, since the evidence discloses that the cause is within the exclusive jurisdiction of the Industrial Commission, notwithstanding the infant plaintiff may have been hired contrary to law. *McNair v. Ward*, 240 N. C. 330, 82 S. E. (2d) 85 (1954).

Action Prosecuted in Behalf of Any Person Entitled to Share in Recovery. — A necessary implication of the statutory requirement respecting the disbursement of

the recovery is that the action against the third party is prosecuted in behalf of any person entitled to claim a share in the recovery, regardless of whether he is a party to the action. *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

Verdict to Be for Full Amount of Damages. — This section clearly contemplates that the action against the third party is to be tried on its merits as an action in tort, and that any verdict of the jury adverse to the third party is to declare the full amount of damages suffered by the employee on account of his injury, notwithstanding any award or payment of compensation to him under the provisions of the Workmen's Compensation Act. *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

Evidence as to Amount of Compensation Prohibited. —

See *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

Trial Court to Enter Judgment Safeguarding Rights of Persons Entitled to Share in Recovery. — In the event of a verdict for the plaintiff in the action against the third party, the trial court, sitting without a jury, is to determine the amount of compensation paid or payable to the injured employee under the Workmen's Compensation Act on the basis either of a stipulation of the interested persons or of evidence submitted to it, and after so doing enter a judgment safeguarding the rights of any person entitled to share in the recovery, regardless of whether or not such person is a party to the action. *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

Reimbursement of Employer and Insurer from Recovery in Action by Employee's Personal Representative. — Where the suit was instituted by the personal representative of the deceased, and the employer and its insurance carrier have taken no action except to file an affidavit of interest, this in itself would not have prevented them from being reimbursed from the recovery. *Essick v. Lexington*, 233 N. C. 600, 65 S. E. (2d) 220 (1951).

Quoted in *Eledge v. Carolina Power, etc., Co.*, 230 N. C. 584, 55 S. E. (2d) 179 (1949).

§ 97-12. Intoxication or willful neglect of employee; willful disobedience of statutory duty, safety regulation or rule.

Sufficiency of Evidence. —

In accord with original. See *Gant v. Crouch*, 243 N. C. 604, 91 S. E. (2d) 705

(1956).

Cited in *Thomason v. Red Bird Cab Co.*, 235 N. C. 602, 70 S. E. (2d) 706 (1952).

§ 97-13. Exceptions from provisions of article.

(c) Prisoners. — This article shall not apply to prisoners being worked by

the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Prison Department shall suffer accidental injury arising out of and in the course of the employment to which he had been assigned, if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this article, then such discharged prisoner may have the benefit of this article by applying to the Industrial Commission as any other employee; provided, such application is made within twelve months from the date of discharge; and provided, further, that the maximum compensation to any prisoner shall not exceed ten dollars per week and the period of compensation shall relate to the date of his discharge rather than to the date of the accident, and prisoners who have been discharged prior to March 15, 1941, who are covered by the terms of the subsection may have twelve months from March 15, 1941, in which to apply for its benefits, but as to such prisoners their compensation shall be computed only from the date of their application and shall not be cumulative for any prior period; and no award shall be made for facial disfigurement, and no award other than burial expenses shall be made for any prisoner whose accident results in death; and no award shall be made for any injury where there is no apparent or outward physical evidence of such injury, unless it is clearly established by medical opinion and supporting testimony that the matter complained of results solely from the accident arising out of and in the course of employment. If any person who has been awarded compensation under the provisions of this section shall be recommitted to prison upon conviction for an offense committed subsequent to the award, such compensation shall immediately cease and determine. Any awards made under the terms of this subsection shall be paid by the State Prison Department from the funds available for the operation of the Prison Department. The provisions of G. S. 97-10 shall apply to prisoners and discharged prisoners entitled to compensation under this subsection and to the State in the same manner as said section applies to employees and employers.

(1957, c. 349, s. 10; c. 809.)

Editor's Note.—

The first 1957 amendment substituted "State Prison Department" for "State Highway and Public Works Commission" in subsection (c). The second 1957 amendment substituted "ten dollars per week"

for "fifteen dollars per month" in line eleven and added the last sentence of the subsection. As only such subsection was changed the rest of the section is not set out.

§ 97-14. Employers not bound by article may not use certain defenses in damage suit.

Employer Is Not Insurer.—

The defendants were not insurers of the safety of their employee, but were required only to exercise the degree of care which a man of ordinary prudence would have used under like circumstances and charged with like duty. *Muldrow v. Weinstein*, 234 N. C. 587, 68 S. E. (2d) 249 (1951).

The fact that plaintiff suffered an injury while at work for the defendants would not of itself impose liability therefor. In order to sustain recovery plaintiff must allege and offer evidence tending to show negligence on the part of his employers, and that such negligence was the proximate

cause of his injury. *Muldrow v. Weinstein*, 234 N. C. 587, 68 S. E. (2d) 249 (1951).

Defenses Not Available.—Where an employer who regularly employs more than five employees in his business elects not to operate under the Workmen's Compensation Act, an injured employee may maintain an action against him at common law, in which action contributory negligence, negligence of a fellow employee, and assumption of risks are not available as defenses. *Bame v. Palmer Stone Works*, 232 N. C. 267, 59 S. E. (2d) 812 (1950).

§ 97-17. Settlements allowed in accordance with article.

Section Contemplates Only Settlement in Respect of Amount of Compensation.—

The only "settlement" contemplated by this section is a settlement in respect of

the amount of compensation to which claimants are entitled under the Act. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

And Does Not Apply to Compromise and Settlement of Common-Law Claim.—Compromise and settlement of the common-law claim of the administratrix of a deceased employee for the wrongful death

of the employee, executed under the mistaken belief that Workmen's Compensation Act was not applicable, will not be disturbed on the ground that the Industrial Commission did not approve such settlement as required by this section. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

§ 97-18. Prompt payment of compensation required; installments; notice to Commission; penalties.

Cited in *Tucker v. Lowdermilk*, 233 N. C. 185, 63 S. E. (2d) 109 (1951).

§ 97-19. Liability of principal contractor has complied with law; right to recover compensation of those who would have been liable; order of liability.

Purpose of Section.—The manifest purpose of this section, enacted as an amendment to the original Workmen's Compensation Act, is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on principal contractors, intermediate contractors, or subcontractors, who, presumably being financially responsible, have it within their power, in choosing subcontractors, to pass upon their financial responsibility and insist upon appropriate compensation protection for their workers. It is also the obvious aim of the statute to forestall evasion of the Workmen's Compensation Act by those who might be tempted to subdivide their regular operations with the workers, thus regulating them for compensation protection to small subcontractors, who fail to carry, or if small enough, may not even be required to carry, compensation insurance. *Greene v. Spivey*, 236 N. C. 435, 73 S. E. (2d) 488 (1952).

This section is not applicable to an independent contractor as distinguished from a subcontractor of the class designated by the statute. And all the more is it so that the statute does not apply to an independent employer who produces or gets out raw materials of his own, like logs, and sells them in the open market to a processor-purchaser who has no control whatsoever over the operations of the independent employer. *Greene v. Spivey*, 236 N. C. 435, 73 S. E. (2d) 488 (1952).

Main Contractor Held Agent of Insurer in Effecting Compensation Insurance for Independent Contractor. — See *Greene v.*

Spivey, 236 N. C. 435, 73 S. E. (2d) 488 (1952).

Lumber Company Buying Timber Held Not Contractor.—A lumber company which purchases timber on the basis of a stipulated price per thousand feet when processed into lumber by it, and which is given the privilege of going upon the land and cutting and logging the timber to its site, cannot be held a contractor of the owners of the timber in the performance of the logging operations, and therefore a person employed by it to conduct logging operations cannot be a subcontractor within the meaning of this section, and the section has no application in determining the liability for injury to one of the workmen employed in the logging operations. *Evans v. Tabor City Lbr. Co.*, 232 N. C. 111, 59 S. E. (2d) 612 (1950).

Assistant Driver Employed by Owner-Lessor of Truck under Trip-Lease Agreement.—Where the owner of a truck drives same on a trip in interstate commerce for an interstate carrier under a trip-lease agreement providing that the carrier's I. C. C. license plates should be used and the carrier retain control and direction over the truck, an assistant driver employed by the owner-lessor is an employee of the carrier within the coverage of the North Carolina Compensation Act. Further, if the owner-lessor be considered an independent contractor, but had less than five employees and no compensation insurance coverage, the carrier would still be liable under this section. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

§ 97-22. Notice of accident to employer.

Cross Reference.—As to failure of minor to give notice of claim, see § 97-22 and the annotation thereto.

Cited in *Duncan v. Carpenter*, 233 N. C.

422, 64 S. E. (2d) 410 (1951); *Biddix v. Rex Mills, Inc.*, 237 N. C. 660, 75 S. E. (2d) 777 (1953).

§ 97-23. What notice is to contain; defects no bar; notice personally or by registered letter.

Cited in *Biddix v. Rex Mills, Inc.*, 237 N. C. 660, 75 S. E. (2d) 777 (1953); *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

§ 97-24. Right to compensation barred after two years; destruction of records.—(a) The right to compensation under this article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter.

(1955, c. 1026, s. 12.)

Cross Reference.—As to tolling of limitation period by the signing of a closing receipt, see § 97-47.

Editor's Note.—

The 1955 amendment, effective July 1, 1955, substituted "two years" for "one year" in lines two and three of subsection (a). As the rest of the section was not changed, only subsection (a) is set out.

Session Laws 1957, c. 1396, s. 5, made a futile attempt to amend this section by providing for "striking out the words 'eighteen months' in lines two and three of subsection (2) of said G. S. 97-24 and inserting in lieu thereof the words 'one year'". There is no subsection (2) in the section nor any language therein to which such purported amendment could apply.

Payment of Medical Expenses by Employer Does Not Constitute Waiver of Limitation.—See note to § 97-25.

Claims Not Filed within Time Prescribed.—

Commission's finding that the employee did not file his claim within twelve months from date of accident, and that claim was therefore barred, was affirmed on appeal. *Coats v. B. & R. Wilson, Inc.*, 244 N. C. 76, 92 S. E. (2d) 446 (1956).

Cited in *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951); *Harris v. Asheville Contracting Co.*, 210 N. C. 715, 83 S. E. (2d) 802 (1954); *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

§ 97-25. Medical treatment and supplies.—Medical, surgical, hospital, nursing services, medicines, sick travel, and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

(1955, c. 1026, s. 2.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, inserted in line two of the first paragraph the words "nursing services, medicines, sick travel." As the rest of the section was not changed, only the first paragraph is set out.

Payment of Medical Expenses Does Not Constitute Admission or Waiver by Employer.—The Workmen's Compensation Act, by this section, requires or permits an employer to pay bills for medical and other treatment of an employee, and the payment of such bills, approved by the Commission, even without formal denial of liability, cannot have the effect of an admission of liability by the employer or constitute a waiver of the requirement of filing timely claim by the employee as pro-

vided in § 97-24. Such facts are insufficient to invoke the doctrine of estoppel. *Biddix v. Rex Mills, Inc.*, 237 N. C. 660, 75 S. E. (2d) 777 (1953).

Relaxation of Rule as to Fees for Practical Nursing.—Industrial Commission was not entitled to relax its rule that fees for practical nursing would not be allowed unless written authority was obtained from Commission in advance, so as to award mother of injured employee an amount for practical nursing services rendered to injured employee, where record showed that Commission never gave its written or oral permission for rendition of services. *Hatchett v. Hitchcock Corp.*, 240 N. C. 591, 83 S. E. (2d) 539 (1954).

§ 97-26. Liability for medical treatment measured by average cost in community; malpractice of physician. — The pecuniary liability of the employer for medical, surgical, hospital service, nursing services, medicines, sick travel or other treatment required, when ordered by the Commission, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person, and the employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such. (1929, c. 120, s. 26; 1955, c. 1026, s. 3.)

Editor's Note. — The 1955 amendment, effective July 1, 1955, inserted near the beginning of the section the words "nursing services, medicines, sick travel."

Approval of Bills Where Liability for Medical Care Voluntarily Incurred by Employer. — When liability for the medical care of an employee who has suffered an accident is voluntarily incurred by the employer, the bills therefor must be ap-

proved by the Commission before the employer can demand reimbursement from its insurance carrier. In this manner such expenditures are kept within the schedule of fees and charges adopted by the Commission. *Biddix v. Rex Mills, Inc.*, 237 N. C. 660, 75 S. E. (2d) 777 (1953).

Stated in *Hatchett v. Hitchcock Corp.*, 240 N. C. 591, 83 S. E. (2d) 539 (1954).

§ 97-28. Seven-day waiting period; exceptions.

Cited in *Tucker v. Lowdermilk*, 233 N. C. 185, 63 S. E. (2d) 109 (1951).

§ 97-29. Compensation rates for total incapacity. — Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty per cent of his average weekly wages, but not more than thirty-five dollars (\$35.00), nor less than ten dollars per week during not more than four hundred weeks from the date of the injury, provided that the total amount of compensation paid shall not exceed ten thousand dollars.

In cases in which total and permanent disability results from paralysis resulting from an injury to the brain or spinal cord or from loss of mental capacity resulting from an injury to the brain, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care shall be paid during the life of the injured employee, without regard to the four hundred weeks limited herein or to the ten thousand dollars maximum compensation under this article. In all such cases, however, if death results from the injury and within three hundred and fifty weeks from the date of accident and before the compensation paid totals ten thousand dollars, then compensation shall be paid for the remainder of the three hundred and fifty week period or until the full ten thousand dollars, including the four hundred dollar funeral benefit, shall have been paid, whichever is sooner, as in any other death case.

The weekly compensation payment for members of the North Carolina National Guard and the North Carolina State Guard shall be the maximum amount of thirty-five dollars (\$35.00) per week as fixed herein. The weekly compensation payment for deputy sheriffs, or those acting in the capacity of deputy sheriffs, who serve upon a fee basis, shall be ten dollars a week as fixed herein, provided that the last sentence herein shall not apply to Ashe, Avery, Bladen, Carteret, Caswell, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Union, Watauga, and Wilkes counties.

An officer or member of the State Highway Patrol shall not be awarded any weekly compensation under the provisions of this section for the first two years of any incapacity resulting from an injury by accident arising out of and in the

course of the performance by him of his official duties if, during such incapacity, he continues to be an officer or member of the State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled under the provisions of this article. (1929, c. 120, s. 29; 1939, c. 277, s. 1; 1943, c. 502, s. 3; c. 543; c. 672, s. 2; 1945, c. 766; 1947, c. 823; 1949, c. 1017; 1951, c. 70, s. 1; 1953, c. 1135, s. 1; 1953, c. 1195, s. 2; 1955, c. 1026, s. 5; 1957, c. 1217.)

Editor's Note.—

The 1951 amendment substituted "thirty dollars" for "twenty-four dollars" in the first paragraph, and changed six thousand dollars to eight thousand dollars in the paragraph. It also substituted "thirty dollars" for "twenty-four dollars" in the first sentence of the third paragraph.

The first 1953 amendment, effective July 1, 1953, rewrote the first three paragraphs and made this section applicable to brain injury cases. The second 1953 amendment added the last paragraph.

§ 97-30. Partial incapacity.—Except as otherwise provided in § 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than thirty-five dollars (\$35.00) a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability. An officer or member of the State Highway Patrol shall not be awarded any weekly compensation under the provisions of this section for the first two years of any incapacity resulting from an injury by accident arising out of and in the course of the performance by him of his official duties if, during such incapacity, he continues to be an officer or member of the State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled under the provisions of this article. (1929, c. 120, s. 30; 1943, c. 502, s. 4; 1947, c. 823; 1951, c. 70, s. 2; 1953, c. 1195, s. 3; 1955, c. 1026, s. 6; 1957, c. 1217.)

Editor's Note.—

The 1951 amendment substituted "thirty dollars" for "twenty-four dollars" in the first sentence.

The 1953 amendment added the last sentence.

The 1955 amendment, effective July 1, 1955, substituted "thirty-two dollars and fifty cents" for "thirty dollars."

The 1957 amendment substituted "thirty-five dollars (\$35.00)" for "thirty-two dollars and fifty cents" in lines six and seven.

Retention of Jurisdiction by Commis-

sion.—The 1955 amendment, effective July 1, 1955, increased the compensation rates in the first three paragraphs and inserted in the second paragraph the words "nursing services, medicines, sick travel."

The 1957 amendment substituted "thirty-five dollars (\$35.00)" for "thirty-two dollars and fifty cents" in the first and third paragraphs.

Cited in *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951); *Brinkley v. United Feldspar & Minerals Corp.*, 246 N. C. 17, 97 S. E. (2d) 419 (1957).

tion.—In *Harris v. Asheville Contr. Co.*, 240 N. C. 715, 83 S. E. (2d) 802 (1954), the court again stated that the Commission was without jurisdiction to retain jurisdiction for 300 weeks. *Branham v. Denny Roll & Panel Co.*, 223 N. C. 233, 25 S. E. (2d) 865 (1943), distinguished.

Quoted in part in *Hill v. DuBose*, 234 N. C. 446, 67 S. E. (2d) 371 (1951).

Cited in *Dail v. Kellex Corp.*, 233 N. C. 446, 64 S. E. (2d) 438 (1951); *Honeycutt v. Carolina Asbestos Co.*, 235 N. C. 471, 70 S. E. (2d) 426 (1952).

§ 97-31. Schedule of injuries; rate and period of compensation.

(t) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye or for partial loss of hearing shall be such proportion of the periods of payment above provided for total loss as such partial loss bears to total loss, except that in cases where there is eighty-five per centum, or more, loss of

vision in any eye, this shall be deemed "industrial blindness" and compensated as for total loss of vision of such eye.

(v) In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed three thousand five hundred dollars. In case of enucleation where an artificial eye cannot be fitted and used, the Industrial Commission may award compensation as for serious facial disfigurement.

(w) In case of serious bodily disfigurement, including the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under the preceding subsections, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the above schedule, the Industrial Commission may award proper and equitable compensation not to exceed three thousand five hundred dollars (\$3,500.00); provided, that the Industrial Commission may not make an award for permanent partial or permanent total disability, and also for bodily disfigurement resulting from loss of, or permanent injury to, any internal organ, the loss of which, resulted in such permanent partial or permanent total disability.

(x) For the total loss of use of the back, sixty per centum (60%) of the average weekly wages during 300 weeks. The compensation for partial loss of use of the back shall be such proportion of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is seventy-five per centum (75%) or more loss of use of the back, in which event the injured employee shall be deemed to have suffered "total industrial disability" and compensated as for total loss of use of the back. (1929, c. 120, s. 31; 1931, c. 164; 1943, c. 502, s. 2; 1955, c. 1026, s. 7; 1957, c. 1221; c. 1396, ss. 2, 3.)

Cross Reference. — As to necessity of showing disability when injury is not within schedule of this section, see note to § 97-2.

Editor's Note.—

The 1955 amendment, effective July 1, 1955, inserted in subsection (t) the words "or for partial loss of hearing," and added subsection (x).

The first 1957 amendment increased the amount mentioned in subsection (v) from two thousand five hundred dollars to three thousand five hundred dollars. It also rewrote subsection (w). The amendatory act provides that it shall apply only to injuries sustained on or after June 10, 1957.

The second 1957 amendment substituted in subsections (t) and (x) the words "periods of payment" for the word "payments."

As the rest of the section was not changed, only subsections (t), (v), (w) and (x) are set out.

Provisions Are Mandatory.—The language of this section is clear, and its provisions are mandatory, and the Commission is without authority to deny the compensation for which it provides on the ground the employee is earning as much as he was earning before the injury. *Watts v. Brewer*, 243 N. C. 422, 90 S. E. (2d) 764 (1956).

Meaning of "Shall Be Deemed."—The

words "shall be deemed," as used in the opening paragraph of this section, mean "shall be held," "shall be adjudged," "shall be determined," "shall be treated as if," "shall be construed." *Watts v. Brewer*, 243 N. C. 422, 90 S. E. (2d) 764 (1956).

Amount Awarded for Loss of Vision.—Under this section a workman who suffers a total loss of an eye is entitled to 60% of his average weekly wages during 120 weeks in addition to the compensation paid during the healing period. If, however, the injury produces only a partial loss of vision, he is entitled to receive that portion of the compensation provided in subsection (q) that the percentage of loss of vision bears to a total loss. *Watts v. Brewer*, 243 N. C. 422, 90 S. E. (2d) 764 (1956).

In case of the loss of an eye the Commission must conclusively presume and adjudge that the disability resulting therefrom continued or will continue for 120 weeks beyond the healing period. *Watts v. Brewer*, 243 N. C. 422, 90 S. E. (2d) 764 (1956).

Award for 75% Impairment of Use of Left Hand Upheld.—See *Pridmore v. McCrary*, 245 N. C. 544, 96 S. E. (2d) 843 (1957).

Cited in *Anderson v. Northwestern Motor Co.*, 233 N. C. 372, 64 S. E. (2d) 265 (1951); *Marshburn v. Patterson*, 241 N.

C. 441, 85 S. E. (2d) 683 (1955); *Smith v. Red Cross*, 245 N. C. 116, 95 S. E. (2d) 559 Mecklenburg County Chapter American (1956).

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

Cited in *Honeycutt v. Carolina Asbestos Co.*, 235 N. C. 471, 70 S. E. (2d) 426 (1952).

§ 97-36. Accidents taking place outside State; employee receiving compensation from another state.

Concurrence of Three Factors, etc.—

In accord with original. See *Aylor v. Barnes*, 242 N. C. 223, 87 S. E. (2d) 269 (1955).

Where the accident, resulting in an employee's death, occurs in another state, but the contract of employment was made in this State between the resident em-

ployee and the resident employer, and the contract of employment is not expressly for services exclusively outside of the State, the North Carolina Industrial Commission has jurisdiction. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

§ 97-38. Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependents.—If death results approximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident, the employer shall pay or cause to be paid, subject to the provisions of the other sections of this article, weekly payments of compensation equal to sixty per cent (60%) of the average weekly wages of the deceased employee at the time of the accident, but not more than thirty-five dollars (\$35.00), nor less than ten dollars, per week for a period of three hundred and fifty weeks from the date of the accident, and burial expenses not exceeding four hundred dollars, to the person or persons entitled thereto as follows:

(1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.

(2) If there is no person wholly dependent, then any person partially dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive a weekly payment of compensation computed as hereinabove provided, but such weekly payment shall be the same proportion of the weekly compensation provided for a whole dependent as the amount annually contributed by the deceased employee to the support of such partial dependent bears to the annual earnings of the deceased at the time of the accident.

(3) If there is no person wholly dependent, and the person or all persons partially dependent is or are within the classes of persons defined as "next of kin" in G. S. 97-40, whether or not such persons or such classes of persons are of kin to the deceased employee in equal degree, and all so elect, he or they may take, share and share alike, the commuted value of the amount provided for whole dependents in (1) above instead of the proportional payment provided for partial dependents in (2) above; provided, that the election herein provided may be exercised on behalf of any infant partial dependent by a duly qualified guardian; provided, further, that the Industrial Commission may, in its discretion, permit a parent or person standing in loco parentis to such infant to exercise such option in its behalf, the award to be payable only to a duly qualified guardian except as in this article otherwise provided; and provided, further, that if such election is exercised by or on behalf of more than one person, then they shall take the commuted amount in equal shares.

When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such pay-

ments, but shall not continue more than 350 weeks from the date of the injury.

Compensation payable under this article to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amount as provided for residents, except that dependents in any foreign country except Canada shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to the surviving father or mother whom the employee has supported, either in whole or in part for a period of one year prior to the date of the injury; provided, that the Commission may, in its discretion, or, upon application of the employer or insurance carrier, shall commute all future installments of compensation to be paid to such aliens to their present value and payment of one-half ($\frac{1}{2}$) of such commuted amount to such aliens shall fully acquit the employer and the insurance carrier. (1929, c. 120, s. 38; 1943, c. 163; c. 502, s. 5; 1947, c. 823; 1951, c. 70, s. 3; 1953, c. 53, s. 1; 1955, c. 1026, s. 8; 1957, c. 1217.)

Cross Reference.—

As to effect of payment of lump sum to mother where there was surviving wife, see note to § 97-40.

Editor's Note.—

The 1951 amendment increased the maximum weekly payment from twenty-four to thirty dollars, and the 1953 amendment rewrote the section.

The 1955 amendment, effective July 1, 1955, increased the maximum and minimum weekly payments and changed the amounts allowed for burial expenses from two hundred to four hundred dollars.

The 1957 amendment substituted "thirty-five dollars (\$35.00)" for "thirty-two dollars and fifty cents" in the introductory paragraph.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 451.

Election by Partial Dependents to Receive Benefits under § 97-40.—The election provided for in the proviso in this section is available when the partial dependents are all next of kin, as defined in § 97-40. *Parsons v. Swift & Co.*, 234 N. C. 580, 68

S. E. (2d) 296 (1951).

The partially dependent widowed mother of the deceased employee and his partially dependent brother may not elect to take as next of kin, under § 97-40, rather than as partial dependents under this section. *Parsons v. Swift & Co.*, 234 N. C. 580, 68 S. E. (2d) 296 (1951).

Death from Pre-existing Heart Condition Aggravated by Injury.—Findings to the effect that the employee suffered an injury arising out of and in the course of the employment, which injury aggravated a pre-existing heart condition and caused death, will support an award for compensation and burial expenses. *Wyatt v. Sharp*, 239 N. C. 655, 80 S. E. (2d) 762 (1954).

Applied in *Willingham v. Bryan Rock and Sand Co.*, 240 N. C. 281, 82 S. E. (2d) 68 (1954).

Quoted in *Wilson v. Utah Constr. Co.*, 243 N. C. 96, 89 S. E. (2d) 864 (1955).

Cited in *Roth v. McCord*, 232 N. C. 678, 62 S. E. (2d) 64 (1950); *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

The term "in all other cases" in the connection in which it appears in this section means in all cases other than those of widows, widowers, and children, claiming to be dependents of the deceased employee, —dependency shall be determined in accordance with the facts as the facts may be at the time of the accident. Manifestly, a woman living in cohabitation with a man, to whom she is not married, is not within the purview of the term "in all other cases." *Fields v. Hollowell*, 238 N. C. 614, 78 S. E. (2d) 740 (1953).

The common-law wife, etc.

A woman who was living with an employee as his common-law wife at the time

of his death and who was actually wholly dependent upon him for support for some years prior to his death by accident arising out of and in the course of his employment is not a dependent of the deceased employee within the purview of this section, and is not entitled to any part of the compensation payable under the provisions of the Workmen's Compensation Act. *Fields v. Hollowell*, 238 N. C. 614, 78 S. E. (2d) 740 (1953.)

Children of employee's common-law wife who were not the children of the employee were not entitled to share compensation with employee's legal widow and their children, even though supported by the em-

ployee, since act of maintenance was voluntary and was not a legal obligation. *Wilson v. Utah Constr. Co.*, 243 N. C. 96, 89 S. E. (2d) 864 (1955).

A child born to employee's common-law wife shortly after death of employee was not entitled to compensation where there was no evidence that employee had ac-

knowledged the child. *Wilson v. Utah Constr. Co.*, 243 N. C. 96, 89 S. E. (2d) 864 (1955).

Applied in *Wyatt v. Sharp*, 239 N. C. 655, 80 S. E. (2d) 762 (1954).

Cited in *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

§ 97-40. Commutation of benefit and payment on absence of dependents.—Subject to the provisions of G. S. 97-38, if the deceased employee leaves neither whole nor partial dependents, then the compensation which would be payable under G. S. 97-38 to whole dependents shall be commuted to its present value and paid in a lump sum to the next of kin as herein defined. For purposes of this section and G. S. 97-38, "next of kin" shall include only child, father, mother, brother or sister of the deceased employee. For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section, the order of priority among them shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate. For all such next of kin who were also partially dependent on the deceased employee but who exercise the election provided for partial dependents by G. S. 97-38, the general law applicable to the distribution of the personal estate of persons dying intestate shall not apply and such person or persons, upon the exercise of such election, shall be entitled, share and share alike, to the compensation provided in G. S. 97-38 for whole dependents commuted to its present value and paid in a lump sum.

If the deceased employee leaves neither whole dependents, partial dependents, nor next of kin as hereinabove defined, then said commuted amount hereinabove provided shall be paid to the Industrial Commission to be held and disbursed by it in the following manner:

(1) One-half ($\frac{1}{2}$) thereof shall be retained by the Industrial Commission and paid into the Second Injury Fund.

(2) The other one-half ($\frac{1}{2}$) thereof shall be paid to the personal representative of the deceased to be by him distributed to the next of kin as defined in the statutes of distribution, but if there be no such next of kin then the personal representative shall pay the costs of administration therefrom and pay the balance remaining to the Industrial Commission which shall pay the same into the Second Injury Fund. (1929, c. 120, s. 40; 1931, c. 274, s. 5; c. 319; 1945, c. 766; 1953, c. 53, s. 2; 1953, c. 1135, s. 2.)

Editor's Note.—

The first 1953 amendment struck out the former first paragraph of this section and inserted the provisions now appearing in lieu thereof. The second 1953 amendment, effective July 1, 1953, struck out the former last three paragraphs, relating to the Second Injury Fund, and inserted present § 97-40.1.

"Next of Kin."—It seems manifest that the General Assembly in defining "next of kin" for the purpose of this section intended to limit recovery to persons within that group, to the exclusion of other more remote next of kin under the statute of distribution. Indeed, the "next of kin" are named in the alternative—clearly indicating that it was intended that those named should not necessarily be of equal degree. *Parsons v. Swift & Co.*, 234 N. C. 580, 68

S. E. (2d) 296 (1951).

Payment to Next of Kin Where Employee Left Wife Surviving.—When Commission entered an award in favor of mother as next of kin and directed that commuted value of the award be paid to her, and afterward it was discovered that deceased employee left surviving a wife, the Commission did not have jurisdiction to direct the mother to pay the sum awarded to the wife. *Green v. Briley*, 242 N. C. 196, 87 S. E. (2d) 213 (1955).

Applied in *Fields v. Hollowell*, 238 N. C. 614, 78 S. E. (2d) 740 (1953).

Stated in *Wilson v. Utah Constr. Co.*, 243 N. C. 96, 89 S. E. (2d) 864 (1955).

Cited in *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

§ 97-40.1. **Second Injury Fund.**—There is hereby created a fund to be known as the “Second Injury Fund,” to be held and disbursed by the Industrial Commission as hereinafter provided.

For the purpose of providing money for said fund the Industrial Commission may assess against the employer or its insurance carrier the payment of not to exceed twenty-five dollars for the loss, or loss of use, of each minor member in every case of a permanent partial disability where there is such loss, and shall assess not to exceed one hundred dollars for fifty per cent or more loss or loss of use of each major member, defined as foot, leg, hand, arm, eye, or hearing.

In addition to the assessments hereinabove provided for, the Commission shall also deposit in said fund all moneys received by it for the Second Injury Fund under the provisions of G. S. 97-40.

The Industrial Commission shall disburse moneys from the Second Injury Fund in unusual cases of second injuries as follows:

(1) To pay additional compensation in cases of second injuries referred to G. S. 97-33; provided, however, that the original injury and the subsequent injury were each at least twenty per cent of the entire member; and, provided further, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident.

(2) To pay additional compensation to an injured employee who has sustained permanent total disability in the manner referred to in the second paragraph of G. S. 97-35, which shall be in addition to the compensation awarded under said section; provided, however, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the compensation for permanent total disability as provided for in G. S. 97-29.

(3) To pay compensation and medical expense in cases of permanent and total disability resulting from an injury to the brain or spinal cord in the manner and to the extent hereinafter provided.

The additional compensation and treatment expenses herein provided for shall be paid out of the Second Injury Fund exclusively and only to the extent to which the assets of such fund shall permit.

In addition to payments for the purposes hereinabove set forth, the Industrial Commission may, in its discretion, make payments from said fund for the following purposes and under the following conditions:

(a) In any case in which total and permanent disability due to paralysis or loss of mental capacity has resulted from an injury to the brain or spinal cord, the Industrial Commission may, in its discretion enter an award and pay compensation and reasonable and necessary medical, nursing, hospital, institutional, equipment, and other treatment expenses from the Second Injury Fund during the life of the injured employee in cases where the injury giving rise to such disability occurred prior to July 1, 1953, and the last payment of compensation has been made subsequent to January 1, 1941. Such compensation and medical expense shall be paid only from April 4, 1947, and after the employer's liability for compensation and treatment expense has ended, and in every case in which the injury resulting in paralysis due to injury to the spinal cord occurred subsequent to April 4, 1947, and prior to July 1, 1953, the liability of the employer and his insurance carrier to pay compensation and medical expense during the life of the injured employee shall not be affected by this section.

(b) When compensation is allowed from the fund in any case under (a) above, the Commission may in its discretion authorize payment of medical, nursing, hospital, equipment, and other treatment expenses incurred prior to the date compensation is allowed and after the employer's liability has ended if funds are reasonably available in the Second Injury Fund for such purpose after paying claims in cases of second injuries as specified in G. S. 97-35 and 97-33.

Should the fund be insufficient to pay both compensation and treatment expenses, then the said expenses may, in the discretion of the Commission, be paid first and compensation thereafter according to the reasonable availability of funds in the fund. (1953, c. 1153, s. 2; 1957, c. 1396, s. 4.)

Cross Reference.—See note under § 97-40.

Editor's Note.—The word "section" at the end of paragraph (a) appears in the printed act as "amendment".

The 1957 amendment changed the second paragraph by substituting "may" for "shall" in line two, and by inserting "not to exceed" before "twenty-five" and "one hundred."

§ 97-41. Total compensation not to exceed \$10,000.—In cases where permanent total disability results from paralysis or loss of mental capacity caused by an injury to the brain or spinal cord, compensation shall be payable for the life of the injured employee as provided by G. S. 97-29. In all other cases, the total compensation paid, including the funeral benefit, shall not exceed ten thousand dollars (1929, c. 120, s. 41; 1947, c. 823; 1951, c. 70, s. 4; 1953, c. 1135, s. 3; 1955, c. 1026, s. 9.)

Editor's Note.—

The 1951 amendment increased the maximum compensation from \$6,000 to \$8,000.

The 1953 amendment, effective July 1, 1953, rewrote this section.

The 1955 amendment, effective July 1,

1955, increased the maximum compensation from \$8,000 to \$10,000.

Applied in *Willingham v. Bryan Rock and Sand Co.*, 240 N. C. 281, 82 S. E. (2d) 68 (1954).

§ 97-47. Change of condition; modification of award.

This section cannot apply unless there has been a previous award of the Commission. If that award directed the payment of both compensation and medical expense, then the injured employee would have one year from the last payment of compensation pursuant to the award in which to file claim for further compensation upon an alleged change of condition. If the award directed the payment of medical bills only, then the injured employee would have one year from the date on which the last payment for medical treatment is made in which to file a claim for further compensation upon an alleged change of condition. *Biddix v. Rex Mills, Inc.*, 237 N. C. 660, 75 S. E. (2d) 777 (1953).

This section has no application except where it is made to appear that previous award has been made by the Industrial Commission. Where the record on appeal to the superior court from an award of the Industrial Commission does not disclose a previous award made to claimant, defendant's contention that the award appealed from cannot be sustained in the absence of a finding of change of condition is untenable. *Penland v. Bird Coal Co.*, 246 N. C. 26, 97 S. E. (2d) 432 (1957).

And it does not apply if the Commission has no jurisdiction of the claim. *Hart v. Thomasville Motors, Inc.*, 244 N. C. 84, 92 S. E. (2d) 673 (1956).

The exception clause added at the end of this section by the 1947 amendment has

no relation to the filing of original claims for compensation or the time within which such claims are to be filed. It relates exclusively to the time within which an employee may file a petition for a review of an award theretofore made, and the time limit within which the review may be had is tolled by the payment of medical bills, if at all, only when such payments are made under the mandate of an award duly entered by the Commission. *Biddix v. Rex Mills, Inc.*, 237 N. C. 660, 75 S. E. (2d) 777 (1953).

Anticipatory Finding of Compensable Disability.—There is nothing in the Workmen's Compensation Act that contemplates or authorizes an anticipatory finding by the Commission that a physical impairment may develop into a compensable disability. Neither does the act vest in the Commission the power to retain jurisdiction of a claim, after compensation has been awarded, merely because some physical impairment suffered by the claimant may, at some time in the future, cause a loss of wages. The Commission is concerned with conditions existing prior to and at the time of the hearing. If such conditions change in the future, to the detriment of the claimant, this section affords the claimant a remedy and fixes the time within which he must seek it. *Dail v. Kellex Corp.*, 233 N. C. 446, 64 S. E. (2d) 438 (1951).

Review of Award for Change of Con-

dition Must Be Made within Twelve Months.—

In accord with 2nd paragraph in original. See *Paris v. Carolina Builders Corp.*, 244 N. C. 35, 92 S. E. (2d) 405 (1956).

The parties entered into an agreement for payment of compensation, approved by the Industrial Commission, which provided for payment of compensation "for necessary weeks" and stipulated that the employee had theretofore returned to work. The employer notified the Commission of final payment under such agreement. It was held that a request for review of the award for changed condition made some sixteen months thereafter is barred since the disability for which compensation was agreed to be paid presumably terminated when the employee returned to work prior to the execution of the agreement, and therefore the phrase of the agreement "for necessary weeks" cannot be enlarged to include the subsequent disability. *Tucker v. Lowdermilk*, 233 N. C. 185, 63 S. E. (2d) 109 (1951).

The agreement for compensation for disability approved by the Commission and the payment made by the carrier followed by the execution of the closing receipt by

§ 97-48. Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer.

Payment in Good Faith Discharges Employer.—Payment of award of compensation to mother was in good faith and discharged the employer, where investigation by employer's carrier prior to hearing revealed that mother and brother were next of kin, and mother and brother testified to the same effect at the hearing,

§ 97-50. Limitation as against minors or mentally incompetent.

Minor Not Barred by Failure to Give Notice of Claim.—A minor dependent under eighteen years of age and who is without guardian, trustee or committee, is not barred during such disability by fail-

§ 97-52. Occupational disease made compensable; "accident" defined.

Purpose of This Section and § 97-53.—Any scheme or plan for the payment of compensation to disabled employees should include those diseases or abnormal conditions of human beings the causative origin of which is occupational in nature. To meet this need the legislature adopted this section and § 97-53. *Henry v. A. C. Lawrence Leather Co.*, 234 N. C. 126, 66 S. E. (2d) 693 (1951).

Injury by Accident and Occupational

plaintiff employee more than one year prior to the filing of application with the Commission for an additional award put the case beyond the time given by this section in which to claim additional compensation. *Smith v. Mecklenburg County Chapter American Red Cross*, 245 N. C. 116, 95 S. E. (2d) 559 (1956).

Date of Last Payment.—The last payment of compensation within the meaning of this section is the date the last check was delivered to and accepted by the employee, and not the date the check was paid by the drawee bank. *Paris v. Carolina Builders Corp.*, 244 N. C. 35, 92 S. E. (2d) 405 (1956).

An employee cannot be allowed twelve months in which to request a review from the last date on which the compensation would have been due had he not elected to accept payment of the award in a lump sum. *Paris v. Carolina Builders Corp.*, 244 N. C. 35, 92 S. E. (2d) 405 (1956).

Applied in *Harris v. Asheville Contracting Co.*, 240 N. C. 715, 83 S. E. (2d) 802 (1954).

Stated in *Green v. Briley*, 242 N. C. 196, 87 S. E. (2d) 213 (1955).

and the Commission judicially determined that mother was entitled to all benefits, notwithstanding the fact that thereafter it was discovered that deceased left surviving a wife in another county. *Green v. Briley*, 242 N. C. 196, 87 S. E. (2d) 213 (1955).

ure to give notice of claim for compensation as required by § 97-22, et seq. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

Disease Distinguished.—An injury by accident, as that term is ordinarily understood, is distinguished from an occupational disease in that the former rises from a definite event, the time and place of which can be fixed, while the latter develops gradually over a long period of time. *Henry v. A. C. Lawrence Leather Co.*, 234 N. C. 126, 66 S. E. (2d) 693 (1951).

Disease Must Be Incident to or Result of Employment.—An award for an occu-

pational disease cannot be sanctioned unless it be shown that the disease was incident to or the result of the particular employment in which the workman was engaged. *Duncan v. Charlotte*, 234 N. C. 86, 66 S. E. (2d) 22 (1951).

If a disease is not a natural result of a particular employment, but is produced by some extrinsic or independent agency, it is in no real sense an occupational disease, and ordinarily may not be imputed to the occupation or employment. *Duncan v. Charlotte*, 234 N. C. 86, 66 S. E. (2d) 22 (1951).

And Only Diseases Mentioned in § 97-53 Are Compensable.—Disablement or death resulting from any "series of events" in

employment shall be treated as the happening of an injury by accident compensable under the Act when and only when such series of events culminates in one of the occupational diseases mentioned in § 97-53. *Henry v. A. C. Lawrence Leather Co.*, 234 N. C. 126, 66 S. E. (2d) 693 (1951).

Applied in *Willingham v. Bryan Rock and Sand Co.*, 240 N. C. 281, 82 S. E. (2d) 68 (1954).

Quoted in *Hensley v. Farmers Federation Cooperative*, 246 N. C. 274, 98 S. E. (2d) 289 (1957).

Cited in *Henry v. Lawrence Leather Co.*, 231 N. C. 477, 57 S. E. (2d) 760 (1950); *Midkiff v. North Carolina Granite Corp.*, 235 N. C. 149, 69 S. E. (2d) 166 (1952).

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.—The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this article:

- (1) Anthrax.
- (2) Arsenic poisoning.
- (3) Brass poisoning.
- (4) Zinc poisoning.
- (5) Manganese poisoning.
- (6) Lead poisoning. Provided the employee shall have been exposed to the hazard of lead poisoning for at least thirty days in the preceding twelve months' period, and; provided further only the employer in whose employment such employee was last injuriously exposed shall be liable.
- (7) Mercury poisoning.
- (8) Phosphorous poisoning.
- (9) Poisoning by carbon bisulphide, methanol, naphtha or volatile halogenated hydrocarbons.
- (10) Chrome ulceration.
- (11) Compressed-air illness.
- (12) Poisoning by benzol, or by nitro and amido derivatives of benzol (dinitrolbenzol, anilin, and others).
- (13) Infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances.
- (14) Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound, product, or residue of any of these substances.
- (15) Radium poisoning or injury by X-rays.
- (16) Blisters due to use of tools or appliances in the employment.
- (17) Bursitis due to intermittent pressure in the employment.
- (18) Miner's nystagmus.
- (19) Bone felon due to constant or intermittent pressure in employment.
- (20) Synovitis, caused by trauma in employment.
- (21) Tenosynovitis, caused by trauma in employment.
- (22) Carbon monoxide poisoning.
- (23) Poisoning by sulphuric, hydrochloric or hydrofluoric acid.
- (24) Asbestosis.
- (25) Silicosis.
- (26) Psittacosis.
- (27) Undulant fever.

Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals. (1935, c. 123; 1949, c. 1078; 1953, c. 1112; 1955, c. 1026, s. 10; 1957, c. 1396, s. 6.)

Cross Reference.—See note to § 97-52.

Editor's Note.—

The 1953 amendment added subsection (27) immediately preceding the last paragraph.

The 1955 amendment, effective July 1, 1955, deleted from subsection (17) the words "of the knee or elbow" formerly appearing after "Bursitis."

The 1957 amendment added "and any other materials or substances" at the end of subsection (13). It deleted former subsection (26) relating to coronary thrombosis, etc., of members of fire departments as occupational diseases, and inserted "(26). Psittacosis" in lieu thereof.

Only those occupational diseases specifically designated are compensable under the Workmen's Compensation Act. *Henry v. Lawrence Leather Co.*, 231 N. C. 477, 57 S. E. (2d) 760 (1950).

"Occupational Disease" Defined. — The legislature, in listing those diseases which are to be deemed occupational in character, was fully aware of the meaning of the term "occupational disease." Indeed, it in effect defined the term in § 97-52 as a diseased condition caused by a series of events, of a similar or like nature, occurring regularly or at frequent intervals over an extended period of time, in employment. The term has likewise been defined as a diseased condition arising gradually from the character of the employee's work. These are the accepted definitions of the term. *Henry v. A. C. Lawrence Leather Co.*, 234 N. C. 126, 66 S. E. (2d) 693 (1951).

Technical Words to Be Accorded Their Technical Connotation. — In designating those diseases and conditions which are to be deemed occupational in origin and compensable under the Act, the legislature, for the most part, used technical terms. Anthrax, bursitis, asbestosis, silicosis, nystagmus, synovitis, tenosynovitis are technical words. In construing the Act the court must accord them their technical connotation. *Henry v. A. C. Lawrence Leather Co.*, 234 N. C. 126, 66 S. E. (2d) 693 (1951).

Tenosynovitis, Caused by Trauma in Employment.—Synovitis is the inflammation of a synovial membrane and tenosynovitis or tendosynovitis is the inflammation of a synovial membrane which forms the protective sheath that encloses the tendon.

It is sometimes used to denote the inflammation of both the sheath and the tendon. *Henry v. A. C. Lawrence Leather Co.*, 234 N. C. 126, 66 S. E. (2d) 693 (1951).

The causative origin of tenosynovitis is either infection or trauma. The clause "caused by trauma in employment" was used by the legislature to modify the word "tenosynovitis" so as to include the occupational and exclude the infectious type—to include the traumatic and exclude the idiopathic. *Henry v. A. C. Lawrence Leather Co.*, 234 N. C. 126, 66 S. E. (2d) 693 (1951).

In using the modifying phrase, "caused by trauma in employment" the legislature necessarily meant a series of events in employment occurring regularly, or at frequent intervals, over an extended period of time, and culminating in the condition technically known as tenosynovitis. *Henry v. A. C. Lawrence Leather Co.*, 234 N. C. 126, 66 S. E. (2d) 693 (1951).

A single blow on the arm might bruise the extensor tendons to such an extent as to cause temporary tenosynovitis. The resulting condition would be properly termed an injury by accident caused by trauma. But it would not constitute an occupational disease, for, an occupational disease is a diseased or morbid condition which develops gradually, and is produced by a series of events in employment occurring over a period of time. *Henry v. A. C. Lawrence Leather Co.*, 234 N. C. 126, 66 S. E. (2d) 693 (1951).

Tenosynovitis attributable to repeated strain or stress on the extensor tendons of claimant's arms incident to the performance of the duties of his employment is "caused by trauma in employment" and is an occupational disease compensable under the provisions of this section, since "trauma" in its technical sense is not limited to injuries resulting from external force or violence. *Henry v. A. C. Lawrence Leather Co.*, 234 N. C. 126, 66 S. E. (2d) 693 (1951).

Silicosis is an inflammatory disease of the lungs due to the inhalation of particles of silicon dioxide. It is incurable and is one of the most disabling occupational diseases because it makes the lungs susceptible to other infection, particularly tuberculosis. According to the textbook writers, it has been definitely determined that the

removal of a man, who has silicosis, from silica exposure, does not stop the progress of the disease at once, but that fibrotic changes continue to develop for another one or two years. *Singleton v. D. T. Vance Mica Co.*, 235 N. C. 315, 69 S. E. (2d) 707 (1952).

Heart Disease.—

In accord with original. See *Duncan v. Charlotte*, 234 N. C. 86, 66 S. E. (2d) 22 (1951).

A dermatitis resulting from contact with gloves made of commercial rubber is not an occupational disease compensable under the Workmen's Compensation Act. *Henry v. Lawrence Leather Co.*, 231 N. C. 477, 57 S. E. (2d) 760 (1950).

Subsection 26 Is Unconstitutional.—

Subsection 26 of this section seeks to confer upon firemen a special privilege not accorded other municipal employees, nor to employees in private industry. It places on the taxpayers a burden which the Con-

stitution declares it was not intended for them to bear. It creates for firemen substantial financial benefits, to be paid from the public treasury under the guise of workmen's compensation benefits, without establishing an occupational disease as the usual incident or result of the particular employment. Any such payment is in direct conflict with the constitutional prohibition (Art. I, § 7) against separate emoluments and special privileges, and the legislature has no power to authorize a municipal corporation to pay any such gratuity to a particular class of its employees. *Duncan v. Charlotte*, 234 N. C. 86, 66 S. E. (2d) 22 (1951), commented on in 30 N. C. Law Rev. 93. See *Davis v. Winston-Salem*, 234 N. C. 95, 66 S. E. (2d) 28 (1951).

Cited in *Johnson v. Erwin Cotton Mills Co.*, 232 N. C. 321, 59 S. E. (2d) 828 (1950); *Autrey v. Victor Mica Co.*, 234 N. C. 400, 67 S. E. (2d) 383 (1951).

§ 97-54. "Disablement" defined.—The terms "disablement" as used in this article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated because of asbestosis or silicosis to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis; but in all other cases of occupational disease "disablement" shall be equivalent to "disability" as defined in G. S. 97-2 (i). (1935, c. 123; 1955, c. 525, s. 1.)

Editor's Note.—The 1955 amendment rewrote this section.

Criterion of Disability in Cases of Asbestosis and Silicosis.—

In accord with original. See *Singleton v. D. T. Vance Mica Co.*, 235 N. C. 315, 69 S. E. (2d) 707 (1952); *Honeycutt v. Carolina Asbestos Co.*, 235 N. C. 471, 70 S. E. (2d) 426 (1952).

It is clear that "disability" resulting from asbestosis and silicosis, as defined in this section, is not synonymous with its meaning as defined in § 97-2 (i). *Honeycutt v. Carolina Asbestos Co.*, 235 N. C. 471, 70 S. E. (2d) 426 (1952).

"Disablement" from silicosis and asbestosis is defined in unambiguous terms by this section and under the statute "the last occupation in which remuneratively employed" is not synonymous with the "place of last injurious exposure" nor does "disablement" mean disability to perform the duties of employment at the place of last exposure. *Huskins v. United Feldspar Corp.*, 241 N. C. 128, 84 S. E. (2d) 645 (1954).

Employee Compensated as for Total Disability.—When an employee becomes incapacitated to work as the result of having developed asbestosis or silicosis, as defined in this section, it was the legislative intent that he should be compensated

as for total disability in accord with the provisions of our Workmen's Compensation Act. Otherwise, the provisions of this section are meaningless. *Honeycutt v. Carolina Asbestos Co.*, 235 N. C. 471, 70 S. E. (2d) 426 (1952).

An employee does not contract or develop asbestosis or silicosis in a few weeks or months. These diseases develop as the result of exposure for many years to asbestos dust or dust of silica. Both diseases, according to the textbook writers, are incurable and usually result in total permanent disability. Therefore, it would seem that the victims of these incurable occupational diseases constitute a legitimate burden on the industries in which they were exposed to the hazards that produced their disablement. Such was the intent of the legislature. No provision was made for their rehabilitation. Rehabilitation is available only to an employee found by the Industrial Commission to be affected by asbestosis or silicosis but not actually disabled thereby [§ 97-61]. *Honeycutt v. Carolina Asbestos Co.*, 235 N. C. 471, 70 S. E. (2d) 426 (1952).

Evidence of Disability from Silicosis.—Due to the nature of silicosis, it is essential to establish the presence of the disease by competent medical authority. But, where it has been established that a per-

son who has been exposed to free silica dust has developed silicosis to the extent that it may be disabling, testimony other than that of a medical expert may be admitted and considered in determining when such person actually became disabled to work or disabled "from performing normal labor in his last occupation in which remuneratively employed." Certainly, a victim of silicosis is competent to testify to his lessened capacity to work, his shortness of breath, the effect that physical exertion has upon him—all of which are normal symptoms of silicosis. *Singleton v. D. T. Vance Mica Co.*, 235 N. C. 315, 69 S. E. (2d) 707 (1952).

Medical Testimony Necessary to Establish "Disablement."—Evidence tending to establish "disablement," as that term is used in the statute in reference to silicosis, must be supported by medical testimony, and the finding of the competent medical authority must be to the effect that disablement occurred within two years from the last exposure. *Huskins v. United Feldspar Corp.*, 241 N. C. 128, 84 S. E. (2d) 645 (1954).

"Last Occupation in Which Remuneratively Employed."—An employee is actually disabled by reason of silicosis when by reason of this disease he is incapable of continuing to perform the normal labor incident to the employment in which he is then engaged with substantial regularity. This definition does not include odd jobs of a trifling nature which the employee may be driven to perform irregularly as a result of economic necessity. *Huskins v. United Feldspar Corp.*, 241 N. C. 128, 84 S. E. (2d) 645 (1954).

"Disability" resulting from asbestosis or silicosis means the event of becoming actually incapacitated from performing

normal labor in the last occupation in which remuneratively employed. The last occupation in which remuneratively employed may be one wholly separate and apart from the employment in which the employee was last exposed to the hazards of silicosis. *Brinkley v. United Feldspar & Minerals Corp.*, 246 N. C. 17, 97 S. E. (2d) 419 (1957).

Finding Entitling Employee to Compensation.—If the Industrial Commission finds that an employee is actually incapacitated because of silicosis from performing normal labor in the last occupation in which he was remuneratively employed, the employee is entitled to ordinary compensation under the general provisions of the Workmen's Compensation Act, unless the Industrial Commission further finds that there is a reasonable basis for the conclusion that the employee possesses the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of asbestosis and silicosis. *Young v. Whitehall Co.*, 229 N. C. 360, 49 S. E. (2d) 797.

Evidence Sufficient to Show Claimant Disabled.—See *Autrey v. Victor Mica Co.*, 234 N. C. 400, 67 S. E. (2d) 383 (1951); *Singleton v. D. T. Vance Mica Co.*, 235 N. C. 315, 69 S. E. (2d) 707 (1952).

Evidence Insufficient to Show Disablement Occurring within Two Years from Last Exposure.—See *Huskins v. United Feldspar Corp.*, 241 N. C. 128, 84 S. E. (2d) 645 (1954).

Applied in *Willingham v. Bryan Rock and Sand Co.*, 240 N. C. 281, 82 S. E. (2d) 68 (1954).

Quoted in *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

§ 97-55. "Disability" defined.

Quoted in *Honeycutt v. Carolina Asbestos Co.*, 235 N. C. 471, 70 S. E. (2d) 426 (1952).

§ 97-57. Employer liable.—In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as thirty working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious; provided, however, that in the event an insurance carrier has been on the risk for a period of time during which an employee has been injuriously exposed to the hazards of asbestosis or silicosis, and if after insurance carrier goes off the risk said employee is further exposed to the hazards of asbestosis or silicosis, although not

so exposed for a period of thirty (30) days or parts thereof so as to constitute a further injurious exposure, such carrier shall, nevertheless, be liable. (1935, c. 123; 1945, c. 762; 1957, c. 1396, s. 7.)

Editor's Note.—

The 1957 amendment added the proviso at the end of the section.

Section Negatives Comparative Responsibility of Successive Employers and Insurance Carriers.—Any suggestion of comparative responsibility as between successive employers and their respective carriers, or as between successive carriers for the same employer, is dispelled by the plain language of this section. The liability is upon the employer and carrier on the risk when the employee was "last injuriously exposed" to the hazards of silicosis, as that expression is here defined. *Stewart v. Duncan*, 239 N. C. 640, 80 S. E. (2d) 764 (1954).

Where Employee Was Advised That He Had Silicosis before Expiration of 30-Day Period.—Where the evidence supports findings of the Industrial Commission that an employee suffering disability from silicosis was last injuriously exposed to the hazards of the disease for thirty working days within seven consecutive calendar months while in the employment of defendant, this section places liability therefore upon such employer and his insurance carrier during that period, and the mere fact that the employee was advised that he had silicosis

prior to the expiration of this 30-day period but continued for a short time to perform his same work is insufficient alone to sustain the insurance carrier's contention that his employment after the discovery of the disease was in bad faith to make the loss fall upon it. *Stewart v. Duncan*, 239 N. C. 640, 80 S. E. (2d) 764 (1954).

Liability of Insurance Carrier.—

Where compensation insurer carried risk for employer from 1947 through Jan. 31, 1953, and employer did not carry insurance from Feb. 1, 1953 through Feb. 19, 1953, insurer was liable for at least a pro rata part of award based on finding that employee became disabled by silicosis on Feb. 19, 1953, the last date the employee was remuneratively employed by employer. *Mayberry v. Oakboro Granite & Marble Co.*, 243 N. C. 281, 90 S. E. (2d) 511 (1955).

Applied in *Singleton v. D. T. Vance Mica Co.*, 235 N. C. 315, 69 S. E. (2d) 707 (1952); *Willingham v. Bryan Rock and Sand Co.*, 240 N. C. 281, 82 S. E. (2d) 68 (1954).

Cited in *Autrey v. Victor Mica Co.*, 234 N. C. 400, 67 S. E. (2d) 383 (1951).

§ 97-58. Claims for certain diseases restricted; time limit for filing claims.—(a) Except as otherwise provided in G. S. 97-61.6, an employer shall not be liable for any compensation for asbestosis or silicosis or lead poisoning unless disablement or death results within two years after the last exposure to such disease, or, in case of death, unless death follows continuous disablement from such disease, commencing within the period of two years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure in the case of lead poisoning, or 350 weeks in the case of asbestosis or silicosis.

(1955, c. 525, s. 6.)

Editor's Note.—The 1955 amendment rewrote subsection (a). As subsections (b) and (c) were not changed they are not set out.

Employee Not Required to Diagnose His Own Condition.—It was not the legislative intent to require an employee, in many instances, suffering from any one of these occupational diseases to make a correct medical diagnosis of his own condition or to file his notice and claim for compensation before he knew he had such disease, or run the risk of having his claim barred by the one year statute. *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

Disablement Dates from Time Claim-

ant Was Advised He Had Disease.—By enacting this section, the legislature intended to authorize the filing of a claim for asbestosis, silicosis or lead poisoning where disablement occurs within two years after the last exposure to such disease; and, although disablement may have existed from the time the employee quit work, such disablement, for the purpose of notice and claim for compensation, should date from the time the employee was notified by competent medical authority that he had such disease. *Autrey v. Victor Mica Co.*, 234 N. C. 400, 67 S. E. (2d) 383 (1951); *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

Due to the peculiar nature of the disease,

the slow process of its development, the similarity of its symptoms to those of other diseases which affect the lungs, and for other reasons, a workman, whatever his actual physical condition may be, is not charged with notice that he has silicosis until and unless he is so advised by competent medical authority, and the time within which he must file his claim for compensation begins to run from the date he is so advised. *Huskins v. United Feldspar Corp.*, 241 N. C. 128, 84 S. E. (2d) 645 (1954).

Advising an employee, who has been exposed to free silica dust, that his examination reveals "evidence of dust disease," is not sufficient to put him on notice that he has silicosis. *Singleton v. D. T. Vance Mica Co.*, 235 N. C. 315, 69 S. E. (2d) 707 (1952).

The finding of the competent medical authority must be that disablement occurred within two years from the last exposure in cases of asbestosis, silicosis and lead poisoning, and in claims involving other occupational diseases that disability occurred within one year thereof. *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951); *Singleton v. D. T. Vance Mica Co.*, 235 N. C. 315, 69 S. E. (2d) 707 (1952).

But Finding Need Not Be Made within Two Years from Last Exposure.—Where disablement from silicosis occurs as defined in § 97-54, and notice of claim is filed in accord with the provisions contained in this section, the claimant need not be advised by competent medical authority that he has silicosis within two years from the date of his last exposure.

§ 97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards.

Stated in *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

Cited in *Willingham v. Bryan Rock and*

Singleton v. D. T. Vance Mica Co., 235 N. C. 315, 69 S. E. (2d) 707 (1952).

The reason for allowing two years from the date of the last exposure to silica dust in which to determine actual disability from silicosis is that silicosis is a progressive disease, the lung changes continuing to develop for one or two years after removal of the worker from the silica hazard. *Brinkley v. United Feldspar & Minerals Corp.*, 246 N. C. 17, 97 S. E. (2d) 419 (1957).

Incapacity Not Resulting within Two Years of Last Exposure.—Claimant was removed from the hazard of silica dust before becoming incapacitated within the meaning of § 97-54. He was thereafter employed by the same employer for five years at the same wage at employment free from the hazard of silica dust. It was held that his retirement from such other occupation at the end of five years could not have been caused by incapacity from silicosis resulting within two years of the last exposure to silica dust, and compensation therefor could not be sustained. *Brinkley v. United Feldspar & Minerals Corp.*, 246 N. C. 17, 97 S. E. (2d) 419 (1957).

The plaintiff is entitled to file his notice and claim for compensation at any time within one year from the time he was notified that he had silicosis. *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

Applied, as to subsection (c), in *Willingham v. Bryan Rock and Sand Co.*, 240 N. C. 281, 82 S. E. (2d) 68 (1954).

Cited in *Williams v. Ornamental Stone Co.*, 232 N. C. 88, 59 S. E. (2d) 193 (1950).

Sand Co., 240 N. C. 281, 82 S. E. (2d) 68 (1954).

§ 97-61: Rewritten as §§ 97-61.1 to 97-61.7.

Editor's Note.—This section was rewritten by Sessions Laws 1955, c. 525, s. 2, to appear as §§ 97-61.1 to 97-61.7. The rewritten section was derived from Public Laws 1935, c. 123, and was amended by Sessions Laws 1945, c. 762.

Period Necessary for Employee to Be Exposed.—The legislature, in dealing with the occupational disease known as "silicosis," which disease ordinarily requires from ten to fifteen years before its symptoms develop, did not intend to provide rehabilitation benefits for an employee under the provisions of this section who had not been exposed to the dust of silica or silicates for as much as two years in this

State, within ten years prior to his last exposure, as provided in § 97-63. However, this has no bearing upon the authority of the Industrial Commission to remove an employee from hazardous employment in the manner provided by this section, but relates only to the question of compensation or rehabilitation benefits provided therein. *Midkiff v. North Carolina Granite Corp.*, 235 N. C. 149, 69 S. E. (2d) 166 (1952).

Disablement Occurring During Process of Rehabilitation.—If in the process of rehabilitation, or thereafter, an employee becomes disabled from asbestosis or silicosis as defined in § 97-54, within two

years of his last exposure to the hazards of asbestosis or silicosis, he would be entitled to ordinary compensation under the general provisions of our Workmen's Compensation Act. *Honeycutt v. Carolina Asbestos Co.*, 235 N. C. 471, 70 S. E. (2d) 426 (1952).

Act Contemplates That Employee Will Seek Other Remunerative Employment.—The Compensation Act contemplates that an employee will not be allowed to remain exposed to silica dust or asbestos dust until he becomes actually incapacitated with-

in the meaning of § 97-54, and that if removed from the hazard before such incapacity, he will seek and obtain other remunerative employment. *Brinkley v. United Feldspar & Minerals Corp.*, 246 N. C. 17, 97 S. E. (2d) 419 (1957).

Cited in *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951); *Autrey v. Victor Mica Co.*, 234 N. C. 400, 67 S. E. (2d) 383 (1951); *Singleton v. D. T. Vance Mica Co.*, 235 N. C. 315, 69 S. E. (2d) 707 (1952).

§ 97-61.1. First examination of and report on employee having asbestosis or silicosis.—When an employee and the Industrial Commission are advised by the State Board of Health that an employee has asbestosis or silicosis, the employer shall be notified by the Industrial Commission, and the employee, when ordered by the Industrial Commission, shall go to a place designated by the Industrial Commission and submit to X-rays and a physical examination by the advisory medical committee, at least one of whom shall conduct the examination, and the member or members of the advisory medical committee conducting the examination shall forward the X-rays and findings to the member or members of the committee not present for the physical examination. The employer shall pay the expenses connected with the examination in such amounts as shall be directed by the Industrial Commission. Within thirty days after the completion of the examination, the advisory medical committee shall make a written report signed by all of its members setting forth:

(a) The X-rays and clinical procedures used by the committee in arriving at its findings.

(b) Whether or not the claimant has contracted asbestosis or silicosis.

(c) The committee's opinion expressed in percentages of the impairment of the employee's ability to perform normal labor in the same or any other employment.

(d) Any other matter deemed pertinent by the committee.

When a competent physician certifies to the Industrial Commission that the employee's physical condition is such that his movement to the place of examination ordered by the Industrial Commission as herein provided in §§ 97-61.1, 97-61.3 and 97-61.4 would be harmful or injurious to the health of the employee, the Industrial Commission shall cause the examination of the employee to be made by the advisory medical committee as herein provided at some place in the vicinity of the residence of the employee suitable for the purposes of making such examination. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2.)

Cross Reference.—See note to § 97-61.

§ 97-61.2. Filing of first report; right of hearing; effect of report as testimony.—The advisory medical committee shall file its report in triplicate with the Industrial Commission, which shall send one copy thereof to the claimant and one copy thereof to the employer by registered mail. Unless within thirty days from receipt of the copy of said report the claimant and employer, or either of them, shall request the Industrial Commission in writing to set the case for hearing for the purpose of examining and cross-examining the members of the advisory medical committee respecting the report of said committee, and for the purpose of introducing additional testimony, said report shall become a part of the record of the case and shall be accepted by the Industrial Commission as expert medical testimony to be considered as such and in connection with all the evidence in the case in arriving at its decision. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2.)

Cross Reference.—See note to § 97-61.

§ 97-61.3. **Second examination and report.**—As soon as practicable after the expiration of one year following the initial examination by the advisory medical committee and when ordered by the Industrial Commission, the employee shall again appear before the advisory medical committee, at least one of whom shall conduct the examination, and the member or members of the advisory medical committee conducting the examination shall forward the X-rays and findings to the member or members of the committee not present for the physical examination. Within thirty days after the completion of the examination, the advisory medical committee shall make a written report to the Industrial Commission signed by all of its members, setting forth any change since the first report in the employee's condition which is due to asbestosis or silicosis, said report to be filed in triplicate with the Industrial Commission, which shall send one copy thereof to the claimant, and one copy to the employer by registered mail. The claimant and employer, or either of them, shall have the right only at the final hearing provided for in G. S. 97-61.4 to examine or cross-examine the members of the advisory medical committee respecting the second report of the committee. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2.)

Cross Reference.—See note to § 97-61.

§ 97-61.4. **Third examination and report.**—As soon as practicable after the expiration of two years from the first examination and when ordered by the Industrial Commission, the employee shall appear before the advisory medical committee, or at least two of them, for final X-rays and physical examination. Upon completion of this examination and within thirty days, the advisory medical committee shall make a written report setting forth:

(a) The X-rays and clinical procedures used by the committee.

(b) To what extent, if any, has the damage to the employee's lungs due to asbestosis or silicosis changed since the first examination.

(c) The opinion of the committee, expressed in percentages, with respect to the extent of impairment of the employee's ability to earn in the same or any other employment the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis.

(d) Any other matter deemed pertinent by the committee.

Said report shall be filed in triplicate with the Industrial Commission which shall send one copy thereof to the claimant and one copy to the employer by registered mail. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2.)

Cross Reference.—See note to § 97-61.

§ 97-61.5. **Hearing after first examination and report; removal of employee from hazardous occupation; compensation upon removal from hazardous occupation.**—(a) After the employer and employee have received notice of the first committee report, the Industrial Commission, unless it has already approved an agreement between the employer and employee, shall set the matter for hearing at a time and place to be decided by it, to hear any controverted questions, determine if and to whom liability attaches, and where appropriate, file a written opinion with its findings of fact and conclusions of law and cause its award to be issued thereon, all of which shall be subject to modification as provided in G. S. 97-61.6.

(b) If the Industrial Commission finds at the first hearing that the employee has either asbestosis or silicosis or if the parties enter into an agreement to the effect that the employee has silicosis or asbestosis, it shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis or silicosis, and if the employee thereafter engages in any occupation which exposes him to the hazards of asbestosis or silicosis without having obtained the written approval of the Industrial Commission as provided in G. S. 97-61.7, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death resulting from asbes-

tosis or silicosis; provided, that if the employee is removed from the industry the employer shall pay or cause to be paid as in this subsection provided to the employee affected by such asbestosis or silicosis a weekly compensation equal to 60% of his average weekly wages before removal from the industry, but not more than thirty-five dollars (\$35.00) or less than ten dollars (\$10.00) a week, which compensation shall continue for a period of 104 weeks. Payments made under this subsection shall be credited on the amounts payable under any final award in the cause entered under G. S. 97-61.6. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; c. 1354; 1957, c. 1217; c. 1396, s. 8.)

Cross Reference.—See note to § 97-61.

Editor's Note.—The second 1955 act, effective July 1, 1955, substituted \$32.50 for \$30.00 and \$10.00 for \$8.00.

The first 1957 amendment substituted "thirty-five dollars (\$35.00)" for "thirty-two dollars and fifty cents (\$32.50)" in

subsection (b). And the second 1957 amendment inserted after "silicosis" in line two of the subsection the words "or if the parties enter into an agreement to the effect that the employee has silicosis or asbestosis."

§ 97-61.6. Hearing after third examination and report; compensation for disability and death from asbestosis or silicosis.—After receipt by the employer and employee of the advisory medical committee's third report, the Industrial Commission, unless it has approved an agreement between the employee and employer, shall set a final hearing in the cause, at which it shall receive all competent evidence bearing on the cause, and shall make a final disposition of the case, determining what compensation, if any, the employee is entitled to receive in addition to the 104 weeks already received.

Where the incapacity for work resulting from asbestosis or silicosis is found to be total, the employer shall pay, or cause to be paid, to the injured employee during such total disability a weekly compensation equal to sixty per centum (60%) of his average weekly wages, but not more than thirty-five dollars (\$35.00), nor less than ten dollars (\$10.00), a week; and in no case shall the period covered by such compensation be greater than 400 weeks, nor shall the total amount of all compensation exceed ten thousand dollars (\$10,000.00).

When the incapacity for work resulting from asbestosis or silicosis is partial, the employer shall pay, or cause to be paid, to the affected employee, a weekly compensation equal to sixty per centum (60%) of the difference between his average weekly wages at the time of his last injurious exposure, and the average weekly wages which he is able to earn thereafter, but not more than thirty-five dollars (\$35.00) a week, and provided that the total compensation so paid shall not exceed a period of 196 weeks, in addition to the 104 weeks for which the employee has already been compensated.

Provided, however, should death result from asbestosis or silicosis within two years from the date of last exposure, or should death result within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement due to asbestosis or silicosis, either partial or total, then in either of these events, the employer shall pay, or cause to be paid, by one of the methods set forth in G. S. 97-38 a total compensation which, when added to the payments already made for partial or total disability to time of death, shall not exceed ten thousand dollars (\$10,000.00) including burial expenses. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; c. 1354; 1957, c. 1217.)

Cross Reference.—See note to § 97-61.

Editor's Note.—The second 1955 act, effective July 1, 1955, substituted \$32.50 for \$30.00, \$10.00 for \$8.00 and \$10,000 for \$8,000.

The 1957 amendment substituted "thirty-five dollars (\$35.00)" for "thirty-two dollars and fifty cents (\$32.50)" in the second and third paragraphs.

§ 97-61.7. Waiver of right to compensation as alternative to forced change of occupation.—An employee who had been compensated under the terms of G. S. 97-61.5(b) as an alternative to forced change of occupation, may,

subject to the approval of the Industrial Commission, waive in writing his right to further compensation for any aggravation of his condition that may result from his continuing in an occupation exposing him to the hazards of asbestosis or silicosis, in which case payment of all compensation awarded previous to the date of the waiver as approved by the Industrial Commission shall bar any further claims by the employee, or anyone claiming through him, provided, that in the event of total disablement or death as a result of asbestosis or silicosis with which the employee was so affected, compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than 100 weeks in addition to the 104 weeks already paid. Such written waiver must be filed with the Industrial Commission, and the Commission shall keep a record of each waiver, which record shall be open to the inspection of any interested person. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2.)

Cross Reference.—See note to § 97-61.

§ 97-62. "Silicosis" and "asbestosis" defined.

Quoted in part in *Midkiff v. North Carolina Granite Corp.*, 235 N. C. 149, 69 S. E. (2d) 166 (1952).

§ 97-63. Period necessary for employee to be exposed.

Requirements of This Section Applicable to Payments under Section 97-61.—Granite Corp., 245 N. C. 233, 95 S. E. (2d) 506 (1956).
See annotations under § 97-61.

Applied in *Hicks v. North Carolina* Cited in *Autrey v. Victor Mica Co.*, 234 N. C. 400, 67 S. E. (2d) 383 (1951).

§ 97-64. General provisions of Act to control as regards benefits.

Cited in *Brinkley v. United Feldspar & Minerals Corp.*, 246 N. C. 17, 97 S. E. (2d) 419 (1957).

§ 97-65. Reduction of rate where tuberculosis develops.

Reduction of Award Rests in Discretion of Commission.—Where the Industrial Commission finds that a disabled employee was suffering from tuberculosis as well as from silicosis, whether the award for disability from silicosis should be reduced one-sixth rests in the discretion of the Industrial Commission. *Stewart v. Duncan*, 239 N. C. 640, 80 S. E. (2d) 764 (1954).

Cited in *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

§ 97-66. Claim where benefits are discontinued.—Where compensation payments have been made and discontinued, and further compensation is claimed, whether for disablement, disability or death from lead poisoning, the claim for further compensation shall be made within two years after the last payment, but in all other cases of occupational disease claims for further compensation shall be made within one year after the last payment, provided, that claims for further compensation for asbestosis or silicosis shall be governed by the final award as set forth in G. S. 97-61.6. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 3.)

Editor's Note.—The 1955 amendment re-wrote this section.

Stated in *Duncan v. Carpenter*, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

§ 97-68. Controverted medical questions.—The Industrial Commission may at its discretion refer to the advisory medical committee controverted medical questions arising out of occupational disease claims other than asbestosis or silicosis. (1935, c. 123; 1955, c. 525, s. 4.)

Editor's Note.—The 1955 amendment re-wrote this section.

Cited in *Autrey v. Victor Mica Co.*, 234 N. C. 400, 67 S. E. (2d) 383 (1951).

§ 97-69. Examination by advisory medical committee; inspection of medical reports.—The advisory medical committee, upon reference to it

of a case of occupational disease shall notify the employee, or, in case he is dead, his dependents or personal representative, and his employer to appear before the advisory medical committee at a time and place stated in the notice. If the employee be living, he shall appear before the advisory medical committee at the time and place specified then or thereafter and he shall submit to such examinations including clinical and X-ray examinations as the advisory medical committee may require. The employee, or, if he be dead, the claimant and the employer shall be entitled to have present at all such examinations, a physician admitted to practice medicine in the State who shall be given every reasonable facility for observing every such examination whose services shall be paid for by the claimant or by the employer who engaged his services. If a physician admitted to practice medicine in the State shall certify that the employee is physically unable to appear at the time and place designated by the advisory medical committee, such committee may, upon the advice of the Industrial Commission, and on notice to the employer, change the place and/or time of the examination so as to reasonably facilitate the examination of the employee, and in any such case the employer shall furnish transportation and provide for other reasonably necessary expenses incidental to necessary travel. The claimant and the employer shall produce to the advisory medical committee all reports of medical and X-ray examinations which may be in their respective possession or control showing the past or present condition of the employee to assist the advisory medical committee in reaching its conclusions. Provided that this section shall not apply to a living employee who has contracted asbestosis or silicosis. (1935, c. 123; 1955, c. 525, s. 5.)

Editor's Note. — The 1955 amendment Cited in *Autrey v. Victor Mica Co.*, 234 added the proviso at the end of the section. N. C. 400, 67 S. E. (2d) 383 (1951).

§ 97-70. Report of committee to Industrial Commission.

Cited in *Autrey v. Victor Mica Co.*, 234 N. C. 400, 67 S. E. (2d) 383 (1951).

§ 97-71. Filing report; right of hearing on report.

Cited in *Autrey v. Victor Mica Co.*, 234 N. C. 400, 67 S. E. (2d) 383 (1951).

§ 97-72. Appointment of advisory medical committee; terms of office; duties and functions; salaries and expenses.—There shall be an advisory medical committee consisting of three members, who shall be licensed physicians in good professional standing and peculiarly qualified in the diagnosis and/or treatment of occupational diseases. They shall be appointed by the Industrial Commission with the approval of the Governor, and one of them shall be designated as chairman of the committee by the Industrial Commission. The members of committee shall be appointed to serve terms as follows: One for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned the Industrial Commission shall appoint a successor for a term of six years; except that the terms of the members first appointed shall expire June thirtieth, one thousand nine hundred thirty-six. The function of the committee shall be to conduct examinations and make reports as required by §§ 97-61, and 97-68 to 97-71, and to assist in any post-mortem examinations provided for in § 97-67 when so directed by the Industrial Commission. Members of the committee shall devote to the duties of the office so much of their time as may be required in the conducting of examinations with reasonable promptness, and they shall attend hearings as scheduled by the Industrial Commission when their attendance is desired for the purpose of examining and cross-examining them respecting any report or reports made by them.

The members of the advisory medical committee shall be paid such salaries and/or fees and expenses, and in monthly installments or in such other manner as may

be determined by the Governor and approved by the Advisory Budget Commission. (1935, c. 123; 1955, c. 525, s. 7.)

Editor's Note. — The 1955 amendment act rewrote § 97-61 to appear as §§ 97-61.1 to 97-61.7. added 97-61 to the sections referred to in line thirteen. Section 2 of the amendatory

§ 97-73. Expenses of making examinations. — The Industrial Commission shall establish a schedule of reasonable charges to defray expenses incurred in making examinations pursuant to §§ 97-60, 97-61 and 97-67, such charges to be collected in accordance with rules and regulations which shall be adopted by the Industrial Commission. Said charges shall be collected from employers who by order of the Industrial Commission are determined to be subject to the hazards of asbestosis and/or silicosis. (1935, c. 123; 1955, c. 525, s. 8.)

Editor's Note. — The 1955 amendment rewrote § 97-61 to appear as §§ 97-61.1 to 97-61.7. added 97-61 to the sections referred to in line three. Section 2 of the amendatory act

§ 97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor.

Cited in *Midkiff v. North Carolina Granite Corp.*, 235 N. C. 149, 69 S. E. (2d) 166 (1952).

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

It was the legislative intent that the Industrial Commission should administer the provisions of the Workmen's Compensation Act under summary and simple procedure, distinctly its own, so as to furnish speedy, substantial, and complete relief to parties bound by the Act. *Greene v. Spivey*, 236 N. C. 435, 73 S. E. (2d) 488 (1952).

Majority of Commission.—The Commission is a continuing body. As a Commission it acts by a majority of its qualified members at the time decision is made. A vote of two of the then members, therefore, constituted a majority of the Commission empowered to act for the Commission. *Gant v. Crouch*, 243 N. C. 604, 91 S. E. (2d) 705 (1956).

§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.

(b) The Commission may appoint a secretary whose duties shall be prescribed by the Commission, and whose salary shall be fixed by the Governor subject to the approval of the Advisory Budget Commission and who, upon entering upon his duties, shall give bond in such sum as may be fixed by the Commission, and who may be removed at the will of the Commission. The Commission may also employ such clerical or other assistance as it may deem necessary, and fix the compensation of all persons so employed, such compensation to be in keeping with the compensation paid to the persons employed to do similar work in other State departments.

(1957, c. 541, s. 6.)

Editor's Note.—The 1957 amendment struck out the words "and Council of the State" in subsection (b) and substituted in lieu thereof

the words "subject to the approval of the Advisory Budget Commission." As only subsection (b) was changed the rest of the section is not set out.

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

(b) The Commission may appoint deputies who shall have the same power to issue subpoenas, administer oaths, conduct hearings, take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission, and the compensation of such deputy or deputies shall be fixed by the Commission.

(e) The North Carolina Industrial Commission, or any member thereof, or any

deputy, is authorized, by appropriate order, to make additional parties plaintiff or defendant in any proceeding pending before the North Carolina Industrial Commission when it is made to appear that such new party is either a necessary party or a proper party to a final determination of the proceeding. (1929, c. 120, s. 53; 1931, c. 274, s. 10; 1951, c. 1059, s. 7; 1955, c. 1026, s. 11.)

Editor's Note.—

The 1951 amendment rewrote subsection (b), and the 1955 amendment, effective July 1, 1955, added subsection (e). As the rest

of the section was not changed only subsections (b) and (e) are set out.

For comment on the 1951 amendment, see 29 N. C. Law Rev. 416.

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

The Industrial Commission was not entitled to relax its rule that fees for practical nursing would not be allowed unless written authority was obtained from the Commission in advance, so as to award mother of injured employee an amount for practical nursing services rendered to in-

jured employee where the record showed Commission never gave its written or oral permission for rendition of services. *Hatchett v. Hitchcock Corp.*, 240 N. C. 591, 83 S. E. (2d) 539 (1954).

Cited in *Tucker v. Lowdermilk*, 233 N. C. 185, 63 S. E. (2d) 109 (1951).

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed form for approval.

Purpose and Effect of Section.—This section was inserted in the Workmen's Compensation Act to protect the employees of the State against the disadvantages arising out of their economic status and give assurance that the settlement is in accord with the intent and purpose of the Act. Therefore, in approving the settlement in which compensation is awarded, the Commission acts in a judicial capacity. The voluntary settlement as approved becomes an award enforceable by a court decree. *Biddix v. Rex Mills, Inc.*, 237 N. C. 660, 75 S. E. (2d) 777 (1953).

Section Contemplates Only Settlement in Respect of Amount of Compensation.—The only "settlement" contemplated by this section is a settlement in respect of

the amount of compensation to which claimants are entitled under the Act. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

And Does Not Apply to Compromise and Settlement of Common-Law Claim.—Compromise and settlement of the common-law claim of the administratrix of a deceased employee for the wrongful death of the employee, executed under the mistaken belief that the Workmen's Compensation Act was not applicable, will not be disturbed on the ground that the Industrial Commission did not approve such settlement as provided in this section. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

§ 97-83. In event of disagreement, Commission is to make award after hearing.—If the employer and the injured employee or his dependents fail to reach an agreement, in regard to compensation under this article within fourteen days after the employee has knowledge of the injury or death, or if they have reached such an agreement which has been signed and filed with the Commission, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

Immediately after such application has been received the Commission shall set the date of a hearing, which shall be held as soon as practicable, and shall notify the parties at issue of the time and place of such hearing. The hearing or hearings shall be held in the city or county where the injury occurred, unless otherwise authorized by the Industrial Commission. (1929, c. 120, s. 57; 1955, c. 1026, s. 12½.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, inserted the words "or hearings" in the last sentence and deleted therefrom the words "agreed to by the parties and" formerly appearing after the word

"otherwise."

When Administratrix Is Proper Claimant.—The administratrix of the decedent is the proper claimant in a proceeding for compensation only when there are no

dependents, whole or partial. However, the joinder of the administratrix with the dependents in the prosecution of a claim will be treated as surplusage. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957). See § 97-40.

How Minor May Prosecute Claim.—While, for the purposes of the Act, a

minor becomes *sui juris* upon attaining the age of 18 years, until then he may prosecute his proceeding for compensation only when represented by general guardian or other legal representative. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 96 S. E. (2d) 438 (1957).

§ 97-84. Determination of disputes by Commission or deputy.—The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event the hearing shall be conducted in the same way and manner prescribed for hearings which are conducted by a member of the Industrial Commission, and said deputy shall proceed to a complete determination of the matters in dispute, file his written opinion, and cause to be issued an award pursuant to such determination. (1929, c. 120, s. 58; 1951, c. 1059, s. 7.)

Editor's Note.—The 1951 amendment rewrote the last sentence of this section so as to allow a deputy to make a complete determination of the dispute, rather than merely to hear the parties and transmit the testimony to the Commission for its final determination and award.

For comment on the 1951 amendment, see 29 N. C. Law Rev. 416.

Fact-Finding Body.—

The Industrial Commission is the sole judge of the truthfulness and weight of the testimony of the witnesses in the discharge of its function as the fact finding authority under the Workmen's Compensation Act. *Henry v. Lawrence Leather Co.*, 231 N. C. 477, 57 S. E. (2d) 760 (1950).

Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. The Commission is not required to make a finding as to each detail of the evidence or as to every inference or shade of meaning to be drawn therefrom. *Guest v. Brenner Iron & Metal Co.*, 241 N. C. 448, 85 S. E. (2d) 596 (1955).

In passing upon issues of fact, the Com-

mission, like any other trier of facts, is the sole judge of the credibility of the witnesses, and of the weight to be given to their testimony. It may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same. *Anderson v. Northwestern Motor Co.*, 233 N. C. 372, 64 S. E. (2d) 265 (1951); *Moses v. Bartholomew*, 238 N. C. 714, 78 S. E. (2d) 923 (1953).

Findings May Not Rest upon Evidence Not Presented to Commission.—In judicial proceedings before the Commission the facts found must rest upon admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard. Recourse may not be had to records, files, evidence, or data not thus presented to the Commission for consideration. *Biddix v. Rex Mills, Inc.*, 237 N. C. 660, 75 S. E. (2d) 777 (1953).

Cited in *Thomason v. Red Bird Cab Co.*, 235 N. C. 602, 70 S. E. (2d) 706 (1952).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.—The award of the Commission, as provided in § 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in § 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within thirty days from the date of such award, or within thirty days after receipt of notice to be sent by registered mail of such award, but not thereafter, appeal from the decision of said Commission to the superior court of the county in which the alleged accident happened, or in which the employer resides or has his principal office, for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions: Provided the Commission shall have sixty days after receipt of notice of appeal, properly served on the opposing

party and the Industrial Commission, within which to prepare and furnish to the appellant or his attorney a certified transcript of the record in the case for filing in superior court. The Commission, of its own motion, may certify questions of law to the Supreme Court, for decision and determination by the said Court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Supreme Court, said appeal or certification shall operate as a supersedeas, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this article: Provided, however, that if the employer is a non-insurer, then appeal by such employer shall not act as a supersedeas and the plaintiff in such case shall have the same right to issue execution or to satisfy the award from the property of the employer pending the appeal as obtains to the successful party in an action in the superior court. (1929, c. 120, s. 60; 1947, c. 823; 1957, c. 1396, s. 9.)

Editor's Note.—

The 1957 amendment added the proviso at the end of the section.

The superior court has appellate jurisdiction to review an award of the Industrial Commission for errors of law when a party to the proceeding in which the award is made appeals to it. *Thomason v. Red Bird Cab Co.*, 235 N. C. 602, 70 S. E. (2d) 706 (1952).

Evidence Not Considered.—

In accord with original. See *Thomason v. Red Bird Cab Co.*, 235 N. C. 602, 70 S. E. (2d) 706 (1952).

Findings of Fact of Industrial Commission Conclusive.—

The findings of fact of the Industrial Commission are conclusive and binding upon appeal when supported by competent evidence. *Henry v. Lawrence Leather Co.*, 231 N. C. 477, 57 S. E. (2d) 760 (1950); *Williams v. Ornamental Stone Co.*, 232 N. C. 88, 59 S. E. (2d) 193 (1950); *Vause v. Vause Farm Equipment Co.*, 233 N. C. 88, 63 S. E. (2d) 173 (1951); *Anderson v. Northwestern Motor Co.*, 233 N. C. 372, 64 S. E. (2d) 265 (1951); *Thomason v. Red Bird Cab Co.*, 235 N. C. 602, 70 S. E. (2d) 706 (1952).

In accord with 4th paragraph in original. See *McCraw v. Calvine Mills, Inc.*, 233 N. C. 524, 64 S. E. (2d) 658 (1951); *Rice v. Thomasville Chair Co.*, 238 N. C. 121, 76 S. E. (2d) 311 (1953); *Moses v. Bartholomew*, 238 N. C. 714, 78 S. E. (2d) 923 (1953); *Hinkle v. Lexington*, 239 N. C. 105, 79 S. E. (2d) 220 (1953).

In accord with 5th paragraph in original. See *Hawes v. Mutual Benefit & Accident Ass'n*, 243 N. C. 62, 89 S. E. (2d) 739 (1955); *Penland v. Bird Coal Co.*, 246 N. C. 26, 97 S. E. (2d) 432 (1957).

If there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the con-

trary. *Tucker v. Lowdermilk*, 233 N. C. 185, 63 S. E. (2d) 109 (1951); *Johnson v. Erwin Cotton Mills Co.*, 232 N. C. 321, 59 S. E. (2d) 828 (1950); *Hawes v. Mutual Benefit Health & Accident Ass'n*, 243 N. C. 62, 89 S. E. (2d) 739 (1955).

Under the Workmen's Compensation Act the Industrial Commission has the exclusive duty and authority to find the facts relative to controverted claims, and its findings of fact, except with respect to jurisdictional findings are conclusive on appeal, both to the superior court and in the Supreme Court, when supported by any competent evidence. *Penland v. Bird Coal Co.*, 246 N. C. 26, 97 S. E. (2d) 432 (1957).

Findings of fact made by the Commission are, when supported by any evidence, conclusive on appeal. Claimant is entitled to urge, in support of the findings, every reasonable inference which can be drawn from the testimony; but when all the evidence and the inferences to be drawn therefrom result in only one conclusion, liability is a question of law subject to review. *Hensley v. Farmers Federation Co-operative*, 246 N. C. 274, 98 S. E. (2d) 289 (1957).

Scope of Review.—While findings of fact of the Industrial Commission are conclusive on appeal when supported by evidence the courts must review the reasonableness of the inferences of fact deduced from the basic facts found, and the conclusions of law predicated upon them. *Evans v. Tabor City Lbr. Co.*, 232 N. C. 111, 59 S. E. (2d) 612 (1950).

The findings of fact of the Industrial Commission are conclusive on appeal only when supported by evidence, and the court, on appeal, may review the evidence to determine as a matter of law whether there is any evidence tending to support the findings. *Vause v. Vause Farm Equipment Co.*, 233 N. C. 88, 63 S. E. (2d) 173 (1951).

On appeal from an award of the Indus-

trial Commission the jurisdiction of the courts is limited to the questions of law as to whether there was competent evidence before the Commission to support its findings of fact and whether such findings justify the legal conclusions and decision of the Commission. *Henry v. Lawrence Leather Co.*, 231 N. C. 477, 57 S. E. (2d) 760 (1950); *Thomason v. Red Bird Cab Co.*, 235 N. C. 602, 70 S. E. (2d) 706 (1952). See *Moses v. Bartholomew*, 238 N. C. 714, 78 S. E. (2d) 923 (1953).

When the assignments of error bring up for review the findings of fact of the Commission, the court will review the evidence to determine as a matter of law whether there is any competent evidence tending to support the findings; if so, the findings of fact are conclusive on the court. If a finding of fact is a mixed question of fact and law, it is conclusive also, if there is sufficient evidence to sustain the facts involved. If a question of law alone, it is reviewable. *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. (2d) 410 (1954).

Exceptions and Objections.—Where appellant on appeal to the superior court does not except to any finding of the Industrial Commission or to the award, but merely gives notice of appeal for a review as to errors of law, the single question presented to the superior court is whether the facts found were sufficient to support the award. Likewise, a sole exception to the judgment of the superior court presents only the question of whether the facts found support the judgment. *Wyatt v. Sharp*, 239 N. C. 655, 80 S. E. (2d) 762 (1954).

Questions of law which appellant desires the Supreme Court to review, including questions of whether specific findings of fact are supported by the evidence, must be presented by exceptions duly taken and assignments of error duly made which point out specifically and distinctly the alleged error, and the Supreme Court, upon a broadside exception, will not make a voyage of discovery through the record to ascertain if error was committed at some time in some way during the progress of the trial or case. *Worsley v. S. & W. Rendering Co.*, 239 N. C. 547, 80 S. E. (2d) 467 (1954).

Review Limited to Record as Certified by Industrial Commission.—When an appeal is taken from the Industrial Commission, it is heard by the presiding judge of the superior court who sits as an appellate court. His function is to review alleged errors of law made by the Industrial Commission, as disclosed by the record and as presented to him by excep-

tions duly entered. Necessarily, the scope of review is limited to the record as certified by the Commission and to the questions of law therein presented. *Penland v. Bird Coal Co.*, 246 N. C. 26, 97 S. E. (2d) 432 (1957).

On appeal from a judgment of superior court affirming or reversing an award of the Industrial Commission, the Supreme Court acts upon the record that was before the superior court, and upon that alone, and if the record was defective, it should have been amended in the superior court. *Penland v. Bird Coal Co.* 246 N. C. 26, 97 S. E. (2d) 432 (1957.)

Matters which were not in the record before the superior court, but which are sent up with the transcript to the Supreme Court, are no more a part of the record in the Supreme Court than they were in the superior court, and may not be made so by certificate of the court below. *Penland v. Bird Coal Co.*, 246 N. C. 26, 97 S. E. (2d) 432 (1957).

The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. *Thomason v. Red Bird Cab Co.*, 235 N. C. 602, 70 S. E. (2d) 706 (1952).

It is required that the Industrial Commission find all the crucial and specific facts upon which the right to compensation depends in order that it may be determined on appeal whether adequate basis exists for the ultimate finding as to whether plaintiff was injured by accident arising out of and in the course of his employment, but it is not required that the Commission make a finding as to each detail of the evidence or as to every shade of meaning to be drawn therefrom. *Guest v. Brenner Iron & Metal Co.*, 241 N. C. 448, 85 S. E. (2d) 596 (1955).

Jurisdictional Facts Not Conclusive on Appeal.—

In accord with original. See *Aylor v. Barnes*, 242 N. C. 223, 87 S. E. (2d) 269 (1955).

Evidence Must Be Legally Competent.—The rule is that the evidence must be legally competent, and a finding based on incompetent evidence is not conclusive. *Penland v. Bird Coal Co.*, 246 N. C. 26, 97 S. E. (2d) 432 (1957).

Findings Not Supported by Competent Evidence.—

In accord with 1st paragraph in original.

See *Penland v. Bird Coal Co.*, 246 N. C. 26, 97 S. E. (2d) 432 (1957).

Effect of Admission of Incompetent Evidence.—

In accord with original. See *Penland v. Bird Coal Co.*, 246 N. C. 26, 97 S. E. (2d) 432 (1957).

Court Is Not Bound by Facts Found under Misapprehension of Law.—

In accord with 1st paragraph in original. See *Hawes v. Mutual Benefit Health & Accident Ass'n*, 243 N. C. 62, 89 S. E. (2d) 739 (1955).

Findings as to Whether Accident Arose Out of and in Course of Employment.—

Where an employee, while about his work, suffers an injury in the ordinary course of his employment, the cause of which is unexplained but which is a natural and probable result of a risk thereof, and the Commission finds from all the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained. If, however, the cause is known and is independent of, unrelated to, and apart from the employment compensation will not be allowed. *Vause v. Vause Farm Equipment Co.*, 233 N. C. 88, 63 S. E. (2d) 173 (1951).

When the specific, crucial findings of fact are made, and the Industrial Commission thereupon finds that plaintiff was injured by accident arising out of and in the course of his employment, the Supreme Court considers such specific findings of fact, together with every reasonable inference that may be drawn therefrom, in plaintiff's favor in determining whether there is a factual basis for such ultimate finding. *Guest v. Brenner Iron & Metal Co.*, 241 N. C. 448, 85 S. E. (2d) 596 (1955).

Whether an accident grew out of the employment within the purview of the Workmen's Compensation Act is a mixed question of law and fact, which the court has the right to review on appeal, and when the detailed findings of fact force a conclusion opposite that reached by the Commission, it is the duty of the court to reverse the Commission. *Alford v. Quality*

Chevrolet Co., 246 N. C. 214, 97 S. E. (2d) 869 (1957).

Findings of fact that the superior of an injured workman was a supervisory employee and not an independent contractor is conclusive on appeal when supported by competent evidence. *Scott v. Waccamaw Lbr. Co.*, 232 N. C. 162, 59 S. E. (2d) 425 (1950).

Finding as to Employer-Employee Relationship.—The relationship of employer and employee created by the facts found by the Commission is a question of law and the conclusion of the Commission based on those facts is reviewable. *Hawes v. Mutual Benefit Health & Acci. Ass'n*, 243 N. C. 62, 89 S. E. (2d) 739 (1955).

Time within Which Assignment of Error Must Be Filed.—Assignments of error are not required to be served at the time the notice of appeal is served. Filing of assignments of error within a reasonable time after receipt of same from Commission is sufficient, and five days is a reasonable time. *Wilson v. Utah Constr. Co.*, 243 N. C. 96, 89 S. E. (2d) 864 (1955).

Record on Appeal.—When an appeal is taken from the Industrial Commission to the superior court, this section requires that a certified transcript of the record before the Commission be filed in the superior court. This necessarily carries to the superior court a transcript of the evidence in question and answer form as transcribed from the reporter's notes. However, on appeal from the superior court, the procedure must be in accordance with the Rules of Practice in the Supreme Court; including Rule 19(4), which requires that the evidence be in narrative form, and not by question and answer, except that a question and answer, or series of them, may be set out when the subject of a particular exception. *Anderson v. Wray Plumbing & Heating Co.*, 238 N. C. 138, 76 S. E. (2d) 458 (1953).

Remand Where Findings Insufficient.—

In accord with original. See *Thomason v. Red Bird Cab Co.*, 235 N. C. 602, 70 S. E. (2d) 706 (1952).

§ 97-87. Agreements approved by Commission or awards may be filed as judgments; discharge or restoration of lien.

An agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Com-

mission affirmed upon appeal. *Tucker v. Lowdermilk*, 233 N. C. 185, 63 S. E. (2d) 109 (1951).

Cited in *Biddix v. Rex Mills, Inc.*, 237 N. C. 660, 75 S. E. (2d) 777 (1953).

§ 97-88. Expenses of appeals brought by insurers.

The Allowance of Attorneys' Fees, etc.—

In accord with original. See *Gant v.*

Crouch, 243 N. C. 604, 91 S. E. (2d) 705 (1956).

When Section Inapplicable.—The por-

tion of this section requiring defendant carrier to pay plaintiffs' costs, including attorney's fee, incident to the appeal by defendants from the Commission to the superior court does not apply when the Su-

preme Court finds error in the Commission's decision in respect to the sole controversy presented by the appeal. *Liles v. Faulkner Neon & Elec. Co.*, 244 N. C. 653, 94 S. E. (2d) 790 (1956).

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims.—(a) Fees for attorneys and physicians and charges of hospitals for services and charges for nursing services, medicines and sick travel under this article shall be subject to the approval of the Commission; but no physician shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Industrial Commission in connection with the case.

(1955, c. 1026, s. 4.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, inserted in subsection (a) the words "and charges for nursing services, medicines and sick travel." As

subsection (b) was not changed, it is not set out.

Stated in *Hatchett v. Hitchcock Corp.*, 240 N. C. 591, 83 S. E. (2d) 539 (1954).

§ 97-91. Commission to determine all questions.

Questions Respecting Existence of Insurance and Liability of Insurance Carrier.—The Commission is specifically vested by statute with jurisdiction to hear "all questions arising under" the Compensation Act. This jurisdiction under the stat-

ute ordinarily includes the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier. *Greene v. Spivey*, 236 N. C. 435, 73 S. E. (2d) 488 (1952).

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits.

Cited in *Evans v. Tabor City Lbr. Co.*, 232 N. C. 111, 59 S. E. (2d) 612 (1950).

ARTICLE 2.

Compensation Rating and Inspection Bureau.

§ 97-102. Compensation Rating and Inspection Bureau created; objects, functions, etc.; hearings where rates changed.

(b) To furnish upon request of any employer in the State of North Carolina or to any member of the Compensation Rating and Inspection Bureau of North Carolina, upon whose risk a compensation rate has been promulgated, information as to the rating including the method of its compilation, and to encourage employers to reduce the number and severity of accidents by adjusting premiums and rates, through the use of credits and debits or other proper factors, under such uniform system of experience or other form of merit rating as may be approved by the Commissioner of Insurance.

(1953, c. 674, s. 2.)

Cross Reference.—

As to validation of experience rating plans for workmen's compensation insurance in use prior to April 7, 1953, see § 58-248.7.

Editor's Note.—

The 1953 amendment rewrote subsection (b). As only subsection (b) was affected by the amendment the rest of the section is not set out.

Chapter 98.

Burnt and Lost Records.

§ 98-16. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.

Cited in Henderson County v. Johnson,
230 N. C. 723, 55 S. E. (2d) 502 (1949).

Chapter 99.

Libel and Slander.

§ 99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.

Provisions as to Notice and Retraction Are Germane Solely to Issue of Damages. — The statutory provisions relating to notice and an opportunity for retraction are germane solely to the issue of punitive

damage and have no bearing upon the sufficiency of the facts alleged in the complaint to constitute a cause of action for libel. Kindley v. Privette, 241 N. C. 140, 84 S. E. (2d) 660 (1954).

Chapter 100.

Monuments, Memorials and Parks.

ARTICLE 1.

Memorials Commission.

§ 100-8. Memorials to persons within twenty-five years of death; acceptance of commemorative funds for useful work. — No monument, statutes, tablet, painting, or other article or structure of a permanent nature intended primarily to commemorate any person or persons shall be purchased from State funds or shall be placed in or upon or allowed to extend over State property within twenty-five years after the death of the person or persons so commemorated: Provided, nevertheless, that nothing in this article shall be interpreted as prohibiting the acceptance of funds by State agencies or institutions from individuals or societies who wish to commemorate some person or persons by providing funds for educational, health, charitable, or other useful work. The agency or institution to which such funds are offered for memorial enterprises shall exercise its discretion as to the acceptance and expenditure of such funds. Nothing in this article shall be interpreted as prohibiting the erection on the lands of the Cliffs of the Neuse State Park an appropriate tablet or plaque honoring the life and memory of the late Lionel Weil of Wayne County. (1941, c. 341, s. 8; 1957, c. 181.)

Editor's Note. — The 1957 amendment added the last sentence to this section.

Chapter 101.

Names of Persons.

§ 101-2. Procedure for changing name; petition; notice. — A person who wishes, for good cause shown, to change his name must file his application before the clerk of the superior court of the county in which he lives, having

first given ten days' notice of the application by publication at the courthouse door.

Applications to change the name of minor children may be filed by their parent or parents or guardian or next friend of such minor children, and such applications may be joined in the application for a change of name filed by their parent or parents: Provided nothing herein shall be construed to permit one parent to make such application on behalf of a minor child without the consent of the other parent of such minor child if both parents be living, except that a minor who has reached the age of 16 years, upon proper application to the clerk may change his or her name, with the consent of the parent who has custody of the minor and has supported the minor, without the necessity of obtaining the consent of the other parent, when the clerk of court is satisfied that the other parent has abandoned the minor. Provided, further, that a change of parentage or the addition of information relating to parentage on the birth certificate of any person shall be made pursuant to G. S. 130-94.

Notwithstanding any other provisions of this section, the consent of a parent who has abandoned a minor child shall not be required if there is filed with the clerk a copy of an order of a court of competent jurisdiction adjudicating that such parent has abandoned such minor child. In the event that a court of competent jurisdiction has not therefore declared the minor child to be an abandoned child, then on written notice of not less than ten days to the parent alleged to have abandoned the child, by registered or certified mail directed to such parent's last known address, the clerk of superior court is hereby authorized to determine whether an abandonment has taken place. If said parent denies that an abandonment has taken place, this issue of fact shall be determined as provided in G. S. 1-273, and if abandonment is determined, then the consent of said parent shall not be required. Upon final determination of this issue of fact the proceeding shall be transferred back to the special proceedings docket for further action by the clerk. (1891, c. 145; Rev., s. 2147; C. S., s. 2971; 1947, c. 115; 1953, c. 678; 1955, c. 951, s. 3; 1957, c. 1442.)

Editor's Note.—

The 1953 amendment added the exception clause at the end of the first proviso to the second paragraph, and the 1955

amendment added the second proviso.

The 1957 amendment added the last paragraph.

§ 101-3. Contents of petition.—The applicant shall state in the application his true name, county of birth, date of birth, the full name of parents as shown on birth certificate, the name he desires to adopt, his reasons for desiring such change, and whether his name has ever before been changed by law, and, if so, the facts with respect thereto. (1891, c. 145; Rev., s. 2147; C. S., s. 2972; 1945, c. 37, s. 1; 1957, c. 1233, s. 1.)

Editor's Note.—

The 1957 amendment inserted in this section the following: "county of birth,

date of birth, the full name of parents as shown on birth certificate."

§ 101-5. Clerk to order change; certificate and record.—If the clerk thinks that good and sufficient reason exists for the change of name, it shall be his duty to issue an order changing the name of the applicant from his true name to the name sought to be adopted. Such order shall contain the true name, the county of birth, the date of birth, the full name of parents as shown on birth certificate, and the name sought to be adopted. He shall issue to the applicant a certificate under his hand and seal of office, stating the change made in the applicant's name, and shall also record said application and order on the docket of special proceedings in his court. He shall forward a copy of the change of name order to the State Registrar of Vital Statistics if the applicant was born in North Carolina. Upon receipt of the order, the State Registrar shall note the change of name of the individual or individuals specified in the order on the birth cer-

tificate of that individual or those individuals and shall notify the register of deeds in the county of birth. (1891, c. 145; Rev., ss. 2149, 2150; C. S., s. 2974; 1955, c. 951, s. 4; 1957, c. 1233, s. 2.)

Editor's Note.—The 1955 amendment added the fourth and fifth sentences. The 1957 amendment inserted the second sentence and added to the fourth sentence the words "if the applicant was born in North Carolina."

Chapter 103.

Sundays and Holidays.

Sec.

103-1. [Repealed.]

103-3. Execution of process on Sunday.

§ 103-1: Repealed by Session Laws 1951, c. 73.

§ 103-3. **Execution of process on Sunday.** — It shall be unlawful for any sheriff, constable, or other lawful officer to execute any summons, capias, or other process on Sunday. (1957, c. 1052.)

Editor's Note.—G. S. 103-3, which was repealed by chapter 912 of the Session Laws of 1953, was re-enacted by the 1957 act to read as above.

§ 103-5. **Acts to be done on Sunday or holidays.**—Where the day or the last day for doing an act required or permitted by law to be done falls on Sunday or on a holiday the act may be done on the next succeeding secular or business day and where the courthouse in any county is closed on Saturday or any other day by order of the board of county commissioners of said county and the day or the last day required for filing an advance bid or the filing of any pleading or written instrument of any kind with any officer having an office in the courthouse, or the performance of any act required or permitted to be done in said courthouse falls on Saturday or other day during which said courthouse is closed as aforesaid, then said Saturday or other day during which said courthouse is closed as aforesaid shall be deemed a holiday; and said advance bid, pleading or other written instrument may be filed, and any act required or permitted to be done in the courthouse may be done on the next day during which the courthouse is open for business. (Code, ss. 3784, 3785, 3786; 1899, c. 733, s. 194; Rev., s. 2839; C. S., s. 3960; 1951, c. 1176, s. 1.)

Editor's Note. — The 1951 amendment added all of the section following the word "day" in the fourth line.

Chapter 104.

United States Lands.

Article 1.

Authority for Acquisition.

Sec.

104-11.1. Governor may accept a retrocession of jurisdiction over federal areas.

ARTICLE 1.

Authority for Acquisition.

§ 104-7. **Acquisition of lands for public buildings; cession of jurisdiction; exemption from taxation.**

Fixtures and improvements placed upon lands in a military reservation leased from the federal government, as well as the value of the leasehold estate, are subject to

taxation in this State, Congress having waived any immunity of such property from taxation. *Cumberland County, 245 N. C. 492, 96 S. E. (2d) 341 (1957).* *Bragg Investment Co. v.*

§ 104-11.1. **Governor may accept a retrocession of jurisdiction over federal areas.**—Whenever a duly authorized official or agent of the United States, acting pursuant to authority conferred by the Congress, notifies the Governor or any other State official, department or agency, that the United States desires or is willing to relinquish to the State the jurisdiction, or a portion thereof, held by the United States over the lands designated in such notice, the Governor may, in his discretion, accept such relinquishment. Such acceptance may be made by sending a notice of acceptance to the official or agent designated by the United States to receive such notice of acceptance. The Governor shall send a signed copy of the notice of acceptance, together with the notice of relinquishment received from the United States, to the Secretary of State, who shall maintain a permanent file of said notices.

Upon the sending of said notice of acceptance to the designated official or agent of the United States, the State shall immediately have such jurisdiction over the lands designated in the notice of relinquishment as said notice shall specify.

The provisions of this section shall apply to the relinquishment of jurisdiction acquired by the United States under the provisions of this chapter or any other provision of law. (1957, c. 1202.)

Chapter 104A.

Degrees of Kinship.

Sec.

104A-1. Degrees of kinship; how computed.

§ 104A-1. **Degrees of kinship; how computed.**—In all cases where degrees of kinship are to be computed, the same shall be computed in accordance with the civil law rule, as follows:

(1) The degree of lineal kinship of two persons is computed by counting one degree for each person in the line of ascent or descent, exclusive of the person from whom the computing begins; and

(2) The degree of collateral kinship of two persons is computed by commencing with one of the persons and ascending from him to a common ancestor, descending from that ancestor to the other person, and counting one degree for each person in the line of ascent and in the line of descent, exclusive of the person from whom the computation begins, the total to represent the degree of such kinship. (1951, c. 315; 1953, c. 1077, s. 2.)

Editor's Note.—The act inserting this section became effective July 1, 1951.

The 1953 amendment, effective July 1, 1953, struck out the words "and the method is not otherwise provided by statute" formerly appearing after "computed"

the first time the word appears in line two.

For comment on this chapter, see 29 N. C. Law Rev. 351.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 375.

Chapter 104B.

Hurricanes or Other Acts of Nature.

Article 1.

In General.

Sec.

104B-1. Removal of property deposited by hurricane or other act of nature.

Article 2.

Zoning of Potential Flood Areas.

140B-2. Governing body of county or municipality may establish zones.

Article 3.

Protection of Sand Dunes along Outer Banks.

Sec.

104B-3. Damaging or removing without permit.

104B-4. Permits granted by municipal or county governing body.

104B-5. Findings prerequisite to issuance of permit.

104B-6. "Outer banks of this State" defined.

104B-7. Penalty.

ARTICLE 1.

In General.

§ 104B-1. **Removal of property deposited by hurricane or other act of nature.**—Whenever the house, garage, building, or any part thereof, or other property of a person, firm or corporation shall be deposited on the land of another by any hurricane, tornado, tidal wave, flood or other act of nature and is not removed from said land within 30 days after the deposit, the owner of such land may notify in writing the owner of the house, garage, building, or other property of such deposit and may require the owner to remove the property so deposited within 60 days after receipt of the notice. If the owner of the deposited property fails to remove it within 60 days after receipt of the notice, the owner of the land may remove the deposited property and destroy it or may use it as he sees fit without incurring liability to the owner of the deposited property, or may sell it and retain the proceeds for his own use; provided, the amount by which the proceeds of any such sale exceed the cost of removal and sale shall be paid to the owner of the deposited property or held for his account.

If the owner of the land is unable to notify the owner of the deposited property and, after diligent search, the owner of the deposited property cannot be located and notified, the owner of the land may, at any time after the expiration of one hundred and twenty (120) days from the date of the deposit of the property on his land, remove, use, or sell the deposited property in the same manner and under the same restrictions as provided above for removal, use, or sale after notice.

Sales made under this section may be either public or private sale. (1955, c. 643.)

ARTICLE 2.

Zoning of Potential Flood Areas.

§ 104B-2. **Governing body of county or municipality may establish zones.**—The governing body of any county or municipality within North Carolina shall have the power and authority to establish districts or zones in those areas deemed subject to seasonal or periodic flooding, or other natural disaster, and such regulations may be applied therein as will minimize danger to life and property and as will secure to the citizens of the area affected eligibility for flood insurance under Public Law 1016, 84th Congress, known as the "Federal Flood Insurance Act of 1956" or subsequently related laws or regulations promulgated thereunder. The governing body of each county or municipality

shall have authority to designate a zoning committee to give effect to the purposes of this section. Such zoning committee shall have authority to make zoning rules and regulations, subject to the approval of the governing body of the county or municipality appointing such committee. The governing body of the county or municipality involved shall forward certified copies of such zoning regulations to the State Commissioner of Insurance and to the federal official administering Public Law 1016, 84th Congress. The State Commissioner of Insurance shall render his opinion on the question of whether such zoning regulations meet the requirements of said Public Law 1016 when requested to do so by the federal official administering said Public Law, and shall furnish a certified copy of his opinion to the governing body of the county or municipality involved. (1957, c. 1005.)

ARTICLE 3.

Protection of Sand Dunes along Outer Banks.

§ 104B-3. **Damaging or removing without permit.** — It shall be unlawful for any person, firm or corporation to damage, destroy, or remove any sand dune, or part thereof, lying along the outer banks of this State or to destroy or remove any trees, shrubbery, grass or other vegetation growing on said dunes unless such person, firm or corporation shall have first obtained a permit authorizing such proposed destruction or removal. (1957, c. 995, s. 1.)

Cross Reference.—As to prohibition of stock running at large along outer banks of State, see G. S. 68-42 to 68-46.

§ 104B-4. **Permits granted by municipal or county governing body.** —Permits may be granted, in accordance with § 104B-5, by the municipal governing body if the permit requested relates to a dune or dunes located within the corporate limits of a city or town, or by the county governing body if the permit requested relates to a dune or dunes located within the county and lying outside the corporate limits of any city or town. (1957, c. 995, s. 2.)

§ 104B-5. **Findings prerequisite to issuance of permit.** — Before granting any permit required by this article, the appropriate governing body shall find as a fact that the particular damage, destruction or removal proposed will not materially weaken the dune as a means of protection from the effects of high wind and water, taking into consideration the height, width, and slope of the dune or dunes and the amount and type of vegetation thereon. (1957, c. 995, s. 3.)

§ 104B-6. **“Outer banks of this State” defined.** — As used in this article, the term “outer banks of this State” shall be construed to mean all of that part of North Carolina which is separated from the mainland by a body of water, such as an inlet or sound, and which is in part bounded by the Atlantic Ocean, and in New Hanover, Onslow and Brunswick counties this shall include the land areas lying between the Inter-Coastal Waterway and the Atlantic Ocean. (1957, c. 995, s. 4.)

§ 104B-7. **Penalty.** — Any person, firm or corporation violating the provisions of this article shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty (30) days. (1957, c. 995, s. 5.)

Chapter 105.

Taxation.

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SUBCHAPTER I. LEVY OF TAXES.

ARTICLE 1.

Schedule A. Inheritance Tax.

§ 105-2. General provisions.

Second. When the transfer is by will or intestate laws of this or any other state of real property or goods, wares, and merchandise within this State, or of any property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has a taxing jurisdiction, including State and municipal bonds, and the decedent was a resident of the State at the time of death; when the transfer is of real property or tangible personal property within the State, or intangible personal property that has acquired a situs in this State, and the decedent was a nonresident of the State at the time of death.

Ninth. Whenever any person or corporation comes into possession or enjoyment of any personal property, including bonds of the United States and bonds of a state or subdivision or agency thereof, at or after the death of an individual and by reason of said individual's having entered into a contract or other arrangement with the United States, a state or any person or corporation to pay, transfer or deliver said personal property, including bonds of the United States and bonds of a state, to the person or corporation receiving the same, whether said person or corporation is named in the contract or other arrangement or not: Provided, that no tax shall be due or collected on that portion of the personal property received under the conditions outlined herein which the person or corporation receiving the same purchased or otherwise acquired by funds or property of the person or corporation receiving the same, or had acquired by a completed inter vivos gift.

Nothing in subsection Ninth shall apply to the proceeds of life insurance policies.

(1951, c. 643, s. 1.)

Editor's Note.—

The 1951 amendment, effective July 1, 1951, substituted "tangible" for "intangible" in line six of subsection Second and inserted subsection Ninth. As the rest of the section was not changed by the amendment it is not set out.

Liberal Construction.—

In accord with 1st paragraph in origi-

nal. See *Watkins v. Shaw*, 234 N. C. 96, 65 S. E. (2d) 881 (1951).

U. S. savings bonds held subject to inheritance tax. See *Watkins v. Shaw*, 234 N. C. 96, 65 S. E. (2d) 881 (1951).

Cited in *State v. Scoggin*, 236 N. C. 19, 72 S. E. (2d) 54 (1952); *Pulliam v. Thrash*, 245 N. C. 636, 97 S. E. (2d) 253 (1957).

§ 105-3. Property exempt.

And also proceeds of all policies of insurance and the proceeds of all adjusted service certificates that have been or may be paid by the United States government, or that have been or may be paid on account of policies required to be carried by

the United States government or any agency thereof, to the estate, beneficiary, or beneficiaries of any person who has served in the armed forces of the United States or in the merchant marine during the first or second World War or any subsequent military engagement; and proceeds, not exceeding the sum of ten thousand dollars (\$10,000.00), of all policies of insurance paid to the estate, beneficiary or beneficiaries of any person whose death was caused by enemy action during the second World War or any subsequent military engagement involving the United States.

(1951, c. 643, s. 1.)

Editor's Note.—

The 1951 amendment, effective July 1, 1951, rewrote the next to last sentence of

subsection (d). As the rest of the section was not affected by the amendment only this sentence is set out.

§ 105-4. Rate of tax—Class A.

(b) The persons mentioned in this class shall be entitled to the following exemptions: Widows, ten thousand dollars (\$10,000.00); each child under twenty-one years of age, five thousand dollars (\$5,000.00); all other beneficiaries mentioned in this section, two thousand dollars (\$2,000.00) each: Provided, a grandchild or grandchildren shall be allowed the single exemption or pro rata part of the exemption of the parent, when the parent of any one grandchild or group of grandchildren is deceased or when the parent is living and does not share in the estate: Provided, that any part of the exemption not applied to the share of the parent may be applied to the share of a grandchild or group of grandchildren of such parent. The same rule shall apply to the taking under a will, and also in case of a specific legacy or devise: Provided, that when any person shall die leaving a widow and child or children under twenty-one years of age, and leaving all or substantially all of his property by will to his wife, the wife shall be allowed at her option an additional exemption of five thousand dollars (\$5,000.00) for each child under twenty-one years of age; provided further, that whenever the wife elects to claim such additional exemption, the child or children shall not be allowed the exemption of five thousand dollars (\$5,000.00) for each child under twenty-years of age hereinabove provided for. (1939, c. 158, s. 3; 1957, c. 1340, s. 1.)

Editor's Note.—The 1957 amendment deleted the former proviso at the end of subsection (b) and inserted the present two provisos in lieu thereof. As subsection

(a) was not changed it is not set out.

Cited in Pulliam v. Thrash, 245 N. C. 636, 97 S. E. (2d) 253 (1957).

§ 105-7. Estate tax.—(a) A tax in addition to the inheritance tax imposed by this schedule is hereby imposed upon the transfer of the net estate of every decedent dying after March 24, 1939, whether a resident or nonresident of the State, where the inheritance tax imposed by this schedule is in the aggregate of a lesser amount than the maximum credit of eighty per cent (80%) of the federal estate tax allowed by the Federal Estate Tax Act as contained in the Internal Revenue Code of one thousand nine hundred and fifty-four, or subsequent acts and amendments, because of said tax herein imposed, then the inheritance tax provided for by this schedule shall be increased by an estate tax on the net estate so that the aggregate amount of tax due this State shall be the maximum amount of credit allowed under said Federal Estate Tax Act; said additional tax shall be paid out of the same funds as any other tax against the estate.

(b) Where no tax is imposed by this schedule because of the exemptions herein or otherwise, and a tax is due the United States under the Federal Estate Tax Act, then a tax shall be due this State equal to the maximum amount of the credit allowed under said Federal Estate Tax Act.

(c) The administrative provisions of this schedule, wherever applicable, shall apply to the collection of the tax imposed by this section. The amount of the tax as imposed by subsection (a) of this section shall be computed in full accordance

with the Federal Estate Tax Act as contained in the Internal Revenue Code of one thousand nine hundred and fifty-four, or subsequent acts and amendments. (1939, c. 158, s. 6; 1957, c. 1340, s. 1.)

Editor's Note.—

For article on credit allowable against basic federal estate tax for death taxes paid to State, see 30 N. C. Law Rev. 123.

The 1957 amendment deleted the words

“Federal Revenue Act of one thousand nine hundred and twenty-six” in subsections (a) and (c) and inserted in lieu thereof “Internal Revenue Code of one thousand nine hundred and fifty-four.”

§ 105-9. Deductions.

(c) Reasonable funeral and burial expenses, which shall include bequests and devises in trust, the entire net income from which is to be applied perpetually to the care and preservation of the burial lot or burial grounds within which the decedent is buried, the enclosure thereof and the structures thereon to the extent to which the value of such bequests and devises does not exceed the smaller of the following amounts: Five hundred dollars (\$500.00), or two per centum (2%) of the amount of the decedent's gross estate.

(e) Estate and inheritance taxes paid to other states, and death duties paid to foreign countries.

(f) The amount actually expended for monuments not exceeding the sum of one thousand dollars (\$1,000.00).

(1951, c. 643, s. 1; 1953, c. 1250; 1957, c. 1340, s. 1.)

Editor's Note.—

The 1951 amendment, effective July 1, 1951, rewrote subsection (f). The 1953 amendment added that part of subsection (c) beginning with the word “which” in line one. The 1957 amendment rewrote

subsection (e). As only subsections (c), (e) and (f) were affected by the amendments the rest of the section is not set out.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 434.

§ 105-9.1. As of what date property valued.—For the purposes of this article, all property shall be valued at its fair market value as of the date of death of the decedent, except that the personal representative of the estate may elect to value the property as of the first anniversary of the date of death of the decedent, substituting in the case of property distributed, sold, exchanged or otherwise disposed of during the one-year period, the fair market value of such property as of the date of such distribution, sale, exchange, or other disposition. In all cases in which such election is made, the provisions of the federal estate tax law and regulations as now existing or as they may be subsequently amended pertaining to optional valuation date shall be applicable. (1951, c. 643, s. 1; 1953, c. 1302, s. 1.)

Editor's Note.— This section became effective July 1, 1951.

1953, rewrote this section.

The 1953 amendment, effective July 1,

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 434.

§ 105-14. Recurring taxes.—Where property transferred has been taxed under the provisions of this article, each transferee (of the classes hereinafter provided) receiving such property on account of any other transfer by reason of a death occurring within two years of the date of the death of the former decedent, shall be allowed a tax credit in an amount equal to the tax paid on such prior transfer of said property. Said tax paid shall be that proportion of the total tax paid on the prior transfer on account of all property received by the prior transferee on the prior transfer as is equal to the proportion of the taxable value, on the prior transfer, of such property to the total taxable value of all property received by the prior transferee on the prior transfer. Provided, that where a transferee receives property which has been taxed under this article upon transfers by reason of the deaths of two or more former decedents, with such deaths having occurred not more than two years prior to the date of death of the decedent, said transferee shall be allowed tax credits as provided in this

section for taxes actually paid upon any or all of such prior transfers. Provided, further, that this section shall apply only to the transferees designated in G. S. 105-4 and 105-5. (1939, c. 158, s. 12; 1957, c. 1340, s. 1.)

Editor's Note. — The 1957 amendment rewrote and enlarged this section.

§ 105-15. When all heirs, legatees, etc., are discharged from liability.

Primary Liability of devisees Not Affected by Compromise Agreement.—The primary liability of the devisees for the inheritance tax on the value of property devised to them under the will is not affected by any compromise agreement under which the ultimate disposition of the lands differs in whole or in part from that prescribed by the will. *Pulliam v. Thrash*, 245 N. C. 636, 97 S. E. (2d) 253 (1957).

Will devising certain lands to three devisees as tenants in common was established by verdict and judgment, and by compromise agreement a fourth person

was let in as a tenant in common and the land sold for partition. An additional inheritance tax assessed was paid by the commissioner out of the proceeds of sale. It was held that the share of each of the three devisees was chargeable with one-third of the tax, and no part thereof was chargeable against the share of the person let in by the compromise agreement or her transferee in the absence of an express or implied agreement to pay same. *Pulliam v. Thrash*, 245 N. C. 636, 97 S. E. (2d) 253 (1957).

§ 105-16. Interest and penalty.—All taxes imposed by this article shall be due and payable at the death of the testator, intestate, grantor, donor or vendor; if not paid within fifteen months from date of death of the testator, intestate, grantor, donor, or vendor, such tax shall bear interest at the rate of six per centum (6%) per annum, to be computed from the expiration of fifteen months from the date of the death of such testator, intestate, grantor, donor, or vendor until paid: Provided, that if the taxes herein levied shall not be paid in full within two years from date of death of testator, intestate, grantor, donor, or vendor, then and in such case a penalty of five per centum (5%) upon the amount of taxes remaining due and unpaid shall be added: Provided further, that the penalty of five per centum (5%) herein imposed may be remitted by the Commissioner of Revenue in case of unavoidable delay in settlement of estate or of pending litigation, and the Commissioner of Revenue is further authorized, in case of protracted litigation or other delay in settlement not attributable to laches of the party liable for the tax, to remit all or any portion of the interest charges accruing under this schedule, with respect to so much of the estate as was involved in such litigation or other unavoidable cause of delay: Provided, that time for payment and collection of such tax may be extended by the Commissioner of Revenue for good reasons shown. (1939, c. 158, s. 14; 1947, c. 501, s. 1; 1953, c. 1302, s. 1.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, substituted "fifteen months" for

"twelve months" in lines three and five of this section.

§ 105-18. Executor, etc., shall deduct tax.

Cited in *Pulliam v. Thrash*, 245 N. C. 636, 97 S. E. (2d) 253 (1957).

§ 105-20. Legacy charged upon real estate, heir or devisee to deduct and pay to executor, etc.—Whenever such legacy shall be charged upon or payable out of real estate, the heir or devisee of such real estate, before paying the same to such legatee, shall deduct the tax therefrom at the rates aforesaid, and pay the amount so deducted to the executor or administrator or the Commissioner of Revenue, and the same shall remain a charge upon such real estate until paid, and in default thereof the same shall be enforced by the decrees of the court in the same manner as the payment of such legacy may be enforced: Provided, that all taxes imposed by this article shall be a lien upon the real and personal property of the estate on which the tax is imposed or

upon the proceeds arising from the sale of such property from the time said tax is due and payable, and shall continue a lien until said tax is paid and receipted for by the proper officer of the State: Provided further, that no lien for inheritance or estate taxes shall attach or affect the land after ten years from the date of death of the decedent. (1939, c. 158, s. 18; 1951, c. 643, s. 1; 1957, c. 1340, s. 1.)

Editor's Note. — The 1951 and 1957 amendments rewrote the last proviso. Cited in *Pulliam v. Thrash*, 245 N. C. 636, 97 S. E. (2d) 253 (1957).

§ 105-22. Duties of the clerks of the superior court.

(c) For these services, where performed by the clerk, the clerk shall be paid by the Commissioner of Revenue, upon submission of proper certification that the service has been performed, as follows: For recording the certificate of the Commissioner of Revenue showing no tax due, the sum of fifty cents (50¢). For recording the certificate of the Commissioner of Revenue, showing that the tax received by the State is one hundred dollars (\$100.00) or less, he shall be paid the sum of two dollars (\$2.00). For recording the certificate of the Commissioner of Revenue showing that the tax received by the State is more than one hundred dollars (\$100.00) and not over five hundred dollars (\$500.00) he shall be paid the sum of three dollars (\$3.00). For recording the certificate of the Commissioner of Revenue showing that the tax received by the State is more than five hundred dollars (\$500.00) and not over one thousand dollars (\$1,000.00) he shall be paid the sum of five dollars (\$5.00). For recording of certificates of the Commissioner of Revenue showing that the tax received by the State is more than one thousand dollars (\$1,000.00) he shall be paid the sum of ten dollars (\$10.00), which sum shall be the maximum amount paid for recording the certificate of the Commissioner of Revenue for any one estate: Provided, that where the decedent owned real estate in one or more counties, other than the county in which the administration of the estate is had, then the fee of the clerks of the courts of such other counties for recording the certificates of the Commissioner of Revenue shall be fifty cents (50¢) each, and the fee paid to clerks of courts for recording the certificate of the Commissioner in the case of the settlements of the estates of nonresidents shall be one dollar (\$1.00). The clerk of the superior court shall receive the sum of two dollars (\$2.00) for making up and transmitting to the Commissioner of Revenue the report required in this section, containing a list of persons who died leaving property in his county during the preceding month, etc.: Provided, further, that where the clerk of the superior court has failed or neglected to make the report required of him in this section, in that case he shall only receive for recording the certificate of the Commissioner of Revenue the sum of fifty cents (50¢).

The clerks of the superior courts of the several counties shall be allowed the fees provided for in this section in addition to other fees or salaries received by them. (1939, c. 158, s. 20; 1943, c. 400, s. 1; 1953, c. 1302, s. 1.)

Editor's Note.— subsection was affected by the amendment
The 1953 amendment, effective July 1, 1953, rewrote subsection (c). As only this the rest of the section is not set out.

§ 105-23. Information by administrator and executor.

The statement herein provided for shall be filed with the Commissioner of Revenue at Raleigh, North Carolina, within fifteen months after the qualification of the executor or administrator, upon blank forms to be prepared by the Commissioner of Revenue.

(1951, c. 643, s. 1.)

Editor's Note.— As the rest of the section was not changed
The 1951 amendment, effective July 1, 1951, substituted "fifteen months" for "twelve months" in the fourth sentence. by the amendment only this sentence is set out.

§ 105-25. **Supervision by Commissioner of Revenue.**—The Commissioner of Revenue shall have complete supervision of the enforcement of all provisions of the Inheritance Tax Act and the collections of all inheritance taxes found to be due thereunder, and shall make all necessary rules and regulations for the just and equitable administration thereof. He shall regularly employ such deputies, attorneys, examiners, or special agents as may be necessary for the reasonable carrying out of its full intent and purpose. Such deputies, attorneys, examiners, or special agents shall, as often as required to do so, visit the several counties of the State to inquire and ascertain if all inheritance taxes due from estates of decedents, or heirs-at-law, legatees, devisees, or distributees thereof have been paid; to see that all statements required by this article are filed by administrators and executors, or by the beneficiaries under wills where no executor is appointed; to examine into all statements filed by such administrators and executors; to require such administrators and executors to furnish any additional information that may be deemed necessary to determine the amount of tax that should be paid by such estate. If not satisfied, after investigation, with valuation returned by the administrator or executor, the deputy, attorney, examiner, or appraiser shall make an additional appraisal after proper examination and inquiry, or may, in special cases, recommend the appointment by the Commissioner of Revenue of a special appraiser who, in such case, shall be paid five dollars (\$5.00) per day and expenses for his services. If not satisfied with such additional appraisal, the administrator or executor may, within thirty days, request a conference with the Commissioner of Revenue, and the matter shall be determined as other cases by the Commissioner. (1939, c. 158, s. 22; 1955, c. 1350, s. 16.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, deleted the former last two sentences and proviso relating to appeals to the Commissioner of Revenue

and from his decision to the superior court, and added the present last sentence in lieu thereof.

§ 105-29. **Uniform valuation.**—(a) If the value of any estate taxed under this schedule shall have been assessed and fixed by the federal government for the purpose of determining the federal taxes due thereon prior to the time the report from the executor or administrator is made to the Commissioner of Revenue under the provisions of this article, the amount or value of such estate so fixed, assessed, and determined by the federal government shall be stated in such report. If the assessment of the estate by the federal government shall be made after the filing of the report by the executor or administrator with the Commissioner of Revenue, as provided in this article, the said executor or administrator shall, within thirty days after receipt of notice of the final determination by the federal government of the value or amount of said estate as assessed and determined for the purpose of fixing federal taxes thereon, make report of the amount so fixed and assessed by the federal government, under oath or affirmation, to the Commissioner of Revenue. If the amount of said estate as assessed and fixed by the federal government shall be in excess of that theretofore fixed or assessed under this schedule for the purpose of determining the amount of taxes due the State from said estate, then the Commissioner of Revenue shall reassess said estate and fix the value thereof at the amount fixed, assessed, and determined by the federal government, unless the said executor or administrator shall, within thirty days after notice to him from the Commissioner of Revenue, show cause why the valuation and assessment of said estate as theretofore made should not be changed or increased. If the valuation placed upon said estate by the federal government shall be less than that theretofore fixed or assessed under this article, the executor or administrator may, within thirty days after filing his return of the amount so fixed or assessed by the federal government, file with the Commissioner of Revenue a petition to have the value of said estate reassessed and the same reduced to the amount as fixed or assessed by the federal

government. In either event the Commissioner of Revenue shall proceed to determine, from such evidence as may be brought to his attention or which he shall otherwise acquire, the correct value of the said estate, and if the valuation is changed, he shall reassess the taxes due by said estate under this article and notify the executor or administrator of such fact. In the event the valuation of said estate shall be decreased and if there shall have been an overpayment of the tax in the amount of three dollars (\$3.00) or more, the Commissioner of Revenue shall, within sixty (60) days after the final determination of the value of said estate and the assessment of the correct amount of tax against the same, refund the amount of such excess tax theretofore paid. In the event that the amount of such overpayment is less than three dollars (\$3.00) the overpayment shall be refunded upon receipt by the Commissioner of Revenue of a written demand for such refund from the taxpayer. No overpayment shall be refunded, irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three (3) years from the date set by the statute for the filing of the return or within six (6) months from the date of the payment of the tax alleged to be an overpayment, whichever is the later.

(1957, c. 1340, s. 14.)

Editor's Note.—The 1957 amendment present last three sentences. As subsection deleted the former last sentence of subsection (a) and substituted therefor the (b) was not changed it is not set out.

§ 105-31. Additional remedies for enforcement of tax.

Cited in Pulliam v. Thrash, 245 N. C. 636, 97 S. E. (2d) 253 (1957).

§ 105-32: Repealed by Session Laws 1957, c. 1340, s. 1.

ARTICLE 2.

Schedule B. License Taxes.

§ 105-33. Taxes under this article.

(c) The State license issued under §§ 105-41, 105-41.1, 105-42, 105-43, 105-45, 105-48, 105-53, 105-54, 105-55, 105-56, 105-57, 105-58, 105-59 and 105-91 shall be and constitute a personal privilege to conduct the profession or business named in the State license, shall not be transferable to any other person, firm or corporation and shall be construed to limit the person, firm or corporation named in the license to conducting the profession or business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this article or schedule. Other license issued for a tax year for the conduct of a business at a specified location shall upon a sale or transfer of the business be deemed a sufficient license for the succeeding purchaser for the conduct of the business specified at such location for the balance of the tax year: Provided, that if the holder of a license under this schedule moves the business for which a license has been paid to another location, a new license may be issued to the licensee at a new location for the balance of the license year, upon surrender of the original license for cancellation and the payment of a fee of five dollars (\$5.00) for each license certificate reissued.

(1951, c. 643, s. 2; 1953, c. 981, s. 1.)

Editor's Note.—

The 1951 amendment, effective June 1, 1951, inserted "105-41.1" in the first line of subsection (c). The 1953 amendment, effective June 1, 1953, added "105-91" to

the list of sections in subsection (c). As only this subsection was affected by the amendments the rest of the section is not set out.

§ 105-36.1. Amusements—outdoor theatres.

For drive-in or outdoor theatres located in or within 10 miles of the corporate limits of cities and towns of

	Car Capacity Up to 150	Car Capacity 150 to 300	Car Capacity 300 to 500	Car Capacity 500 or over
less than 3,000 pop.	.83 per car	.92 per car	1.00 per car	1.08 per car
3,000 to 5,000 pop.	.92 per car	1.00 per car	1.08 per car	1.17 per car
5,000 to 10,000 pop.	1.00 per car	1.08 per car	1.17 per car	1.25 per car
10,000 to 20,000 pop.	1.08 per car	1.17 per car	1.25 per car	1.33 per car
20,000 to 40,000 pop.	1.17 per car	1.25 per car	1.33 per car	1.46 per car
40,000 and over	1.25 per car	1.33 per car	1.46 per car	1.67 per car

(1957, c. 1340, s. 2.)

Editor's Note.—The 1957 amendment, effective for the license year beginning June 1, 1957, and thereafter, rewrote the rate schedule in the second paragraph of

subsection (a). As the rest of the section was not changed only such paragraph is set out.

§ 105-37. Amusements—moving pictures or vaudeville shows—admission.—Every person, firm, or corporation engaged in the business of operating a moving picture show or place where vaudeville exhibitions or performances are given or operating a theatre or opera house where public exhibitions or performances are given for compensation shall apply for and obtain in advance from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such State license for each room, hall, or tent used the following tax:

	Seating Ca- pacity up to 600 Seats	Seating Ca- pacity of 600 to 1200 Seats	Seating Ca- pacity over 1200 Seats
In cities or towns of less than 1,500 population	\$104.00	\$ 125.00	\$ 167.00
In cities or towns of 1,500 and less than 3,000 population	167.00	208.00	250.00
In cities or towns of 3,000 and less than 5,000 population	208.00	250.00	333.00
In cities or towns of 5,000 and less than 10,000 population	292.00	333.00	500.00
In cities or towns of 10,000 and less than 15,000 population	333.00	500.00	667.00
In cities or towns of 15,000 and less than 25,000 population	417.00	667.00	833.00
In cities or towns of 25,000 and less than 40,000 population	500.00	833.00	1,250.00
In cities or towns of 40,000 population or over	667.00	1,250.00	2,083.00

(1957, c. 1340, s. 2.)

Editor's Note.—The 1957 amendment, effective for the license year beginning June 1, 1957, and thereafter, rewrote the rate schedule in the

first paragraph. As the rest of the section was not changed only the first paragraph containing the schedule is set out.

§ 105-39. Amusements—carnival companies, etc.

Nothing herein contained shall prevent veterans' organizations and posts char-

tered by Congress or organized and operated on a state-wide or nation-wide basis from holding fairs or tobacco festivals on any dates which they may select, provided said fairs or festivals have heretofore been held as annual events.

(1951, c. 643, s. 2.)

Editor's Note.—

The 1951 amendment, effective June 1, 1951, rewrote the last paragraph of subsec-

tion (b). As the rest of the section was not changed by the amendment only this paragraph is set out.

§ 105-41. **Attorneys at law and other professionals.** — Every practicing attorney at law, practicing physician, veterinary, surgeon, osteopath, chiropractor, chiroprapist, dentist, oculist, optician, optometrist, any person practicing any professional art of healing for a fee or reward, every practicing professional engineer as defined in chapter 89 of the General Statutes, every practicing land surveyor as defined in chapter 89 of the General Statutes, every architect and landscape architect, photographer, canvasser for any photographer, agent of a photographer in transmitting pictures or photographs to be copied, enlarged or colored (including all persons enumerated in this section employed by the State, county, municipality, a corporation, firm or individual), and every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in the business of selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, or who is engaged in the business of leasing or offering to lease, renting or offering to rent, or of collecting any rents as agent for another for compensation, or who is engaged in the business of soliciting and/or negotiating loans on real estate as agent for another for a commission, brokerage and/or other compensation, shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business or profession, or the doing of the act named, and shall pay for such license twenty-five dollars (\$25.00): Provided, that no professional man or woman shall be required to pay a privilege tax after he or she has arrived at the age of seventy-five years. Further provided, that it shall be unlawful for a nonresident of this State to engage in the real estate business in this State, as defined in this section, unless the State of residence of such person will permit a resident of this State to engage in such business. Any person who shall engage in the real estate business in this State in violation of the terms of this provision shall be guilty of a misdemeanor and shall be punished in the discretion of the court; and further provided, that the obtaining of a real estate dealer's license by such person shall not authorize such nonresident to engage in the real estate business in this State, and provided further that in all prosecutions under this section, a certificate under the hand and seal of the Commissioner of Revenue that the accused filed no income tax returns with his department for the preceding taxable year shall be prima facie evidence that the accused is a nonresident and that his license is void.

Persons practicing the professional art of healing for a fee or reward shall be exempt from the payment of the license tax levied in the preceding paragraph of this section, if such persons are adherents of established churches or religious organizations and confine their healing practices to prayer or spiritual means.

(1953, c. 1306; 1957, c. 1064.)

Editor's Note.—

The 1953 amendment, effective June 1, 1953, struck out in lines four and five of the first paragraph the words "civil engineer, electrical engineer, mining engineer, mechanical engineer" and inserted in lieu thereof the words "every practicing professional engineer as defined in chapter 89

of the General Statutes, every practicing land surveyor as defined in chapter 89 of the General Statutes, every". The 1957 amendment inserted the second paragraph. As the rest of the section was not affected by the amendments only the first and second paragraphs are set out.

§ 105-48.1. Itinerant photographers, their agents and employees.

—(a) It is hereby declared that it is in the public interest to require the licensing of persons practicing the profession or occupation of an itinerant photographer and to license an itinerant photographer's employees, agents or servants. An itinerant photographer is defined to be a person, partnership or corporation having no regularly established place of business in this State who personally or through officers, employees, agents or servants goes from town to town or from place to place within a town other than within the county of his residence, soliciting the making of photographic pictures or reproductions with a view to selling the same to the persons solicited. Unless duly licensed as hereinafter provided, it shall be unlawful for any person to practice as an itinerant photographer in this State and it shall be unlawful for any officer, employee, agent or servant of any itinerant photographer to engage in business in behalf of an itinerant photographer. The words "regularly established place of business" are defined to mean a place of business open to the public at least two days a week for not less than four hours daily and having one or more persons in charge thereof, and at which place the same person has the intent to continue in business for at least six consecutive months.

(b) Any person who practices the profession or occupation of an itinerant photographer in this State, whether as principal, officer, employee, agent or servant, and whether engaged in soliciting or in one or more of the operations involved in the making of photographic pictures or reproductions, shall obtain a license as hereinafter provided, paying therefor an annual fee of one hundred dollars (\$100.00). All the provisions of the Revenue Act applicable to other State license taxes not inconsistent herewith shall be applicable with respect to the license tax herein provided.

(c) Counties, cities and towns may levy a license tax on each person taxed under this section not in excess of that levied by the State. (1957, c. 1256.)

§ 105-53. Peddlers.—(a) Any person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sells or barter the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, with an established warehouse in this State and selling only to merchants for resale, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the following tax:

Peddler, on foot, for each county	\$10.00
Peddler, with horse or other animal, and with or without vehicle, each county, for each vehicle	15.00
Peddler, resident of this State, with vehicle propelled by motor or other mechanical power, for each county, for each vehicle	25.00
Peddler, not a resident of this State, with vehicle propelled by motor or other mechanical power, for four or less counties, for each vehicle ..	100.00
Peddler, not a resident of this State, with vehicle propelled by motor or other mechanical power, for each county in excess of four, for each vehicle	25.00

(g) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the annual license levied by the State. But the board of county commissioners of any county may levy a license tax on the business taxed in this section not in excess of that levied by the State for each unincorporated town or village in the county with a population of one thousand or more within a radius of one mile in which such business is engaged in; and any county or city may levy on peddlers of goods, wares, or merchandise with vehicle propelled by motor or other mechanical power, taxed by the State under subsection (a) of this section, a tax not exceeding two hundred dollars (\$200.00) for each vehicle, which said tax may, in the discretion of the govern-

ing body, be graduated in accordance with the size or weight of said vehicles, the amount of merchandising space in and on said vehicles, the average value of goods carried, the types of products offered for sale, or any other reasonable principle, except that the tax levied hereunder on account of a vehicle of one-half ton capacity or less shall not exceed twenty-five dollars (\$25.00.)

No county, city, or town shall levy any license tax under this section upon the persons so exempted in this section, nor upon any person, firm or corporation who or which is a wholesale dealer, with an established warehouse in this State and selling only to merchants for resale, nor upon drummers selling by wholesale.

(h) Any person, firm or corporation who or which maintains a fixed permanent location at or in which at least ninety per cent (90%) of his or its total sales volume is made and who or which pays all applicable State and local taxes for such fixed permanent location shall not be deemed a peddler with respect to other sales which may be made from vehicles within the county wherein the fixed permanent location is maintained. (1939, c. 158, s. 121; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1951, c. 643, s. 2; 1955, c. 1315.)

Local Modification.—Gates, as to subsection (g): 1955, c. 923; Hyde, as to subsection (g): 1955, c. 632.

ment also added subsection (h) at the end of the section.

The 1955 amendment inserted in the second paragraph of subsection (g) the provisions as to "wholesale dealer."

As the rest of the section was not changed only subsections (a), (g) and (h) are set out.

Editor's Note.—

The 1951 amendment, effective June 1, 1951, inserted "resident of this state" in line twelve of subsection (a) and added at the end of the subsection the two classifications of nonresident peddlers. The amend-

§ 105-54. Contractors and construction companies.

(f) In the event joint bidders shall submit one joint bid for the construction of any of the projects enumerated under subsection (a), each of the joint bidders shall procure in his own name a bidder's license under subsection (a); provided, that if a joint bidder has already procured a bidder's license for the current year, he will not be required to procure an additional bidder's license by reason of joining in a joint bid, and the license so procured shall entitle the licensee to submit other bids, either severally or in conjunction with others, during the remainder of the current license tax year. In the event a contract shall be awarded to joint bidders, a new project license shall be procured under subsection (b) in the full amount of the contract price or estimated cost of the project, in the same name or names under which the contract is awarded, which new license will be valid for the remainder of the license tax year for the same combination of joint bidders in other joint projects, but will not be valid for a part of the joint bidders, nor for all of them plus others, nor for a part of them plus others.

For the purpose of this subsection, "joint bidders" shall mean two or more separate entities consisting of either individuals, partnerships or corporations who or which combine for the purpose of submitting one joint bid for the construction of a particular project, or who or which jointly enter into a contract for the construction of a particular project.

(g) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy an annual contractor's license tax not in excess of ten dollars (\$10.00) when the license provided for under this section has been paid: Provided, that this subsection shall not be construed to prevent the collection of building, electrical, and plumbing inspection charges by municipalities to cover the actual cost of said inspection.

(h) The tax under this section shall not apply to the business taxed in § 105-91. (1939, c. 158, s. 122; 1951, c. 643, s. 2.)

Editor's Note.— The 1951 amendment, effective June 1, 1951, redesignated former subsections (f) and (g) as (g) and (h), respectively, and inserted present subsec-

tion (f). As the rest of the section was not changed only subsections (f)-(h) are set out.

§ 105-64. Billiard and pool tables.

Tables measuring not more than 2 feet wide and 4 feet long	\$ 5.00
Tables measuring not more than 2½ feet wide and 5 feet long	10.00
Tables measuring not more than 3 feet wide and 6 feet long	15.00
Tables measuring not more than 4 feet wide and 8 feet long	20.00
Tables measuring not more than 4½ feet wide and 9 feet long	25.00
Tables measuring more than 4½ feet wide and 9 feet long	30.00

(1953, c. 1302, s. 2.)

Editor's Note.—

The 1953 amendment, effective June 1, 1953, made changes in the schedule of

taxes in the first paragraph. As only the schedule was affected by the amendment the rest of the section is not set out.

§ 105-65.1. Merchandising dispensers and weighing machines.—

(1) Every person, firm or corporation engaged in the business of operating, maintaining or placing on location anywhere within the State of North Carolina merchandising dispensers in which are kept any article or merchandise to be purchased, or weighing machines, shall be deemed a distributor or operator and shall apply for and procure from the Commissioner of Revenue a State-wide license to be known as an annual distributor's or operator's license, and shall pay for such license the following tax:

Distributors or operators of 5 or more cigarette dispensers or dispensers of other tobacco products	\$250.00
Distributors or operators of 5 or more drink dispensers	100.00
Distributors or operators of 5 or more food or other merchandising dispensers selling products for 5¢ or more per unit	150.00
Distributors or operators of 5 or more food or other merchandising dispensers selling products for less than 5¢ per unit	25.00
Distributors or operators of 5 or more weighing machines	50.00

A person, firm or corporation operating and maintaining soft drink dispensers or any other dispensers as set forth above in places of business operated by him or it, and not elsewhere, shall not be considered a distributor or operator of such dispensers for the purpose of this subsection.

Any person, firm or corporation operating, maintaining or placing on location fewer than five (5) such machines or dispensers shall not be considered a distributor or operator for the purpose of this subsection. Any person, firm or corporation operating, maintaining or placing on location five (5) or more soft drink dispensers shall not be considered a distributor or operator for the purpose of this subsection when all of said dispensers operated, maintained or placed on location by such person, firm or corporation are operated, maintained or placed in a single building, all parts of which are accessible through the same outside entrance, and which building is occupied by a single commercial, manufacturing or industrial business. Every machine or dispenser placed on location by a licensed operator or distributor as herein defined shall have affixed thereto identification showing the name and address of the owner, operator, or distributor. The operator of any machine or dispenser not so identified shall be liable for the license tax levied by subsection (2).

Any licensed distributor or operator of dispensers dispensing cigarettes or other tobacco product who shall operate, maintain or place on location any such dispenser at any location for which the license fee prescribed by G. S. 105-84 has not been paid shall become liable for the payment of such license fee.

(2) (a) In addition to the above annual distributor's or operator's license, every distributor or operator distributing or operating a dispenser or machine designed or used for the dispensing or selling of soft drinks shall apply for and obtain from the Commissioner of Revenue a State-wide license for each such dispenser or machine so operated and shall pay therefor an annual tax of \$15.00

per machine or dispenser: Provided, however, that said annual tax shall be five dollars (\$5.00) in lieu of fifteen dollars (\$15.00), per soft drink machine or dispenser on each soft drink machine or dispenser having a total capacity not in excess of 48 bottles or other dispensing units, including those bottles or other dispensing units stored in such machine or dispenser as well as those in the dispensing rack.

(b) Every person, firm or corporation, operating, maintaining or placing on location any dispenser or machine described in subsection (1) and not required to procure a distributor's or operator's license under the terms of subsection (1) shall apply for and obtain from the Commissioner of Revenue a State-wide license for each such dispenser or machine, and shall pay therefor an annual tax as follows:

Cigarette dispensers or dispensers of other tobacco products	\$ 5.00
Drink dispensers having a capacity in excess of 48 bottles or other dispensing units	15.00
Drink dispensers having a capacity not in excess of 48 bottles or other dispensing units, including those bottles or other dispensing units stored in such machine or dispenser as well as those in the dispensing rack	5.00
Food or other merchandising dispensers selling products for 5¢ or more per unit	1.00
Food or other merchandising dispensers selling products for less than 5¢ per unit50
Weighing machines	2.50

Provided that the tax on food or merchandising dispensers imposed by this paragraph (b) shall not apply to dispensers dispensing peanuts only or to dispensers dispensing no commodity other than candy containing fifty per cent (50%) or more peanuts, or to penny self-service dispensers or machines twenty per cent (20%) of the gross revenue from which inures to the benefit of the visually handicapped.

(c) The applicant for license under this section shall, in making application for license, specify the serial number of the dispenser, or dispensers and of the weighing machine, or machines, proposed to be distributed or operated, together with a description of the merchandise or service offered for sale thereby, and the amount of deposit required by or in connection with the operation of such dispenser, or dispensers, and such machine, or machines. The license shall carry the serial number to correspond with that on the application, and no such license shall under any conditions be transferable to any other dispenser or machine. It shall be the duty of the person in whose place of business the dispenser or machine is operated or located to see that the proper State license is attached in a conspicuous place on the dispenser or machine before its operation shall commence.

(d) When application is made under this subsection (2) for license to operate a machine dispensing soft drinks or cigarettes or other tobacco products the applicant for such license shall pay or cause to be paid the license fee provided for under G. S. 105-79 and 105-84, as the case may be.

(5) Counties, cities, and towns shall not levy or collect any annual distributor's or operator's occupational license levied for the distribution or operation of any of the dispensers or machines described in subsection (1), nor any per dispenser or per machine license tax for any machine or dispenser described in subsections (1) or (2) of this section, except that counties, cities, and towns may levy and collect an annual occupational license from operators of cigarette dispensing machines not in excess of \$10.00 per annum.

(1953, c. 1142; 1955, cc. 1271, 1344; 1957, c. 1340, s. 2.)

Editor's Note.—

The 1953 amendment, effective June 1, 1953, rewrote subsections (1), (2) and (5).

The first 1955 amendment, effective June

1, 1955, inserted the sentence relating to five or more soft drink dispensers beginning in line twenty-two of subsection (1).

The second 1955 amendment substituted

in line twelve of subsection (1) "5c or more" for "less than for 5c," and in line fourteen "less than 5c" for "5c or more."

The 1957 amendment changed subsection (2) by adding the proviso to paragraph (a), and by inserting in paragraph (b) much of the matter relating to "Drink dispensers", which prior to the amendment read "Drink dispensers15.00".

As the rest of the section was not affected by the amendments it is not set out.

Drink Dispensers.—A bottling company which owns and distributes as a part of its business a large number of machines for distributing its product which it places in location with merchants and others under agreement, is liable for the occupational tax of \$100.00 levied under the provisions

§ 105-67. Security dealers.

Cited in *State v. Carolina Tel. & Tel. Co.*, 243 N. C. 46, 89 S. E. (2d) 802 (1955).

§ 105-68. Cotton buyers and sellers on commission.

Stated in *Robinson & Hale, Inc. v. Shaw*, 242 N. C. 486, 87 S. E. (2d) 909 (1955).

§ 105-69. Manufacturers, producers, bottlers and distributors of soft drinks.

Stated in *Robinson & Hale, Inc. v. Shaw*, 242 N. C. 486, 87 S. E. (2d) 909 (1955).

§ 105-72. Persons, firms, or corporations selling certain oils.—(a) Every person, firm, or corporation engaged in the business of selling illuminating oil or greases, or benzine, naphtha, gasoline, or other products of like kind shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business, and shall pay for the same a tax of two dollars and fifty cents (\$2.50).
(1957, c. 1340, s. 2.)

Editor's Note. — The 1957 amendment deleted the words "or lubricating" formerly appearing immediately before the word "oil" in line two of subsection (a). As only this subsection was changed the rest of the section is not set out.

§ 105-73: Repealed by Session Laws 1957, c. 1340, ss. 2, 9.

§ 105-74. Pressing clubs, dry cleaning plants, and hat blockers.

In addition to the annual tax levied in this section, there is hereby levied a tax of one per cent (1%) on the gross receipts from supplying dry cleaning, pressing and hat blocking services to the public, whether the taxpayer performs the service or contracts with other establishments to perform the service or solicits such cleaning, pressing or hat blocking on a commission basis, whether performed in or solicited from a permanent establishment in this State or from vehicles operating in this State. Such dry cleaners, pressers, hat blockers, and solicitors shall add to the amount charged each customer, except those exempted herein, one per cent (1%) of said amount and this added amount shall be paid by each customer as a tax. Provided, the failure of any such dry cleaner, presser, hat blocker or solicitor to add, and collect from its customers one per cent (1%) of the amount charged its customers shall not relieve said dry cleaner, presser, hat blocker or solicitor from liability for the tax herein imposed. Reports shall be made to the

Commissioner of Revenue in such form as he may prescribe within the first ten days of each month, covering all such gross receipts for the previous month, and the tax herein levied shall be paid monthly at the time such reports are made. There shall be excluded from the gross receipts taxed under this section, all sales to the United States government, the State of North Carolina or any agency or subdivision thereof, and sales of charitable or religious organizations or institutions and hospitals not operated for profit. The one per cent gross receipts tax levied by this paragraph shall not be due or payable by dry cleaners, pressers, hat blockers or solicitors on that portion of their business upon which three per cent (3%) sales tax is due and payable.

Failure to file reports herein prescribed and pay the tax shown to be due thereon, within the time prescribed, shall subject persons, firms or corporations taxed hereunder to a penalty of five per centum (5%) per month of the amount of tax due from the date the tax is due. If the taxpayer shall refuse to make the reports required under this section, then such reports shall be made by the Commissioner or his duly authorized agents from the best information available, and such reports shall be prima facie correct for the purpose of this article, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payments, and if payment not be made within thirty days after demand therefor by the Commissioner or his duly authorized agents, there shall be added not more than one hundred per centum (100%) as damages, together with interest at the rate of one per centum (1%) per month from the time such tax was due. If such tax be paid within thirty days after notice by the Commissioner, then there shall be added not more than ten per centum (10%) as damages per month from the time such tax was due until paid.

The Commissioner for good cause may extend the time for making any report required under the provisions of this section, and may grant such additional time within which to make such report as he may deem proper, but the time for filing any such report shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such report. If the time for filing a report be extended, interest at the rate of one-half of one per centum ($\frac{1}{2}$ of 1%) per month from the time the report was required to be filed to the time of payment shall be added and paid.

(1957, c. 1340, s. 2.)

Editor's Note.—The 1957 amendment inserted the above three paragraphs following the fourth paragraph and immediately preceding the paragraph beginning with

“Definitions.” As the rest of the section was not changed only the new paragraphs are set out.

§ 105-82. Pianos, organs, victrolas, records, radios, accessories.—

Every person, firm or corporation engaged in the business of selling, offering or ordering for sale, repairing or servicing any of the articles hereinafter enumerated in this section shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of conducting such business and shall pay for each license the following tax:

For pianos and/or organs, graphaphones, victrolas, or other instruments using discs or cylinder records, and/or the sale of records for either or all of these instruments, television sets, television accessories and repair parts, radios or radio accessories and repair parts, including radios designed for exclusive use in automobiles, an annual license tax of ten dollars (\$10.00); provided, that persons licensed under this section shall not be required to procure a license under G. S. 105-89 by reason of being engaged in the business of selling, installing, or servicing automobile radios.

(1957, c. 1340, s. 2.)

Editor's Note.—

The 1957 amendment rewrote the first two paragraphs. As paragraphs (a)

through (c) were not changed they are not set out.

§ 105-83. Installment paper dealers.

(b) In addition to the tax levied in subsection (a) of this section, such person, firm, or corporation shall submit to the Revenue Commissioner quarterly on the first day of January, April, July, and October of each year, upon forms prescribed by the said Commissioner, a full, accurate, and complete statement, verified by the officer, agent, or person making such statement, of the total face value of the installment paper, notes, bonds, contracts, evidences of debt, and/or other securities described in this section dealt in, bought and/or discounted within the preceding three months and, at the same time, shall pay a tax of two hundred and seventy-five thousandths of one per cent of the face value of such obligations dealt in, bought and/or discounted for such period.

(1957, c. 1340, s. 2.)

Editor's Note.—The 1957 amendment substituted the words "two hundred and seventy-five thousandths of one per cent" for "one third of one per cent" near the

end of subsection (b). As only this subsection was changed the rest of the section is not set out.

§ 105-89. Automobiles, wholesale supply dealers and service stations.

In unincorporated communities and in cities or towns of less than 2,500 population \$10.00

(1953, c. 1302, s. 2.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, substituted the words "unincorporated communities and in" for the words "rural sections and/or" in the first line

of the table of license rates in subsection (1). As only this line was affected by the amendment the rest of the section is not set out.

§ 105-90. Emigrant and employment agents.—(a) No person other than the North Carolina Employment Security Commission shall engage in the business of emigrant agent in this State without first having obtained a license therefor from the Commissioner of Revenue and the county treasurer of each county in which he solicits emigrants. The term "emigrant agent" as used in this section, shall be construed to mean any person engaged in the business of hiring laborers or soliciting emigrants in this State to be employed beyond the limits of the State or any person engaged in hiring laborers or soliciting laborers in this State to be employed beyond the limits of the State in farm labor, whether in the employ of the emigrant agent or otherwise. Any person shall be entitled to State and county license, which shall be good for one year, upon payment to the Commissioner of Revenue for the use of the State of five hundred dollars (\$500.00) for each county in which he operates or solicits emigrants for each year so engaged and upon payment into the county treasury of each county in which he operates or solicits emigrants, for the use of each such county, of one thousand dollars (\$1,000.00) for each year so engaged. Any person other than the North Carolina Employment Security Commission acting as an emigrant agent without having first obtained such license shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or imprisonment in the discretion of the court. and in addition to such fine or imprisonment the court may, in its discretion, require the defendant to purchase the State and county licenses herein provided.

(b) Every person, firm, or corporation who or which engages in the business of securing employment for a person or persons and charging therefor a fee, commission, or other compensation shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license the following annual tax for each location in which such business is carried on:

In unincorporated communities and in cities and towns of less than 2,500 population	\$100.00
In cities or towns of 2,500 and less than 5,000 population	200.00
In cities or towns of 5,000 and less than 10,000 population	300.00
In cities or towns of 10,000 or more population	500.00

Provided, that this section shall not apply to any employment agency operated by the federal government the State, any county or municipality, or whose sole business is procuring employees for work in the production and harvesting of farm crops within the State: And provided further, that under this section the tax on any employment agency whose sole business is the placement of teachers and/or other school employees and which has been approved by the State Superintendent of Public Instruction shall be twenty-five dollars (\$25.00): Provided further, that the tax on employment agencies where the sole business is the placement of domestic servants or unregistered nurses for employment within the State shall be twenty-five dollars (\$25.00).

(1) Any person, firm, or corporation violating the provisions of this subsection shall be guilty of a misdemeanor and fined, in addition to other penalties, not less than one thousand dollars (\$1,000.00) and/or imprisoned, in the discretion of the court.

(2) Counties, cities and towns may levy a license tax on the business taxed under this subsection not in excess of that levied by the State. (1939, c. 158, s. 154; 1945, c. 635; 1953, c. 1237, ss. 1-3.)

Editor's Note.—

The 1953 amendment rewrote subsection (a), renumbered former subsections (c) and (d) as paragraphs (1) and (2) of subsection (b) and substituted "subsection" for "section" in each of said paragraphs. Section 4 of the amendatory act provides: "The provisions of this act shall apply

only to emigrant agents who hire labor or solicit emigrants for employment in a state having a law substantially similar to the provisions of this act." From this it would seem that G. S. 105-90, as it appears in the recompiled volume, remains in effect as to emigrant agents other than those mentioned in section 4 of the amendatory act.

§ 105-91. Plumbers, heating contractors, and electricians.—Every person, firm, or corporation engaged in the business of a plumber, installing plumbing fixtures, piping or equipment, steam or gas fitter, or installing hot-air heating systems, or installing electrical equipment, or offering to perform such services, shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business, and shall pay for such license the following tax based on population:

Municipalities of less than 2,000 population	\$ 7.50
Municipalities of 2,000 and less than 5,000 population	12.50
Municipalities of 5,000 and less than 10,000 population	15.00
Municipalities of 10,000 and less than 20,000 population	17.50
Municipalities of 20,000 and less than 30,000 population	22.50
Municipalities of 30,000 and less than 50,000 population	30.00
Municipalities of 50,000 or more	40.00

If any person, firm, or corporation, required to be licensed under the provisions of this section, engages in said business in two or more cities or towns, such person, firm, or corporation shall procure a license based on the population of the largest city or town in which the business taxed under this section is carried on; however, after a basic tax has been paid, in accordance with the above schedule, same shall apply as a credit when a higher tax is required.

Provided, that when an individual required to be licensed under this section employs only one additional person the tax shall be one-half: Provided further, that any person, firm, or corporation engaged exclusively in the businesses enumerated in and licensed under this section shall not be liable for the tax provided in G. S. 105-54 to 105-56. All plumbing inspectors in cities or towns

shall make a monthly report to the Commissioner of Revenue of all installation or repair permits issued for plumbing or heating.

With respect to electricians and electrical contractors, a license procured under this section shall cover the installation of electrical equipment, fixtures and wiring in or upon the consumer's premises, or on the "customer's side" of the point of delivery of electric service, but shall not cover the installation of or service to transmission or distribution lines or work on the "distributor's side" of the point of delivery of electric service. With respect to plumbers and plumbing contractors, a license procured under this section shall cover plumbing work and plumbing installations in buildings and upon the premises upon which the buildings are situated and up to the connection with the sewer or water mains, but shall not cover the construction of or work upon water or sewer systems or mains.

Counties shall not levy any license tax on the business taxed under this section, but any city or town may levy a license tax not in excess of the base license tax which would be levied by the State if such city or town was the only city or town in which the licensee engaged in business.

(1939, c. 158, s. 155; 1945, c. 708, s. 2; 1951, c. 643, s. 2; 1953, c. 981, s. 2.)

Editor's Note.— The 1951 amendment inserted the next to last paragraph and the 1953 amendment, effective June 1, 1953, rewrote the section. For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 434.

§ 105-96. Marble yards.

Counties shall not levy any license tax on the business taxed under this section, and only the city or town in which the principal office, branch office or plant of any such business is located may levy a license tax on the business taxed under this section. No license tax levied by a city or town on the business taxed under this section shall be greater in amount than the tax herein levied by the State. (1939, c. 158, s. 160; 1951, c. 565.)

Editor's Note. — The 1951 amendment rewrote the last paragraph. As the rest of the section was not affected by the amendment it is not set out.

§ 105-102. Junk dealers.—Every person, firm, or corporation engaged in the business of buying and/or selling or dealing in what is commonly known as junk, including scrap metals, glass, waste paper, waste burlap, waste cloth, and cordage of every nature, kind and description, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax for each location where such business is carried on, according to the following schedule:

In unincorporated communities and in cities or towns of less than 2,500 population	\$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, that if any person, firm, or corporation shall engage in the business enumerated in this section within a radius of two miles of the corporate limits of any city or town in this State, he or it shall pay a tax based on the population of such city or town according to the schedule above set out: Provided further, that any person, firm or corporation engaged in the business enumerated in this section who does not maintain an established place of business in this State and who buys and/or sells or disposes of junk and other waste materials purchased or collected in this State shall be liable for the license tax herein imposed upon the same basis as if such person, firm or corporation maintained a place of business in each county and municipality where such activity is carried on.

Counties, cities and towns may levy a license tax not in excess of one-half of that levied by the State; provided, however, that any person, firm or corporation dealing solely in waste paper shall not be liable for said tax; and provided further, the licenses levied herein shall apply to persons engaged in the collection of scrap, who maintain no regular place of business, and further that salvage committees operating, under State or federal sponsorship, community scrap yards where personal profit does not accrue, shall not be required to pay license under this section. (1939, c. 158, s. 168; 1943, c. 400, s. 2; 1949, c. 580, ss. 1, 2; 1957, c. 949.)

Editor's Note.—

The 1957 amendment deleted the words "otherwise than to licensed junk dealers or manufacturers in this State" formerly appearing immediately after "State" in line eight of the second paragraph. The amendment also changed the last paragraph by deleting the word "not" formerly appear-

ing between "shall" and "apply" in line four and by striking out the words "but sell only to licensed dealers or manufacturers in this State" formerly appearing after "business" in line five.

Stated in *Hinshaw v. McIver*, 244 N. C. 256, 93 S. E. (2d) 90 (1956).

§ 105-102.1. Certain cooperative associations.—(a) Every cooperative marketing association operating solely for the purpose of marketing the products of its members or other farmers, which operations may include activities which are directly related to such marketing activities, and turning back to them the proceeds of sales, less the necessary operating expenses of the association, including interest and dividends on capital stock, on the basis of the quantity of product furnished by them, and every mutual ditch or irrigation association, mutual or cooperative telephone association or company, mutual canning association, cooperative breeding association, or like organizations or associations of a purely local character deriving receipts solely from assessments, dues or fees collected from members for the sole purpose of meeting expenses, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax of ten dollars (\$10.00), but shall not be required to pay any other tax levied by the provisions of this article.

(b) Counties, cities and towns may not levy any license tax upon such cooperative marketing associations. (1955, c. 1313, s. 1; 1957, c. 1340, s. 2.)

Editor's Note.—The 1957 amendment inserted, after "farmers" in line three, the following words "which operations may include activities which are directly related to such marketing activities."

Administrative Provisions of Schedule B.

§ 105-109. Engaging in business without a license.

(e) The provisions of this section for the collection of delinquent license taxes shall apply to license taxes levied by the cities and towns of this State under authority of this article, or any other provision of law, in the same manner and to the same extent as they apply to taxes levied by the State and counties of this State: Provided, the municipal officer charged with the duty of collecting municipal taxes may exercise the powers vested in the sheriff by this section. (1939, c. 158, s. 187; 1957, c. 859.)

Editor's Note.—The 1957 amendment added subsection (e). As the rest of the section was not changed it is not set out.

ARTICLE 3.

Schedule C. Franchise Tax.

§ 105-116. Franchise or privilege tax on electric light, power, street railway, street bus, gas, water, sewerage, and other similar public serv-

ice companies not otherwise taxed.—(1) Every person, firm, or corporation, domestic or foreign, other than municipal corporations, engaged in the business of furnishing electricity, electric lights, current, power or piped gas, or owning and/or operating a water or public sewerage system, or owning and/or operating a street railway, street bus or similar street transportation system for the transportation of freight or passengers for hire, shall, within thirty days after the first day of January, April, July and October of each year, make and deliver to the Commissioner of Revenue, upon such forms and blanks as required by him, a report verified by the oath of the officer or authorized agent making such report and statement, containing the following information:

(3) On every such person, firm or corporation there is levied an annual franchise or privilege tax of six per cent (6%), payable quarterly, of the total gross receipts derived from such business within this State, after the deductions allowed as herein provided for, which said tax shall be for the privilege of carrying on or engaging in the business named in this State, and shall be paid to the Commissioner of Revenue at the time of filing the report herein provided for: Provided, the tax upon privately owned water companies shall be four per cent (4%) of the total gross receipts derived from such business within this State: Provided further, the tax on gas companies shall be at the rate of four per cent (4%) upon the first twenty-five thousand dollars (\$25,000.00) of the total gross receipts from piped gas, and the tax on all gross receipts in excess of twenty-five thousand dollars (\$25,000.00) from piped gas shall be at the rate of six per cent (6%): Provided further, the tax on street bus or similar street transportation system for the transportation of passengers for hire shall be at the rate of one and one-half per cent (1½%).

(1951, c. 643, s. 3; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3.)

Editor's Note.—

The 1951 amendment, effective April 9, 1951, inserted in line three of the first paragraph of subsection (1) the word "piped", and inserted the words "from piped gas" in the last proviso in subsection (3).

The 1955 amendment, effective July 1, 1955, added the proviso at the end of subsection (3).

The 1957 amendment substituted "one and one-half per cent (1½%)" for "three per cent (3%)" at the end of subsection (3).

As the rest of the section was not changed by the amendments only the first paragraph of subsection (1) and all of subsection (3) are set out.

§ 105-119. Franchise or privilege tax on telegraph companies.

(2) On every such person, firm or corporation there is hereby levied an annual franchise or privilege tax of six per cent (6%) of the total gross receipts derived from business within this State. Such gross receipts shall include all charges for services, all rentals, fees, and all other similar charges from business which both originates and terminates in the State of North Carolina, whether such business in the course of transmission goes outside this State or not. The tax herein levied shall be for the privilege of carrying on or engaging in the business named in this State, and shall be paid to the Commissioner of Revenue at the time of filing the report herein provided for.

(5) Counties shall not levy a franchise, privilege, or license tax on the business taxable under this section, and municipalities may levy the following license tax:

Less than 5,000 population	\$10.00
5,000 and less than 10,000 population	15.00
10,000 and less than 20,000 population	20.00
20,000 population and over	50.00

(1939, c. 158, s. 206; 1951, c. 643, s. 3; 1957, c. 1340, s. 3.)

Editor's Note.— The 1951 amendment, effective April 9, 1951, struck from subsection (2) the former proviso which read as follows: "Provided, that the tax on the first

one thousand dollars (\$1,000.00) of gross receipts of any such telegraph company shall be at the rate of four per cent (4%), and all gross receipts in excess of said first

one thousand dollars (\$1,000.00) shall be taxed at the rate of six per cent (6%)."

The 1957 amendment deleted from subsection (5) the provision that "Nothing in this section shall be construed to authorize

the imposition of any tax upon interstate commerce."

As only subsections (2) and (5) were changed the rest of the section is not set out.

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.—(1) Every corporation, domestic and foreign, incorporated, or, by any act, domesticated under the laws of this State, except as otherwise provided in this article or schedule, shall, on or before the thirty-first day of July of each year, make and deliver to the Commissioner of Revenue in such form as he may prescribe a full, accurate and complete report and statement signed by either its president, vice president, treasurer, assistant treasurer, secretary or assistant secretary, containing such facts and information as may be required by the Commissioner of Revenue as shown by the books and records of the corporation at the close of its last calendar or fiscal year next preceding July thirty-first of the year in which report is due.

There shall be annexed to the return required by this subsection the affirmation of the officer signing the return in the following form: "I hereby affirm that this return, including the accompanying schedules and statements (if any) have been examined by me, and, to the best of my knowledge and belief, is true and complete and is made in good faith covering the taxable period stated, pursuant to the Revenue Act of 1939, as amended, and the regulations issued under authority thereof, and that this affirmation is made under the penalties prescribed by law." Any individual who wilfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not to exceed one thousand dollars (\$1,000.00) or by imprisonment not to exceed six months, or both, in the discretion of the court.

(2) Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus and undivided profits; no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities. There shall also be treated as a deductible liability reserves for the entire cost of any sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of water pollution resulting from the discharge of sewage and industrial wastes or other polluting materials or substances into streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Commissioner a certificate from the State Stream Sanitation Committee certifying that said Committee has found as a fact that the waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Committee with respect to such plants or equipment, that such plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the State Stream Sanitation Committee, and that the primary purpose thereof is to reduce water pollution resulting from the discharge of sewage and waste and not merely incidental to other purposes and functions; such deductible liability shall be allowed only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955. Treasury stock shall not be considered in computing the capital stock, surplus and undivided profits as the basis for franchise tax, but shall be excluded proportionately from said capital stock, surplus and undivided profits as the case may be upon the basis and to the extent of the cost thereof.

Every corporation doing business in this State which is a parent, subsidiary, or affiliate of another corporation shall add to its capital stock, surplus and undivided profits all indebtedness owed to or endorsed or guaranteed by a parent, subsidiary or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. The term "indebtedness" as used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation. The terms "parent," "subsidiary," and "affiliate" as used in this paragraph shall have the meaning specified in § 105-143. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary or affiliate, the debtor corporation, which is required under this paragraph to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the said creditor corporation, may deduct from the debt thus included a proportionate part determined on the basis of the ratio of such borrowed capital as above specified of the creditor corporation to the total assets of the said creditor corporation. Further, in case the creditor corporation as above specified is also taxable under the provisions of this section, such creditor corporation shall be allowed to deduct from the total of its capital, surplus and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that such debt has been included in the tax base of said parent, subsidiary or affiliated debtor corporation reporting for taxation under the provisions of this section.

In determining the total amount of the capital stock, surplus and undivided profits, as herein defined, effect shall be given to the final judgment of any court approving a corporate reorganization entered prior to July first of any calendar year and since the close of the corporation's last calendar or fiscal year next preceding.

(3) After ascertaining and determining the amount of its capital stock, surplus and undivided profits, as herein provided, every such corporation permitted to do business in this State shall allocate to such business in this State a proportion of the total amount of its capital stock, surplus and undivided profits as herein defined, according to the following rules:

(A) Where the principal business of the corporation part of which is conducted in this State is the manufacture, production or sale of tangible personal property the total amount of capital stock, surplus and undivided profits of such corporation shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following three ratios, except, that where the items of property and payroll described in paragraphs (a) and (b) of this subdivision are both 100 per cent attributable to North Carolina (resulting in 100 per cent ratios) the total amount of capital stock, surplus and undivided profits of such corporation shall be attributable to North Carolina unless such corporation is taxed upon its net income under the laws of some other state or states or would be taxed upon its net income by some other state or states if such other state or states had the income tax laws of North Carolina:

(a) Property.—The ratio of the value of real estate and tangible personal property used by such corporation in this State at the close of the income year of such corporation to the value of the entire real estate and tangible personal property used by it everywhere at the close of the income year of such corporation, as defined in G. S. 105-132, except that inventories of goods, wares and merchandise shall be valued on the basis of a monthly or other periodic average during the income year of such corporation. If the taxpayer does not take or keep records of monthly or other periodic inventories, or, if in the opinion of the Commissioner of Revenue the method and time of taking such inventories does not accurately reflect the true average inventory, the Commissioner shall determine the proper amount from such information as may be available. As used in this paragraph:

(i) The words "tangible personal property" shall mean corporeal property such as machinery, tools, implements, goods, wares and merchandise, and shall not mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, evidence of an interest in property or evidences of debt.

(ii) The word "value" as applied to property owned other than inventories shall mean original cost plus additions and improvements less reserve for depreciation, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis, in which event the Commissioner may construe "value" to mean fair market value. Inventories shall be valued in accordance with the accounting practice of the corporation, unless in the opinion of the Commissioner of Revenue a different method is required in order to better reflect the business conducted by the corporation in this State. In determining the value of property no deductions shall be made for encumbrances thereon.

(iii) The words "property used" shall include all real estate and all tangible personal property owned, leased or rented by the corporation at the close of the income year, as defined in G. S. 105-132, except that any property not connected with the business of the corporation part of which is conducted within North Carolina shall be excluded from both the numerator and denominator of the ratio.

(iv) The word "value" as applied to real estate rented or leased shall mean the net annual rental rate multiplied by 8, and as applied to tangible personal property rented or leased the word "value" shall mean the net annual rental rate multiplied by such figure for each type of property as the Commissioner shall direct. The net annual rental rate shall mean the gross annual rental rate paid by the taxpayer less the gross annual rental rate received by the taxpayer for subrentals of real estate.

(b) Payrolls.—The ratio of all salaries, wages, commissions and other personal service compensation paid or incurred by the taxpayer in connection with the trade or business of the taxpayer in this State during the income year as defined in G. S. 105-132 to the total salaries, wages, commissions and other personal service compensation paid or incurred by the taxpayer in connection with the entire trade or business of the taxpayer wherever conducted during the income year. For the purposes of this section, all such compensation to employees chiefly working at, sent out from or chiefly connected with an office, agency or place of business of the taxpayer in this State shall be deemed to be in connection with the trade or business of the taxpayer in this State; all such compensation to general executive officers having company-wide authority shall be excluded from the numerator and the denominator of the ratio, and all such compensation in connection with income separately allocated under the provisions of this section shall be excluded from the numerator and the denominator of the ratio.

(c) Sales.—The ratio of sales made by such corporation during the income year as defined in G. S. 105-132 which are attributable to North Carolina to the total sales made by such corporation everywhere during the income year.

For purposes of this subsection sales attributable to North Carolina shall be all sales where the goods, merchandise or property is received in this State by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. Provided that direct delivery into this State by the taxpayer to a person or firm designated by a purchaser from within or without the State shall constitute delivery to the purchaser in this State. The word "sales" as used in this subsection shall be construed to include rentals of tangible personal property the rentals from which are not separately allocated under subsection (4) of G.

S. 105-134, such rentals to be attributed to North Carolina if the property is located in North Carolina.

(B) Where the principal business of the corporation, part of which is conducted in this State is other than those in subdivision (A) of this subsection the corporation shall apportion the total amount of its capital stock, surplus and undivided profits to North Carolina by the use of the ratio of the gross receipts in this State during the income year as defined in G. S. 105-132 to gross receipts of the company everywhere. For purposes of this paragraph "gross receipts" shall mean all receipts from whatever source received except that gross receipts from sources the net income from which is separately allocated under subsections (1) through (5) of G. S. 105-134 shall be excluded from both the numerator and the denominator of the ratio.

(C) If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the Commissioner of Revenue has operated or will so operate as to subject it to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to business within the State, it shall be entitled to file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Tax Review Board may prescribe. The Board shall grant a hearing thereon. At least three members of the Tax Review Board shall attend any hearing pursuant to such petition. In such cases the Tax Review Board's membership shall be augmented by the addition of the Commissioner of Revenue, who shall sit as a member of said Board with full power to participate in its deliberations and decisions with respect to petitions filed under the provisions of this section. An informal record containing in substance the evidence, contentions and arguments presented at the hearing shall be made. All members of the augmented Tax Review Board shall consider such evidence, contentions and arguments, and the decision thereon shall be made by a majority vote of the augmented Board. If the Board shall find that the application of the allocation formula subjects the corporation to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to its business within this State:

(a) If the corporation shall employ in its books of account a detailed allocation of receipts and expenditures which reflects more clearly than the applicable allocation formula or alternative formulas prescribed by this section the portion of the capital stock, surplus and undivided profits attributable to the business within this State, application for permission to base the return upon the taxpayer's books of account shall be considered by the Tax Review Board. The Board shall be authorized to permit such separate accounting method in lieu of applying the applicable allocation formula if the Board deems such method proper as best reflecting the portion of the capital stock, surplus and undivided profits attributable to this State.

(b) If the corporation shall show that any other method of allocation than the applicable allocation formula or alternative formulas prescribed by this section reflects more clearly the portion of the capital stock, surplus and undivided profits attributable to the business within this State, application for permission to base the return upon such other method shall be considered by the Tax Review Board. The application shall be accompanied by a statement setting forth in detail, with full explanations, the method the taxpayer believes will more nearly reflect the portion of its capital stock, surplus and undivided profits attributable to the business within this State. If the Board shall conclude that the allocation formula and the alternative formulas prescribed by this section allocate to this State a greater portion of the capital stock, surplus and undivided profits of the corporation than is reasonably attributable to business within this State, it shall determine the allocable portion by such other method as it shall find best calculated to

assign to this State for taxation the portion reasonably attributable to its business within this State.

There shall be a presumption that the appropriate allocation formula reasonably attributes to this State the portion of the corporation's capital stock, surplus and undivided profits reasonably attributable to its business in this State and the burden shall rest upon the corporation to show the contrary. The relief herein authorized shall be granted by the Board only in cases of clear, cogent and convincing proof that the petitioning taxpayer is entitled thereto. No corporation shall use any alternative formula or method other than the applicable allocation formula provided by statute in making a franchise tax report or return to this State except upon order in writing of the Board and any return in which any alternative formula or other method other than the applicable allocation formula prescribed by statute is used without the permission of the Board, shall not be a lawful return.

When the Board determines, pursuant to the provisions of this article, that an alternative formula or other method more accurately reflects the portion of the capital stock, surplus and undivided profits allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its capital stock, surplus and undivided profits for future years in accordance with such determination and decision of the Board so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the business method of operation of the corporation changes. Provided, however, that the Commissioner of Revenue may, in his discretion, with respect to any subsequent year, require the corporation to furnish information relating to its property, operations and activities.

A corporation which proposes to do business in this State may file a petition with the Board setting forth the facts upon which it contends that the applicable allocation formula will allocate a greater portion of the corporation's capital stock, surplus and undivided profits to North Carolina than will be reasonably attributable to its proposed business within the State. Upon a proper showing in accordance with the procedure described above for determination by the Board, the Board may authorize such corporation to allocate its capital stock, surplus and undivided profits to North Carolina on the basis prescribed by the Board under the provisions of this section for such future years as the conditions constituting the basis upon which the Board's decision is made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operations presented by the corporation to the Board.

When the Commissioner of Revenue asserts liability under the formula adjustment decision of the Tax Review Board, an aggrieved taxpayer may pay the tax under protest and bring a civil action for recovery under the provisions of G. S. 105-241.4.

(D) The proportion of the total capital stock, surplus and undivided profits of each such corporation so allocated shall be deemed to be the proportion of the total capital stock, surplus and undivided profits of each such corporation used in connection with its business in this State and liable for annual franchise tax under the provisions of this section.

(4) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection (3) of this section, which amount so determined shall in no case be less than the total assessed value (including total gross valuation returned for taxation of intangible personal property) of all the real and personal property in this State of each such corporation for the year in which report is due nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Commissioner of Revenue, at the time the report and statement are due, a franchise or privilege tax, which is hereby levied, at the rate of one dollar and fifty cents (\$1.50)

per one thousand dollars (\$1,000.00) of the total amount of capital stock, surplus and undivided profits as herein provided. The tax imposed in this section shall in no case be less than ten dollars (\$10.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each such corporation in this State: Provided, that the basis for the franchise tax on all corporations, eighty per cent (80%) of whose outstanding capital stock is owned by persons or corporations to whom or to which such stock was issued prior to January 1, 1935, in part payment or settlement of their respective deposits in any closed bank of the State of North Carolina, shall be the total assessed value of the real and tangible personal property of such corporation in this State for the year in which report and statement is due under the provisions of this section. The term "total actual investment in tangible property" as used in this section shall be construed to mean the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon. In computing "total actual investment in tangible personal property" there shall also be deducted reserves for the entire cost of any sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of water pollution resulting from the discharge of sewage and industrial wastes or other polluting materials or substances into streams, lakes, or rivers, upon condition that the corporation claiming such deduction shall furnish to the Commissioner a certificate from the State Stream Sanitation Committee certifying that said Committee has found as a fact that the waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Committee with respect to such plants or equipment, that such plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the State Stream Sanitation Committee, and that the primary purpose thereof is to reduce water pollution resulting from the discharge of sewage and waste and not merely incidental to other purposes and functions; such deduction shall be allowed only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

In determining the total tax payable by any corporation under this section and under § 105-115 there shall be allowed as credit on such tax the amount of intangible tax paid during the preceding franchise tax year on bank deposits under the provisions of § 105-199, except that the minimum tax herein provided shall not be less than the ten dollars (\$10.00) elsewhere specified.

(5) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this State.

Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1947, c. 501, s. 3, 1951, c. 643, s. 3; 1953, c. 1302, s. 3; 1955, c. 1100, s. 2½; c. 1350, s. 17; 1957, c. 1340, s. 3.)

Editor's Note.—

The 1951 amendment, effective April 9, 1951, rewrote this section.

The 1953 amendment, effective July 1, 1953, inserted in the first sentence of subsection (1) the provision as to signing the report and statement in lieu of the former provision as to the verification thereof, and added all of the subsection beginning with the second paragraph. The amendment also rewrote subdivisions

(A), (B) and (C) of subsection (3).

The first 1955 amendment inserted the second sentence of the first paragraph of subsection (2), and added the last sentence of the first paragraph of subsection (4). The second 1955 amendment, effective July 1, 1955, rewrote the latter part of the first paragraph of subsection (3) (C) and also rewrote the last paragraph of subparagraph (b) of said subsection.

The 1957 amendment rewrote subsection

(1). It also changed subsection (3) by re-writing former subdivisions (A), (B) and (C) as present subdivisions (A) and (B), by deleting paragraph (a) of former subdivision (D) and redesignating (b) and

(c) as (a) and (b), and by redesignating former subdivisions (D) and (E) as present subdivisions (C) and (D).

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 435, 441.

§ 105-124. **Review of returns—additional taxes.**— Upon receipt of any report, statement and tax as provided by this article or schedule, the Commissioner of Revenue shall cause same to be reviewed and examined for the purpose of ascertaining if same constitute a true and correct return as required by this article or schedule. If the Commissioner of Revenue discovers from the examination of any return, or otherwise, that the franchise or privilege tax of any taxpayer has not been correctly determined, computed and/or paid, he may at any time within three years after the date the return is actually filed or the filing date of the return (whichever is later), give notice in writing, to the taxpayer of such deficiency plus interest at the rate of six per cent (6%) per annum from date when return was due, and any overpayment of the tax shall be returned to the taxpayer within thirty days after it is ascertained. In the case of any taxpayer who has failed to file any return or statement required under this article or schedule, the limitation of three years shall not apply and the Commissioner of Revenue shall, from facts within his knowledge, prepare tentative returns for such delinquent taxpayer, and shall assess the taxes, penalties and interest upon these findings; this provision shall not be construed to relieve said taxpayer from liability for a return or from any penalties and remedies imposed for failure to file proper return. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the Commissioner of Revenue, if within thirty days after date of notice of such proposed assessment, the taxpayer shall apply in writing for such hearing, explaining in detail his objections to same. If no request for such hearing is made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the Commissioner of Revenue, and after such hearing the Commissioner of Revenue shall render his decision. The taxpayer shall be advised of his decision by mail, and such amount shall be due and payable within ten days after date of notice thereof. (1939, c. 158, s. 212; 1957, c. 1340, s. 3.)

Editor's Note.—The 1957 amendment in lieu thereof the words "the date the deleted the words "the time when the return was due" from line eight and inserted return is actually filed or the filing date of the return (whichever is later)."

§ 105-125. **Corporations not mentioned.**—None of the taxes levied in §§ 105-122 and 105-123 shall apply to religious, fraternal, benevolent, scientific or educational corporations, not operating for a profit; nor to banking and insurance companies; nor to mutual ditch or irrigation associations, mutual or co-operative telephone associations or companies, mutual canning associations, co-operative breeding associations, or like organizations or associations of a purely local character deriving receipts solely from assessments, dues, or fees collected from members for the sole purpose of meeting expenses; nor to co-operative marketing associations operating solely for the purpose of marketing the products of members or other farmers, which operations may include activities which are directly related to such marketing activities, and turning back to them the proceeds of sales, less the necessary operating expenses of the association, including interest and dividends on capital stock on the basis of the quantity of product furnished by them; nor to business leagues, boards of trade, clubs organized and operated exclusively for pleasure, recreation and other non-profitable purposes, civic leagues operated exclusively for the promotion of social welfare, or chambers of commerce and merchants associations not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder, individual, or other corporations:

Provided, that each such corporation must, upon request by the Commissioner

of Revenue, establish in writing its claim for exemption from said provisions. The provisions of §§ 105-122 and 105-123 shall apply to electric light, power, street railway, gas, water, Pullman, sleeping and dining car, express, telegraph, telephone, motor bus, and truck corporations to the extent and only to the extent that the franchise tax levied in §§ 105-122 and 105-123 exceed the franchise taxes levied in other sections of this article or schedule. The exemptions in this section shall apply only to those corporations specially mentioned, and no other.

Provided, that any North Carolina corporation which in the opinion of the Commissioner of Revenue of North Carolina qualifies as a "regulated investment company" under the provisions of United States Code Annotated Title 26, section 361, and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company", shall in determining its basis for franchise tax be allowed to deduct the aggregate market value of its investments in the stocks, bonds, debentures, or other securities or evidences of debt of other corporations, municipalities, governmental agencies or governments. (1939, c. 158, s. 213; 1951, c. 937, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 3.)

Editor's Note. — The 1951 amendment added the last paragraph.

The 1955 amendment, effective July 1, 1955, inserted in the first paragraph references to various mutual and cooperative associations.

The 1957 amendment made this section also applicable to scientific nonprofit

corporations and inserted, beginning in line ten of the first paragraph, the words "which operations may include activities which are directly related to such marketing activities."

For brief comment on the 1951 amendment, see 29 N. C. Law Rev. 415.

§ 105-129. Extension of time for filing returns; fraudulent return made misdemeanor.

(2) The provisions of G. S. 105-241.2, 105-241.3, and 105-241.4 with respect to review and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or additional tax shall not apply to the assessment of additional taxes upon fraudulent return. Any officer or agent of a corporation who shall knowingly make a fraudulent return under this article or schedule shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) and/or imprisoned at the discretion of the court. (1939, c. 158, s. 216; 1955, c. 1350, s. 17.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote the first sen-

tence of subsection (2). As subsection (1) was not changed it is not set out.

ARTICLE 4.

Schedule D. Income Tax.

§ 105-132. Definitions.

3. A "head of a household" is an individual who actually maintains and supports in one household, irrespective of whether or not in this State, one or more individuals who are closely related by blood relationship, relationship by marriage, or by adoption, and whose right to exercise family control and provide for these dependent individuals is based on some moral or legal obligation.

11. The words "fiscal year" mean an income year, ending on the last day of any month other than December. A taxpayer who pursuant to the provisions of § 441(f) of the Federal Internal Revenue Code of 1954 has elected to compute his income tax liability to the United States on the basis of an annual period varying from 52 to 53 weeks, for any income year ending after August 16, 1954, shall compute his taxable income for the purposes of this article on the basis of the same period used by such taxpayer in accordance with the Federal Internal

Revenue Code of 1954 in computing his tax liability to the United States for such income year.

(1955, c. 1331, s. 2; 1957, c. 1340, s. 4.)

Editor's Note.—

The 1955 amendment added the second sentence of subsection 11. The 1957 amendment inserted in line two of subsection 3

the words "irrespective of whether or not." As the rest of the section was not changed only subsections 3 and 11 are set out.

Imposition of Income Tax.

§ 105-133. **Individuals.**—A tax is hereby imposed upon every resident of the State, and upon every fiduciary as defined in G. S. 105-139, which tax shall be levied, collected and paid annually, with respect to the net income of the taxpayer as herein defined, and upon income earned within the State of every non-resident having a business or agency in this State or income from property owned and from every business, trade, profession or occupation carried on in this State, computed at the following rates, after deducting the exemptions provided in this article.

On the excess over the amount legally exempted, up to two thousand dollars, three per cent (3%).

On the excess above two thousand dollars, and up to four thousand dollars, four per cent (4%).

On the excess above four thousand dollars, and up to six thousand dollars, five per cent (5%).

On the excess over six thousand dollars, and up to ten thousand dollars, six per cent (6%).

On the excess over ten thousand dollars, seven per cent (7%). (1939, c. 158, s. 310; 1957, c. 1340, s. 4.)

Editor's Note.—The 1957 amendment every fiduciary as defined in G. S. 105-139 inserted in line two of the words "and upon 139."

§ 105-134. **Corporations.**—Every corporation engaged in doing business in this State shall pay annually an income tax equivalent to six per cent of its net taxable income. The net taxable income of such corporation shall be determined as provided in this article.

If the entire business of the corporation is transacted or conducted within the State, the tax shall be measured by the entire net income of the corporation for the income year. The entire business of a corporation shall be deemed to have been transacted and conducted within this State if such corporation is not subject to a net income tax or a franchise tax measured by net income in any other state, the District of Columbia, a territory or possession of the United States or any foreign country, or would not be subject to a net income tax in any other such taxing jurisdiction if such other taxing jurisdiction adopted the net income tax laws of this State. If the corporation is transacting or conducting its business partly within and partly without North Carolina, the tax shall be imposed upon a base which reasonably represents the proportion of the trade or business carried on within the State. A corporation subject to taxation under this article shall be deemed to have been transacting or conducting its business partly within and partly without this State if such corporation is subject to a net income tax or a franchise tax measured by net income in any other state, the District of Columbia, a territory or possession of the United States, or any foreign country, or would be subject to a net income tax in any other such taxing jurisdiction if such other taxing jurisdiction adopted the net income tax laws of this State. That a corporation is chartered in a particular state shall not of itself show that the corporation is transacting or conducting a portion of its business in said state. Provided, that nothing in this paragraph shall be construed as denying the rights of allocation and apportionment as provided in this section to corporations suffering a net loss, but that for the purpose of determining the taxable portion of

stock under the intangible property tax, of determining the deductible portion of dividends under the income tax, and of the apportionment of net economic losses carried forward the provisions apply as if the corporation had a net income. The allocation or apportionment of the entire net income of the corporation shall be made in accordance with the following provisions:

- (1) Interest received from intangible property not connected with the business of the corporation part of which is conducted within North Carolina less all related expenses shall be allocated to the State in which the principal place of business of the corporation is located.
- (2) Dividends received from, and gains or losses from the sale or other disposition of corporate stocks owned other than stocks of a subsidiary corporation having business transactions with or being engaged in the same or similar type of business as the taxpayer less all related expenses and less that portion of such dividends deductible under the provisions of subsection 5 of G. S. 105-147 shall be allocated to the state in which the principal place of business of the corporation is located. For purposes of this paragraph a corporation shall be considered to be a subsidiary if the parent corporation owns fifty per cent (50%) or more of the voting stock of such subsidiary.
- (3) Royalties or similar income received from the use of patents, trademarks, copyrights, secret processes and other similar intangible rights less all related expenses shall be allocated to the state in which the principal place of business of the corporation is located.
- (4) Rents received from the lease or rental of real estate or tangible personal property, royalties received from tangible property, and gains or losses from the sale or other disposition of real estate or tangible personal property where the property leased, rented or sold is (or was) not used in or is (or was) not connected with the trade or business of the taxpayer during the income year less all related expenses allowable as deductions under this article shall be allocated to the state in which the property was located at the time the income was derived.
- (5) The income less all related expenses from any other investments, the net income from which is not properly includable in the net apportionable income of corporations engaged in interstate commerce under the Constitution of the United States because it is unrelated to the business activity of the corporation conducted partly within and partly without North Carolina, shall be allocated to the state in which the business situs of the investment is located; provided, that if the business situs of such investment is partly within and partly without North Carolina it shall be apportioned by use of the same formula as provided for apportioning the net income of the corporation.
- (6) The net income of the above classes having been separately allocated, the remainder of the net income of the corporation shall be apportioned as follows:
 - a. Where the income is derived principally from the manufacture, production or sale of tangible personal property or from dealing in tangible personal property the corporation shall apportion its net apportionable income to North Carolina on the basis of the ratio obtained by taking the arithmetic average of the following three ratios:
 1. Property.—The ratio of the value of real estate and tangible personal property used by such corporation in this State at the close of the income year of such corporation to the value of the entire real estate and tangible

personal property used by it everywhere at the close of the income year of such corporation, except that inventories of goods, wares and merchandise shall be valued on the basis of a monthly or other periodic average during the income year of such corporation. If the taxpayer does not take or keep records of monthly or other periodic inventories, or, if in the opinion of the Commissioner of Revenue the method and time of taking such inventories does not accurately reflect the true average inventory, the Commissioner shall determine the proper amount from such information as may be available. Provided, that a corporation which ceases its operations in this State before the end of its income year due to dissolution or to withdrawal of its articles of domestication shall value the real estate and tangible personal property used as of the last day of its operations in this State except that inventories of goods, wares and merchandise shall be valued on the basis of a monthly or other periodic average during the period of operation in this State. As used in this paragraph:

- I. The words "tangible personal property" shall mean corporeal property such as machinery, tools, implements, goods, wares and merchandise, and shall not mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, evidence of an interest in property or evidences of debt.
- II. The word "value" as applied to property owned other than inventories shall mean original cost plus additions and improvements less reserve for depreciation, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis, in which event the Commissioner may construe "value" to mean fair market value. Inventories shall be valued in accordance with the accounting practice of the corporation, unless in the opinion of the Commissioner of Revenue a different method is required in order to better reflect the net income of the corporation. In determining the value of property no deductions shall be made for encumbrances thereon.
- III. The words "property used" shall include all real estate and all tangible personal property owned, leased or rented by the corporation at the close of the income year, except that any property the income from which is excluded from the net apportionable income of the taxpayer under the provisions of subsections (1) through (5) of this section shall be excluded in the computation of the property ratio.
- IV. The word "value" as applied to real estate rented or leased shall mean the net annual

rental rate multiplied by 8, and as applied to tangible personal property rented or leased the word "value" shall mean the net annual rental rate multiplied by such figure for each type of property as the Commissioner shall direct. The net annual rental rate shall mean the gross annual rental rate paid by the taxpayer less the gross annual rental rate received by the taxpayer for subrentals.

2. Payrolls.—The ratio of all salaries, wages, commissions and other personal service compensation paid or incurred by the taxpayer in connection with the trade or business of the taxpayer in this State during the income year to the total salaries, wages, commissions and other personal service compensation paid or incurred by the taxpayer in connection with the entire trade or business of the taxpayer wherever conducted during the income year. For the purposes of this section, all such compensation to employees chiefly working at, sent out from or chiefly connected with an office, agency or place of business of the taxpayer in this State shall be deemed to be in connection with the trade or business of the taxpayer in this State; all such compensation to general executive officers having company-wide authority shall be excluded from the numerator and the denominator of the ratio, and all such compensation in connection with income separately allocated under the provisions of this section shall be excluded from the numerator and denominator of the ratio.
3. Sales.—The ratio of sales made by such corporation during the income year which are attributable to North Carolina to the total sales made by such corporation everywhere during the income year.

For purposes of this subsection sales "attributable to North Carolina" shall be all sales where the goods, merchandise or property is received in this State by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser: Provided, that direct delivery into this State by the taxpayer to a person or firm designated by a purchaser from within or without the State shall constitute delivery to the purchaser in this State. The word "sales" as used in this subsection shall be construed to include rentals of tangible personal property the rentals from which are not separately allocated under subsection (4) of this section, such rentals to be attributed to North Carolina if the property is located in North Carolina.

- b. Where the income is derived principally from the operation of a railroad the corporation shall apportion its net apportionable income to North Carolina on the basis of the ratio of "railway operating revenue" from business done within this State to "total railway operating revenue" from all business done by

the company as shown by its records kept in accordance with the standard classification of accounts prescribed by the Interstate Commerce Commission.

For purposes of this subsection "‘railway operating revenue’ from business done within this State" shall mean "railway operating revenue" from business wholly within this State, plus the equal mileage proportion within this State of each item of "railway operating revenue" received from the interstate business of the company. "Equal mileage proportion" shall mean the proportion which the distance of movement of property and passengers over lines in this State bears to the total distance of movement of property and passengers over lines of the company receiving such revenue. "Interstate business" shall mean "railway operating revenue" from the interstate transportation of persons or property into, out of, or through this State. If the Commissioner of Revenue shall find, with respect to any particular company, that its accounting records are not kept so as to reflect with exact accuracy such division of revenue by State lines as to each transaction involving interstate revenue, the Commissioner of Revenue may adopt such regulations, based upon averages, as will approximate with reasonable accuracy the proportion of interstate revenue actually earned upon lines in this State. Provided, that in determining the taxable income of a railroad company operating two or more lines of railroad not physically connected, when one of such railroad lines is located wholly within this State, the actual earnings and expenses of such line in this State, insofar as they may be severable, shall be used in determining net income taxable in this State. Provided further, that where a railroad is being operated by a partnership which is treated as a corporation for income tax purposes and pays a net income tax to this State, or if located in another state would be so treated and so pay as if located in this State, each partner's share of the net profits shall be considered as dividends paid by a corporation for purposes of this article and shall be so treated for inclusion in gross income, deductibility, and separate allocation of dividend income, and if the proportion of ownership of such partnership shall be in excess of fifty per cent (50%) the partnership shall be considered to be a subsidiary corporation for purposes of determining separate allocation of such net profits.

- c. Where the income is derived principally from the operation of a telephone company the corporation shall apportion its net apportionable income to North Carolina on the basis of the ratio of gross operating revenue from local service in this State plus gross operating revenue from toll services performed wholly within this State plus the proportion of revenue from interstate toll services attributable to this State as shown by the records of such company plus the gross operating revenue in North Carolina from other service less the uncollectible revenue in this State to the total gross operating revenue from all business done by the company everywhere less total uncollectible revenue. Provided, that where a telephone company is required to keep its records in accordance with the standard classification of accounts prescribed by the Federal Communications Commission the amounts in such accounts shall be

used in computing the apportionment ratio as provided in this paragraph.

- d. Motor carriers of property shall apportion their net apportionable income to North Carolina by the use of the ratio of vehicle miles in this State to total vehicle miles of the company everywhere. For purposes of this paragraph the words "vehicle miles" shall mean miles traveled by vehicles (whether owned or operated by the company) hauling property for a charge or traveling on a scheduled route.
- e. Motor carriers of passengers shall apportion their net apportionable income to North Carolina by the use of the ratio of vehicle miles in this State to total vehicle miles of the company everywhere. For purposes of this paragraph "vehicle miles" shall mean miles traveled by vehicles (whether owned or operated by the company) carrying passengers for a fare or traveling on a scheduled route.
- f. Where the income is derived principally from the operation of businesses other than that described in subdivisions a through e of this subsection the corporation shall apportion its net apportionable income to North Carolina by the use of the ratio of the gross receipts in this State to gross receipts of the company everywhere. For purposes of this paragraph "gross receipts" shall mean all receipts from whatever source received except that gross receipts from business operations or from property the net income from which is excluded from net apportionable income under the provisions of subsections (1) through (5) of this section shall be excluded from both the numerator and the denominator of the ratio. Provided, where the income is derived principally from the operation of a telegraph company, the corporation shall apportion its net apportionable income to North Carolina on the basis of the ratio obtained by taking the arithmetic average of the following three ratios:
 1. Property as defined in subsection (6) a 1 of this § 105-134;
 2. Payrolls as defined in subsection (6) a 2 of this § 105-134; and
 3. Gross receipts as defined in this subsection (6) f.
- g. If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the Commissioner of Revenue has operated or will so operate as to subject it to taxation on a greater portion of its income than is reasonably attributable to business or earnings within the State, it shall be entitled to file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Tax Review Board may prescribe. The Board shall grant a hearing thereon. At least three members of the Tax Review Board shall attend any hearing pursuant to such petition. In such cases the Tax Review Board's membership shall be augmented by the addition of the Commissioner of Revenue, who shall sit as a member of said Board with full power to participate in its deliberations and decisions with respect to petitions filed under the provisions of this section. An informal record containing in substance the evidence,

contentions and arguments presented at the hearing shall be made. All members of the augmented Tax Review Board shall consider such evidence, contentions and arguments and the decisions thereon shall be made by a majority vote of the augmented Board. If the Board shall find that the application of the allocation formula subjects the corporation to taxation on a greater portion of its income or earnings than is reasonably attributable to its business or earnings within this State:

1. If the corporation shall employ in its books of account a detailed allocation of receipts and expenditures which reflects more clearly than the applicable allocation formula or alternative formulas prescribed by this section the income attributable to the business within this State, application for permission to base the return upon the taxpayer's books of account shall be considered by the Tax Review Board. The Board shall be authorized to permit such separate accounting method in lieu of applying the applicable allocation formula if the Board deems such method proper as best reflecting the income and earnings attributable to this State.
2. If the corporation shall show that any other method of allocation than the applicable allocation formula prescribed by this section reflects more clearly the income attributable to the business within this State, application for permission to base the return upon such other method shall be considered by the Tax Review Board. The application shall be accompanied by a statement setting forth in detail, with full explanations, the method the taxpayer believes will more nearly reflect its income from business within this State. If the Board shall conclude that the allocation formula and the alternative formulas prescribed by this section allocate to this State a greater portion of the net income of the corporation than is reasonably attributable to business or earnings within this State, it shall determine the allocable net income by such other method as it shall find best calculated to assign to this State for taxation the portion of the net income of the corporation reasonably attributable to its business or earnings within this State.

There shall be a presumption that the appropriate allocation formula reasonably attributes to this State the portion of the corporation's income earned in this State and the burden shall rest upon the corporation to show the contrary. The relief herein authorized shall be granted by the Board only in cases of clear, cogent and convincing proof that the petitioning taxpayer is entitled thereto. No corporation shall use any alternative formula or method other than the applicable allocation formula provided by statute in making a report or return of its income to this State except upon order in writing of the Board and any return in which any alternative formula or other method other than the applicable allocation formula prescribed by statutes is used without permission of the Board, shall not be a lawful return.

When the Board determines, pursuant to the provisions of this article, that an alternative formula or other method more accurately reflects the income allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its net income for future years in accordance with such determination and decision of the Board so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the business method of operation of the corporation changes. Provided, however, that the Commissioner of Revenue may, in his discretion, with respect to any subsequent year, require the corporation to furnish information relating to its property, operations and activities.

A corporation which proposes to do business in this State may file a petition with the Board setting forth the facts upon which it contends that the applicable allocation formula will allocate a greater portion of the corporation's future income to North Carolina than will be reasonably attributable to its proposed business or contemplated earnings within the State. Upon a proper showing in accordance with the procedure described above for determinations by the Board, the Board may authorize such corporation to allocate income from its future business to North Carolina on the basis prescribed by the Board under the provisions of this section for such future years as the conditions constituting the basis upon which the Board's decision is made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operation presented by the corporation to the Board.

When the Commissioner of Revenue asserts liability under the formula adjustment decision of the Tax Review Board, an aggrieved taxpayer may pay the tax and bring a civil action for recovery under the provisions of G. S. 105-241.4. (1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 752, s. 3; 1953, c. 1302, s. 4; 1955, c. 1350, s. 18; 1957, c. 1340, s. 4.)

Editor's Note.—

The 1953, 1955 and 1957 amendments rewrote this section.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 435.

§ 105-136: Repealed by Session Laws 1957, c. 1340, s. 4.

§ 105-138. Conditional and other exemptions.

2. Every bank or banking association, State or national, trust company or any combination of such facilities or services required to report and subject to taxation for excise tax purposes under article 8C of this chapter; and building and loan associations or savings and loan associations required to report and subject to taxation for capital stock tax and/or excise tax purposes under article 8D of this chapter and any cooperative banks without capital stock organized and operated for mutual purposes and without profit.

3. Cemetery corporations and corporations organized or trusts created for religious, charitable, 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.

9. Mutual associations formed under §§ 54-111 to 54-128, formed to conduct agricultural business on the mutual plan; or to marketing associations organized under §§ 54-129 to 54-158.

Nothing in this subsection shall be construed to exempt any co-operative, mutual association or other organization from an income tax on net income which has not been refunded to patrons on a patronage basis and distributed either in cash, stock, certificates, or in some other manner that discloses to each patron the amount of his patronage refund; provided, that such patronage refunds made after the close of the taxable year and on or before the fifteenth day of the ninth month following the close of such year shall be considered as made on the last day of such taxable year to the extent the allocations are attributable to income derived before the close of such year; provided further, that no stabilization or marketing organization, which handles agricultural products for sale for producers on a pool basis, shall be deemed to have realized any net income or profit in the disposition of a pool or any part of a pool until all of the products in that pool shall have been sold and the pool shall have been closed; provided, further, that a pool shall not be deemed closed until the expiration of at least 90 days after the sale of the last remaining product in that pool. Such cooperatives and other organizations shall file an annual informational return with the State Department of Revenue on forms to be furnished by the Commissioner and shall include therein the names and addresses of all persons, patrons and/or shareholders, whose patronage refunds amount to \$10.00 or more.

Any North Carolina corporation which in the opinion of the Commissioner of Revenue of North Carolina qualifies as a "regulated investment company" under the provisions of United States Code Annotated Title 26, section 361, and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company", shall be taxed under this article upon only that part of its net income which is not distributed or declared for distribution to shareholders during the income year or within thirty days thereafter. (1939, c. 158, s. 314; 1945, c. 708, s. 4; c. 752, s. 3; 1949, c. 392, s. 3; 1951, c. 937, s. 1; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4.)

Editor's Note. —

The 1951 amendment added the paragraph at the end of the section.

The 1955 amendment, effective July 1, 1955, deleted from the second paragraph of subsection 9 the clause "(gross income minus operating expenses, including interest paid on capital stock)" formerly appearing after the word "income" in line two, the deletion to apply to all income years ending on or after December 31, 1955. The amendment also deleted the words "or interest on stock" formerly appearing after the word "refunds" in the last line of the second

paragraph, and substituted \$10.00 for \$50.00 in the said line.

The 1957 amendment rewrote subsection 2 and inserted the words "or trusts created" in line one of subsection 3. It also changed the second paragraph of subsection 9 by substituting "refunded" for "allocated" in line three and inserting the first proviso.

As the rest of the section was not changed, only subsections 2, 3 and 9 and the last paragraph are set out.

For brief comment on the 1951 amendment, see 29 N. C. Law Rev. 415.

§ 105-139. **Fiduciaries.** — (a) The tax imposed by this article shall be imposed upon the following:

- (1) The net income of an estate or trust administered by a resident fiduciary for the benefit of a resident of this State;
- (2) The net income of an estate or trust administered by a resident fiduciary which is earned in this State for the benefit of a nonresident;
- (3) The net income of an estate or trust administered by a nonresident fiduciary for the benefit of a resident of this State; and
- (4) The net income received during the income year by deceased individuals who, at the time of death, were residents of this State and who died during the tax year or the income year without having made a return.

(b) In determining the net income of an estate or trust for purposes of subsection (a), there shall be allowed as a deduction the share of the net income which during the income year is distributed or is distributable to the beneficiaries of the estate or trust.

(c) Where the beneficiary of an estate or trust is a resident of this State and is an insolvent or incompetent individual, such beneficiary's share of the net income of the estate or trust shall not be allowed as a deduction under subsection (b), whether or not any portion thereof is held for the future use of the beneficiary, where the fiduciary administering the estate or trust, has complete charge of such net income.

(d) The tax imposed upon the net income of an estate or trust by this section shall be a charge against the estate or trust. (1939, c. 158, s. 315; 1957, c. 1340, s. 4.)

Editors' Note.—The 1957 amendment rewrote this section.

§ 105-141. **Gross income defined.** — (a) The words "gross income" mean the income of a taxpayer derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce or sales, or dealings in property, whether real or personal, located in this or any other state or any other place, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever and in whatever form paid. The amount of all such items shall be included in the gross income of the income year in which received by the taxpayer, unless, under the methods of accounting permitted under this article, any such amounts are to be properly accounted for as of a different period. The term "gross income" as used in this article shall include the salaries of all constitutional State officials taking office after the date of the enactment of this article by election, reelection or appointment, and all acts fixing the compensation of such constitutional State officials are hereby amended accordingly. The term "gross income" and the words "business, trade, profession, or occupation," and the words "salaries, wages, or compensation for personal services," as used in this article, shall include compensation received for personal service as an officer or employee of the United States, any territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, including compensation as an officer or employee of the executive, legislative, or judicial branches of the government of the United States and of the military, naval, coast guard or other services thereof.

The term "gross income" as used in this article shall include income from annuities as provided in G. S. 105-141.1.

The Commissioner of Revenue is hereby authorized, in his discretion, to adopt rules and regulations providing that recoveries of bad debts or similar items which have been charged off by banks or other business under the regulations and supervision of a State agency, where such charge-offs were required to be made by said supervising State agency, shall be includible in gross income to the same extent as such recoveries are includible in gross income under the federal income tax laws in effect at the time of the issuance of said rules and regulations, or to adopt such other rules and regulations regarding such recoveries as may be deemed just, reasonable and proper. The rules and regulations may be made applicable to charge-offs made prior to January first, one thousand nine hundred and forty-five, but not recovered until after January first, one thousand nine hundred and forty-five.

The words "gross income" include payments received by a divorced or estranged spouse from his or her spouse who is living separate and apart from

the spouse making such payments for the separate support and maintenance of such spouse subject to the provisions of G. S. 105-141.2.

The words "gross income" include any payments received by the estate, widow or heirs of an employee if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee. Provided, that such payments may be excluded from gross income to the extent of five thousand dollars (\$5,000.00) with respect to the death of any one employee regardless of the number of employers making such payments, except that such exclusion shall not apply to amounts with respect to which the employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living (other than total distributions payable to a distributee by a qualified stock bonus, pension, or profit-sharing trust or under an annuity contract within one taxable year of the distributee by reason of the employee's death).

(b) The words "gross income" do not include the following items, which shall be exempt from taxation under this article, but shall be reported in such form and manner as may be prescribed by the Commissioner of Revenue:

- (1) The proceeds of life insurance policies and contracts paid upon the death of the insured to beneficiaries or to the estate of the insured.
- (2) The amount received by the insured as a return of premium or premiums paid by him under life insurance endowment contracts, either during the term or at the maturity of the term mentioned in the contracts or upon surrender of the contract.
- (3) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income).
- (4) Interest upon the obligations of the United States or its possessions, or of the State of North Carolina, or of a political subdivision thereof: Provided, interest upon the obligations of the United States, shall not be excluded from gross income unless interest upon obligations of the State of North Carolina or any of its political subdivisions is excluded from income taxes imposed by the United States. Except that interest upon the obligations of the United States or its possessions, or of the State of North Carolina, or of a political subdivision thereof, shall in no case be included in the "gross income" of any banking corporation organized under the banking laws of North Carolina.
- (5) Any amounts received through accident or health insurance, or any amounts received through health or accident plans financed by profit-sharing trusts or pension trusts, or any amounts received under the Workmen's Compensation Act, as compensation for personal injuries or sickness, plus the amount of any damages received, whether by suit or agreement, on account of such injuries or sickness.
- (6) The rental value of any dwelling and the appurtenances thereof furnished to a minister of the gospel as a part of his compensation nor a cash payment made to a minister of the gospel as a rental allowance to the extent that such cash payment is actually used in paying rental on a dwelling occupied by the minister together with appurtenances thereof; also the rental value of any homes and quarters and the appurtenances thereof furnished the officers and employees of orphanages, whose duties require them to live on the premises and in buildings owned by such institutions, as a part of their compensation.
- (7) The amounts received in lump sum or monthly payments of benefits under the Social Security Act.
- (8) The amounts received in lump sum or monthly payment benefits from retirement or pension systems of other states by former teachers or State employees of such states: Provided, this exclusion shall apply only to individuals receiving benefits from states which grant simi-

lar exclusions or exemptions for individual income tax purposes to retired members of the North Carolina Retirement System for Teachers and State Employees or which levy no income tax on individuals.

- (9) The gross income of an employee shall not include:
 - a. The value of any meals or lodging furnished by his employer for the convenience of the employer provided, in the case of meals, the meals are furnished on the business premises of the employer, and, in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment; and
 - b. Amounts expended by his employer for premiums on group life, accident, health, or hospitalization insurance plans for the benefit of the employee.

(1939, c. 158, s. 317; 1941, c. 50, s. 5; c. 283; 1943, c. 400, s. 4; 1945, c. 708, s. 4; c. 752, s. 3; 1951, c. 643, s. 4; 1957, c. 1224; c. 1340, s. 4.)

Editor's Note.—

The 1951 amendment added the fourth paragraph of subsection (a).

The first 1957 amendment, applicable to tax years beginning on or after January 1, 1957, added subdivision (8) of subsection (b). The second 1957 amendment changed subsection (a) by rewriting the second and

fourth paragraphs and adding the last paragraph. It changed subsection (b) by rewriting subdivision (5), adding subdivisions (7) and (9), and inserting in subdivision (6) the words appearing between "compensation" in line two and the semicolon.

§ 105-141.1. Gross income — annuities. — (a) With respect to amounts received as annuities, "gross income" as used in this article shall include any amount received as an annuity (whether for a period certain or during one or more lives) under an annuity, endowment or life insurance contract, exclusive of that part of any amount received as an annuity under an annuity, endowment or life insurance contract which bears the same ratio to such amount as the investment in the contract (as of the annuity starting date) bears to the expected return under the contract (as of such date).

(b) Definitions:

- (1) Investment in the Contract.—For the purposes of subsection (a), the investment in the contract as of the annuity starting date is
 - a. The aggregate amount of premiums or other consideration paid for the contract, minus
 - b. The aggregate amount received under the contract before such date, to the extent that such amount was excludable from gross income under this section or prior income tax laws.
- (2) Adjustment in Investment Where There Is Refund Feature.—If,
 - a. The expected return under the contract depends in whole or part on the life expectancy of one or more individuals;
 - b. The contract provides for payments to be made to a beneficiary (or to the estate of an annuitant) on or after the death of the annuitant or annuitants; and
 - c. Such payments are in the nature of a refund of the consideration paid,

then the value (computed without discount for interest) of such payments on the annuity starting date shall be subtracted from the amount determined under paragraph (1). Such value shall be computed in accordance with actuarial tables prescribed by the Commissioner. For the purposes of this paragraph and subsection (d) (2) a, the term "refund of the consideration paid" includes amounts payable after the death of an annuitant by reasons of a provision in the contract for a life annuity with a minimum period of payment certain, but (if part of the consideration was contributed by an em-

ployer) does not include that part of any payment to a beneficiary (or to the estate of the annuitant) which is not attributable to the consideration paid by the employee for the contract as determined under paragraph (1) a.

(3) Expected Return. — For the purposes of subsection (a), the expected return under the contract shall be determined as follows:

a. Life Expectancy. — If the expected return under the contract, for the period on and after the annuity starting date, depends in whole or in part on the life expectancy of one or more individuals, the expected return shall be computed in accordance with annuity tables in force and used by the Federal Internal Revenue Service in computing annuities at the time as of which such computation is made.

b. Installment Payments.—If subparagraph a does not apply, the expected return is the aggregate of the amounts receivable under the contract as an annuity.

(4) Annuity Starting Date. — For purposes of this section, the annuity starting date in the case of any contract is the first day of the first period for which an amount is received as an annuity under the contract; except that if such date was before January 1, 1957, then the annuity starting date is January 1, 1957.

(c) Employees Annuities:

(1) Employees Contributions Recoverable in Three Years.—Where,

a. Part of the consideration for annuities, endowment or life insurance contract is contributed by the employer, and

b. During the three-year period beginning on the date (whether on or before January 1, 1957) on which an amount is first received under the contract as an annuity, the aggregate amount receivable by the employee under the terms of the contract is equal to or greater than the consideration for the contract contributed by the employee,

then all amounts received as an annuity under the contract shall be excluded from gross income until there has been so excluded (under this paragraph and prior income tax laws) an amount equal to the consideration for the contract contributed by the employee. Thereafter all amounts so received under the contract shall be included in gross income.

(2) Special Rules for Application of Paragraph (1).—For the purpose of paragraph (1), if the employee died before any amount was received as an annuity under the contract, the words “receivable by the employee” shall be read as “receivable by a beneficiary of the employee”.

(d) Amounts Not Received as Annuities:

(1) General Rule. — If any amount is received under an annuity, endowment or life insurance contract, if such amount is not received as an annuity, and if no other provision of the section applies, then such amount:

a. If received on or after the annuity starting date, shall be included in gross income; or

b. If subparagraph a does not apply, shall be included in gross income, but only to the extent that it (when added to amounts previously received under the contract which were excludable from gross income under this article or prior income tax laws) exceeds the aggregate premiums or other consideration paid.

For purposes of this section any amount received that is in the nature

of a dividend or similar distribution shall be treated as an amount not received as an annuity.

(2) Special Rules for Application of Paragraph (1). — For purposes of paragraph (1), the following shall be treated as amounts not received as annuities:

- a. Any amount received, whether in a single sum or otherwise, under a contract in full discharge of the obligation under the contract which is in the nature of a refund of the consideration paid for the contract; and
- b. Any amount received under a contract on its surrender, redemption or maturity.

In the case of any amount to which the preceding sentence applies, the rule of paragraph (1) b shall apply (and the rule of paragraph (1) a shall not apply).

(3) Limit on Tax Attributable to Receipt of Lump Sum.—If a lump sum is received under an annuity, endowment or life insurance contract, and the part which is includable in gross income is determined under paragraph (1), then the tax attributable to the inclusion of such part in gross income for the taxable year shall not be greater than the aggregate of the tax attributable to such part had it been included in the gross income of the taxpayer ratably over the tax year in which received and the preceding two taxable years.

(e) Special Rules for Computing Employees Contributions. — In computing for purposes of subsection (b) (1) a, the aggregate amount of premiums or other consideration paid for the contract, for the purposes of subsection (c) (1), the consideration for the contract contributed by the employee, and for the purposes of subsection (d) (1) b, the aggregate premiums or other consideration paid, amounts contributed by the employer shall be included, but only to the extent that:

- (1) Such amounts were includable in the gross income of the employee under this article or prior income tax laws; or
- (2) If such amounts had been paid directly to the employee at the time they were contributed, they would not have been includable in the gross income of the employee under the law applicable at the time of such contribution.

(f) Rules for Transfer Where a Transfer Was for Value.—Where any contract (or any interest therein) is transferred (by assignment or otherwise) for a valuable consideration, to the extent that the contract (or interest therein) does not, in the hands of the transferee, have a basis which is determined by reference to the basis in the hands of the transferor, then:

- (1) For purposes of this section, only the actual value of such consideration, plus the amount of the premiums and other consideration paid by the transferee after the transfer, shall be taken into account in computing the aggregate amount of the premiums or other consideration paid for the contract;
- (2) For purposes of subsection (b) (1) b there shall be taken into account only the aggregate amount received under the contract by the transferee before the annuity starting date, to the extent that such amount was excludable from gross income under this article or prior income tax laws; and
- (3) The annuity starting date is January 1, 1957, or the first day of the first period for which the transferee received an amount under the contract as an annuity, whichever is the later.

For purposes of this subsection, the term "transferee" includes a beneficiary of, or the estate of, the transferee.

(g) Option to Receive Annuity in Lieu of Lump Sum.—If,

- (1) A contract provides for payment of a lump sum in full discharge of an obligation under the contract, subject to an option to receive an annuity in lieu of such lump sum;
- (2) The option is exercised within sixty (60) days after the date on which such lump sum first became payable; and
- (3) Part or all of such lump sum shall (but for this subsection) be includable in gross income by reason of subsection (d) (1),

then, for purposes of this section, no part of such lump sum shall be considered as includable in gross income at the time such lump sum first became payable.

(h) Interest. — Notwithstanding any other provisions of this section, if any amount is held under an agreement to pay interest thereon, the interest payments shall be included in gross income. (1957, c. 1340, s. 4.)

§ 105-141.2. Gross income—alimony payments.—

1. General Rule:

(a) Decree of Divorce or Separate Maintenance.—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(b) Written Separation Agreement.—If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this article, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship).

(c) Decree for Support.—If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after January 1, 1957, from her husband under a decree requiring the husband to make the payments for her support and maintenance.

2. Payments to Support Minor Children. — Subsection 1 shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount specified in the decree, instrument or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

3. Principal Sum Paid in Installments.

(a) General Rule.—For purposes of subsection 1, installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.

(b) Where Period for Payment Is More Than 10 Years.—If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (a) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (a)) the installment payments shall be treated as periodic payments for purposes of subsection 1, but (in the case of any one taxable year of the wife) only to the extent of ten per cent (10%) of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a pe-

riod after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received.

4. Treatment of Income from a Trust.

(a) Inclusion in Gross Income of Wite.—There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance (or who is separated from her husband under a written separation agreement) the amount of the income of any trust which such wife is entitled to receive and which, except for this section, would be includable in the gross income of her husband, and such amount shall not, despite any other provision of this article, be includable in the gross income of such husband. This subsection shall not apply to that part of any such income of the trust which the terms of the decree, written separation agreement or trust instrument fix, in terms of an amount of money or a portion of such income, as a sum which is payable for the support of minor children of such husband. In case such income is less than the amount specified in the decree, agreement or instrument for the purpose of applying the preceding sentence, such income, to the extent of such sum payable for such support, shall be considered a payment for such support.

(b) Wife Considered a Beneficiary.—For purposes of computing the taxable income of the estate or trust and the taxable income of a wife to whom subsection (a) applies, such wife shall be considered as the beneficiary specified in this part. A periodical payment to any portion of which this part applies shall be included in the gross income of the beneficiary in the taxable year in which under this part such portion is required to be included.

5. Husband and Wife.—As used in this section and § 105-147 (14), if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of such sections, the term “wife” shall be read “former wife” and the term “husband” shall be read “former husband”; and, if the payments described in such sections are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versa, wherever appropriate to the meaning of such sections, the term “husband” shall be read “wife” and the term “wife” shall be read “husband”. (1957, c. 1340, s. 4.)

§ 105-142. Basis of return of net income.—(a) The net income of a taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but such method of accounting must be consistent with respect to both income and deductions, but if in any case such method does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income, but shall follow as nearly as practicable the federal practice, unless contrary to the context and intent of this article.

(b) Change of Income Year.

(1) A taxpayer may change the income year upon which he reports for income tax purposes without prior approval by the Commissioner of Revenue if such change in income year has been approved by or is acceptable to the Federal Commissioner of Internal Revenue and is used for filing income tax returns under the provisions of the Internal Revenue Code of 1954.

If a taxpayer desires to make a change in his income year other than as provided above he may make such change in his income year with the approval of the Commissioner of Revenue, provided such approval is requested at least thirty days prior to the end of his new income year.

A taxpayer who has changed his income year without requesting the approval of the Commissioner of Revenue as provided in the first paragraph of this subdivision shall submit to the Commissioner of Revenue notification of any change in the income year after the change has been approved by the Federal Commissioner of Inter-

nal Revenue or his agent where application for permission to change is required by the Federal Commissioner of Internal Revenue with such notification stating that such approval has been received. Where application for change of the income year is not required by the Federal Commissioner of Internal Revenue, notification of the intention to change the income year shall be submitted to the Commissioner of Revenue prior to the time for filing the short period return.

- (2) A return for a period of less than twelve months (referred to in this subsection as "short period") shall be made when the taxpayer changes his income year. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year, except that taxpayers changing to, or from, a taxable year varying from fifty-two (52) to fifty-three (53) weeks as provided in subsection 11 of G. S. 105-132 shall not be required to file a short period return if such change results in a short period of three hundred and fifty-nine (359) days or more or of less than seven (7) days. Short period income tax returns shall be filed within the same period following the end of such short period as is required for full year returns under the provisions of G. S. 105-155.
- (3) In the case of a taxpayer who is an individual, if a return is made for a short period under the provisions of subdivision (2) of this subsection the exemptions allowed as a deduction under G. S. 105-149 shall be reduced to amounts which bear the same ratio to the full exemptions as the number of months in the short period bears to twelve and the net taxable income for the short period shall be placed on an annual basis by multiplying such income by twelve and by dividing the result by the number of months in the short period. The tax shall be the same part of the tax computed on the annual basis as the number of months in the short period is of twelve months.

(c) An individual carrying on business in partnership shall be liable for income tax only in his individual capacity, and shall include in his gross income, whether distributed or not, his distributive share of the net income of the partnership and dividends from foreign corporations for each income year. If an established business in this State is owned by a nonresident individual or by a partnership having one or more nonresident members, the manager of the business in this State shall report the earnings of such business in this State, and the distributive share of the income of each nonresident owner or partner and pay the tax as levied on individuals in this article for each such nonresident owner or partner. The individual or partnership business carried on in this State may deduct the payment required to be made for such nonresident individual or partner or partners from their distributive share of the profits of such business in this State: Provided, that if an established unincorporated business owned by a nonresident individual or a partnership having one or more nonresident members is operating in one or more other states the net income of the business attributable to North Carolina shall be determined by multiplying the total net income of the business by the ratio ascertained under the provisions of G. S. 105-134, and shall be entitled to the rights and privileges accorded corporations therein. Total net income shall be the entire gross income of the business less all expenses, taxes, interest and other deductions allowable under this article which were incurred in the operation of the business.

(d) There shall be included in the gross income of a beneficiary of an estate or trust the share of the net income of the estate or trust which during the in-

come year is distributed or is distributable to such beneficiary and which has not been included as net income of the estate or trust subject to tax during any prior year.

Unless otherwise provided by law or by the will, deed or other instrument creating the estate, trust or fiduciary relation, the net income of the estate or trust shall be deemed to be distributed or distributable to the beneficiaries (including the fiduciary as a beneficiary, in the case of income accumulated for future distribution) ratably in proportion to their respective interests.

(e) In the case of trusts which qualify for exemption under G. S. 105-138 (10), employees or their beneficiaries shall include in their gross incomes only the amounts actually received or made available to them within the income year; provided, that if such employees have made contributions to such trusts, and the benefits are received as periodical payments, the amounts annually received shall be taxed as an annuity as provided in G. S. 105-141.1.

(f) An individual, who patronizes or owns stock or has membership in a farmers' marketing or purchasing co-operative or mutual, organized under subchapter 4 or subchapter 5 of chapter 54 of the General Statutes of North Carolina, shall include in his gross income for the year in which the allocation is made his distributive share of any savings, whether distributed in cash or credit, allocated by the co-operative or mutual association for each income year.

(g) (1) A taxpayer who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

- (2) Income from a sale or other disposition of real property, or a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year) for a price exceeding one thousand dollars (\$1,000.00), may be returned on the basis and in the manner prescribed in subdivision (1), provided, however, that such income may be so returned only if in the taxable year of the sale or other disposition there are no payments or the payments (exclusive of evidence of indebtedness of the purchaser) do not exceed thirty per cent (30%) of the selling price.
- (3) Sale or Other Disposition.

a. If an installment obligation is satisfied at other than its face value or is distributed, transmitted, sold or otherwise disposed of, gain or loss shall result to the extent of the difference between the basis of the obligation and

1. The amount realized, in the case of satisfaction at other than face value or a sale or exchange, or
2. The fair market value of the obligation at the time of the distribution, transmission or disposition in the case of the distribution, transmission, or disposition otherwise than by sale or exchange.

Any gain or loss so resulting shall be considered as resulting from the sale or exchange of the property in respect of which the installment obligation was received.

b. The basis of an installment obligation shall be the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied in full.

c. Except as provided elsewhere in this article this subdivision (3) shall not apply to the transmission of installment obliga-

tions at death; provided, that any corporation availing itself of the provisions of this subsection and which is planning to either withdraw its articles of domestication or remove its business from this State, merge, or consolidate its business with another corporation or other interests or dissolve its charter, be required to make a report for income tax purposes, to the Department of Revenue, of any unrealized or unreported income from installment sales made while doing business in this State and to pay any tax which may be due on such income. The manner and form for making such report and paying the tax shall be as prescribed by the Commissioner.

(1939, c. 158, s. 318; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1949, c. 392, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, deleted the words "or interest on stock" formerly appearing after "savings" in line five of subsection (f).

The 1957 amendment rewrote subsections (b) and (d), deleted the former third

sentence of subsection (c) and added the proviso and sentence at the end thereof, deleted all of subsection (e) after "annuity" in line six and inserted in lieu thereof "as provided in G. S. 105-141.1", and added subsection (g).

§ 105-142.1. Income in respect of decedents. — (a) The amount of all items of gross income in respect of a decedent which are not properly includable in the gross income of the decedent for the taxable period in which falls the date of his death or for a prior taxable period (including all items of gross income in respect of a prior decedent if the right to receive such items was acquired by reason of the death of the prior decedent or by bequest, devise or inheritance from the prior decedent) shall be included in the gross income, for the taxable year when received, of:

- (1) The estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;
- (2) The person who, by reason of the death of the decedent, acquires the right to receive the amount if the right to receive the amount is not acquired by the decedent's estate from the decedent; or
- (3) The person who acquires from the decedent the right to receive the amount by bequest, devise or inheritance if the amount is received after a distribution by the decedent's estate of such right or is received without an administration of the decedent's estate.

(b) If a right to receive an amount of income in respect of a decedent is transferred by the estate of the decedent or by a person who received such right by reason of the death of the decedent or by bequest, devise or inheritance from the decedent, there shall be included in the gross income of the estate of such person, as the case may be, for the taxable period in which the transfer occurs, the fair market value of such right at the time of transfer plus the amount by which any consideration for the transfer exceeds such fair market value. For purposes of this paragraph, the term "transfer" includes a sale, exchange, or other disposition or the satisfaction of an installment obligation at other than face value, but does not include transmission at death to the estate of the decedent or a transfer to a person pursuant to the right of such person to receive such amount by reason of the death of the decedent or by bequest, devise or inheritance from the decedent.

(c) For the purposes of this section an amount equal to the excess of the face amount of an installment obligation (the income from which was properly reportable by the decedent on the installment basis under G. S. 105-142) over the basis of such obligation in the hands of the decedent shall be considered as an item of gross income in respect of a decedent, and such obligation shall be considered a right to receive an item of gross income in respect of a decedent.

(d) The amount of any deduction allowable under this article in respect of a decedent which is not properly allowable to the decedent for the taxable period in which falls the date of his death or for a prior taxable period shall be allowed to the estate of the decedent except that, if the estate of the decedent is not liable to discharge the obligation to which the deduction relates, such deduction shall be allowed to the person, who by reason of the death of the decedent or by bequest, devise or inheritance acquires, subject to the obligation, from the decedent an interest in property of the decedent. (1957, c. 1340, s. 4.)

§ 105-144. **Determination of gain or loss.** — (a) For the purpose of ascertaining the gain or loss from the sale or other disposition of property acquired after January first, one thousand nine hundred and twenty-one, the basis shall be the cost thereof provided, however, that in the case of property which was included in the last preceding annual inventory used in determining net income in a return under this article, such inventory value shall be the basis in lieu of cost. In the case of property acquired before January first, one thousand nine hundred and twenty-one, the basis for the purpose of ascertaining gain shall be the fair market value of the property at January first, one thousand nine hundred and twenty-one, or the cost of the property, whichever is greater, and the basis for determining loss shall be the cost of the property in all cases if such cost is known or determinable. Otherwise, the basis shall be the fair market value of the property at January 1, 1921. The basis so determined shall be adjusted for capital additions or losses applicable to the property and for depreciation, amortization and depletion allowed or allowable.

(b) Except as hereinafter provided in subsection (c), the final distribution to the taxpayer of the assets of a corporation shall be treated as a sale of the stock or securities of the corporation owned by him, and the gain or loss shall be computed accordingly.

(c) No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation, if the corporation receiving such property was on the date of the adoption of the plan of liquidation and has continued to be at all times until the receipt of the property the owner of stock (in such other corporation), possessing at least eighty per centum (80%) of the total combined voting power of all classes of stock entitled to vote, and the owner of at least eighty per centum (80%) of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends).

(d) If property is received by a corporation in a distribution in complete liquidation of another corporation within the meaning of subsection (c), then, except as hereinafter provided in subsection (e), the basis of the property in the hands of the distributee shall be the same as it would be in the hands of the transferor.

(e) If property is received by a corporation in a distribution in complete liquidation of another corporation within the meaning of subsection (c), and if

- (1) The distribution is pursuant to a plan of liquidation adopted on or after January first, one thousand nine hundred and fifty-seven, and not more than two years after the date of the transaction hereinafter described in subparagraph (2) (or in the case of a series of transactions the date of the last such transaction); and
- (2) Stock of the distributing corporation possessing at least eighty per centum (80%) of the total combined voting power of all classes of stock entitled to vote, and at least eighty per centum (80%) of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends), was acquired by the distributee in a taxable exchange during a period of not more than twelve months,

then the basis of the property in the hands of the distributee shall be the adjusted basis of the stock with respect to which the distribution was made.

(f) No gain or loss shall be recognized to a corporation on the receipt of money or other property in exchange for stock (including treasury stock) of such corporation. (1939, c. 158, s. 319; 1941, c. 50, s. 5; 1957, c. 1340, s. 4.)

Editor's Note.—

The 1957 amendment rewrote this section.

This section has to do only with fixing for tax purposes the mode of ascertaining realized gains or losses sustained in re-

spect to the disposal of property. Hence the statute is not applicable to a gift of property to a charitable institution. *Wiscassett Mills Co. v. Shaw*, 235 N. C. 14, 68 S. E. (2d) 816 (1952).

§ 105-144.2. Sale of principal residence of taxpayer — nonrecognition of gain.—(a) If property (in this section called “old residence”) used by the taxpayer as his principal residence is sold by him after December 31, 1956, and, within a period beginning one year before the date of such sale and ending one year after such date, property (in this section called “new residence”) is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer’s adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer’s cost of purchasing the new residence.

(b) Adjusted Sales Price Defined.

(1) In General. — For purposes of this section, the term “adjusted sales price” means the amount realized, reduced by the aggregate of the expenses for work performed on the old residence in order to assist in its sale.

(2) Limitations. — The reduction provided in paragraph (1) applies only to expenses—

a. For work performed during the 90-day period ending on the day on which the contract to sell the old residence is entered into;

b. Which are paid on or before the 30th day after the date of the sale of the old residence; and

c. Which are

1. Not otherwise allowable as deductions in computing taxable income under this chapter, and

2. Not taken into account in computing the amount realized from the sale of the old residence.

(3) Effective Date. — The reduction provided in paragraph (1) applies to expenses for work performed in any taxable year (whether beginning before, on or after January 1, 1957), but only in the case of a sale or exchange of an old residence which occurs after December 31, 1956.

(c) Rules for Application of Section.—For the purposes of this section:

(1) An exchange by the taxpayer of his residence for other property shall be treated as a sale of such residence, and the acquisition of a residence on the exchange of property shall be treated as a purchase of such residence.

(2) A residence any part of which was constructed or reconstructed by the taxpayer shall be treated as purchased by the taxpayer. In determining the taxpayer’s cost of purchasing a residence, there shall be included only so much of his cost as is attributable to the acquisition, construction, reconstruction, and improvements made which are properly chargeable to capital account, during the period specified in subsection (a).

(3) If a residence is purchased by the taxpayer before the date of his sale of the old residence, the purchased residence shall not be treated as

his new residence if sold or otherwise disposed of by him before the date of the sale of the old residence.

- (4) If the taxpayer, during the period described in subsection (a), purchases more than one residence which is used by him as his principal residence at some time within one year after the date of the sale of the old residence, only the last of such residences so used by him after the date of such sale shall constitute the new residence.
- (5) In the case of a new residence the construction of which was commenced by the taxpayer before the expiration of one year after the date of the sale of the old residence, the period specified in subsection (a), and the one year referred to in paragraph (4) of this subsection, shall be treated as including a period of 18 months beginning with the date of the sale of the old residence.

(d) **Limitation.**—Subsection (a) shall not apply with respect to the sale of the taxpayer's residence if within one year before the date of such sale the taxpayer sold at a gain other property used by him as his principal residence, and any part of such gain was not recognized by reason of subsection (a).

(e) **Basis of New Residence.**—Where the purchase of a new residence results, under subsection (a) in the nonrecognition of gain on the sale of an old residence, in determining the adjusted basis of the new residence as of any time following the sale of the old residence, the adjustments to basis shall include a reduction by an amount equal to the amount of the gain not so recognized on the sale of the old residence. For this purpose, the amount of the gain not so recognized on the sale of the old residence includes only so much of such gain as is not recognized by reason of the cost, up to such time, of purchasing the new residence.

(f) **Tenant-Stockholder in a Cooperative Housing Corporation.** — For purposes of this section references to property used by the taxpayer as his principal residence, and references to the residence of a taxpayer, shall include stock held by a tenant-stockholder in a cooperative housing corporation if—

- (1) In the case of stock sold, the house or apartment which the taxpayer was entitled to occupy as such stockholder was used by him as his principal residence, and
- (2) In the case of stock purchase, the taxpayer used as his principal residence the house or apartment which he was entitled to occupy as such stockholder.

(g) **Husband and Wife.**

- (1) If the taxpayer and his (or her) spouse own the old residence by the entirety and purchase the new residence by the entirety, then any gain shall be recognized only to the extent provided in subsection (a) of this section and shall be divided equally between the spouses, and the basis of the new residence shall be divided equally between said spouses.
- (2) If the taxpayer and his (or her) spouse own (or owned) either the old or the new residence by the entirety and the other residence is (or was) owned solely by one of the spouses then the nonrecognition of gain as provided in subsection (a) of this section shall not apply unless both such spouses consent to compute any gain or loss upon the sale of the old residence as if the new residence were purchased under the same ownership as the old residence and to determine the basis of the new residence as if the old residence were owned under the same ownership as that under which the new residence is purchased. (1957, c. 1340, s. 4.)

§ 105-144.3. Amortization of bond premiums not deductible.—Amortization of premiums paid upon the purchase of bonds shall not be deduc-

tible in determining net income under this article, but premiums shall constitute a part of the cost basis of the bond in determining profit or loss. For the purposes of this section, the term "bond" means any bond, debenture, note, or certificate or other evidence of indebtedness issued by any corporation and bearing interest (including any like obligation issued by a government or political subdivision thereof), but does not include any such obligation which constitutes stock in trade of the taxpayer or any such obligation of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or any such obligation held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. (1957, c. 1340, s. 4.)

§ 105-145. Exchanges of property.—1. When property is exchanged for other property of like kind, the property received in exchange shall be considered as a conversion of assets from one form to another, from which no gain or loss shall be deemed to arise.

2. (a) In the case of the organization of a corporation, the stock or securities received shall be considered to take the place of property transferred therefor, and no gain or loss shall be deemed to arise therefrom.

(b) No gain or loss shall be recognized when property is transferred to a corporation, the organization of which has been completed before such transfer, solely in exchange for stock or securities in such corporation if, immediately after such exchange, the person or persons making such transfer are in control of the corporation.

3. (a) No gain or loss to a stockholder shall be recognized when a corporation, which is a party to a reorganization, in pursuance of the plan of reorganization, and in exchange solely for its own stock or securities, or without the transfer to it by or on account of its stockholders of any property, distributes to its stockholders stock or securities in one or more other corporations, each of which is also a party to the reorganization. No gain or loss to the holder of any security issued by a corporation shall be recognized when such corporation is a party to a reorganization and, in pursuance of the plan of reorganization and in exchange solely for securities issued by it, distributes to the holders of such securities stock or securities in one or more other corporations each of which is also a party to the reorganization.

(b) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(c) As used in this section, the term "reorganization" includes a statutory merger or consolidation, a transfer by a corporation of all or a part of its assets to another corporation, if immediately after the transfer the transferor or its shareholders, or both, are in control of the corporation to which the assets are transferred, or a recapitalization, or a mere change in identity, form, or place of organization, however effected.

(d) As used in this section, the term "a party to a reorganization" includes the corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another, and the term "control" means the ownership of stock possessing at least eighty per cent (80%) of the total combined voting power of all classes of stock entitled to vote and at least eighty per cent (80%) of the total number of shares of all other classes of stock of the corporation.

4. If a corporation distributes to a shareholder, with respect to its stock, or distributes to a security holder, in exchange for its securities, solely stock or securities of a corporation which it controls immediately before the distribution and if the distribution was not used principally as a device for the distribution of the earnings and profits of the distributing corporation or the controlled corporation or both, and as part of the distribution the distributing corporation distributes all of the stock and securities in the controlled corporation held by it immediately

before the distribution or an amount of stock in the controlled corporation constituting control and if the distribution of the stock in the controlled corporation was not in pursuance of a plan having as one of its principal purposes the avoidance of income tax, then no gain or loss shall be recognized to, and no amount shall be includable in the income of, such shareholder or security holder on the receipt of such stock or securities. (1939, c. 158, s. 320; 1943, c. 400, s. 4; 1955, c. 1239, ss. 1-3; 1957, c. 1340, s. 4.)

Editor's Note.—The 1955 amendment added paragraph (b) of subsection 2, rewrote paragraph (a) of subsection 3, and added former subsection 5. Section 4 of the amendatory act made it applicable only to reorganizations, exchanges, dis-

tributions, and matters and things begun after July 1, 1955.

The 1957 amendment struck out former subsection 4 and redesignated subsection 5 as 4.

§ 105-147. Deductions.—In computing net income there shall be allowed as deductions the following items:

1. All the ordinary and necessary expenses paid during the income year in carrying on any trade or business, including:

(a) As to individuals, reasonable wages of employees for services rendered in producing such income.

(b) As to partnership, reasonable wages of employees and a reasonable allowance for copartners or members of a firm, for services actually rendered in producing such income, the amount of such salary allowance to be included in the personal return of the copartner receiving same.

(c) As to corporations, wages of employees and salaries of officers, if reasonable in amount, for services actually rendered in producing such income.

(d) As to taxpayers engaged in the business of farming, reasonable expenditures paid and reasonable indebtedness incurred during the income year for the purpose of soil or water conservation in respect of land used in farming, or for the prevention of erosion of land used in farming. The amount of such expenditures and indebtedness claimed as a deduction under this paragraph shall not exceed the amount of the deduction therefor claimed by the taxpayer upon his income tax return filed with the United States for such income year or the amount allowable therefor in accordance with the provisions of § 175 of the Federal Internal Revenue Code of 1954. No deduction shall be allowed in any income year on account of the depreciation, obsolescence, or amortization of any structure, improvement, or property any part of the cost of which has been claimed as an expense deductible under this subsection.

1¾. All the ordinary and necessary expenses paid during the income year by any teacher, principal or superintendent of the public schools of the State for the purpose of attending summer school in any accredited college or university. Ordinary and necessary expenses shall be construed to include tuition, matriculation fees, registration fees, amounts paid for books and necessary classroom supplies, subsistence and individual athletic supplies. The deduction authorized under this subsection shall not exceed the sum of two hundred and fifty dollars (\$250.00) for any one year.

5. Dividends from stock issued by any corporation to the extent herein provided. As soon as may be practicable after the close of each calendar year, the Commissioner of Revenue shall determine from each corporate income tax return filed with him during such year, and due from the filing corporation during such year, the proportion of the total net income of the corporation upon which such corporation is liable to pay to this State an income tax under the provisions of this article. A taxpayer who is a stockholder in any such corporation shall be allowed to deduct from his gross income the same proportion of the dividends received by him from such corporation during his income year ending at or after the end of such calendar year. No deduction shall be allowed for any part of any dividend received by such taxpayer from any corporation which filed no in-

come tax return with the Commissioner of Revenue during such calendar year. The total amount of dividends received by such taxpayer from a corporation of this State may be deducted by such taxpayer from his gross income if such corporation filed with the Commissioner of Revenue during such calendar year an income tax return due in such year but had no net income. Dividends received from a foreign corporation, which corporation filed with the Commissioner of Revenue during such calendar year an income tax return due in such year but had no net income for the year covered by such return, shall be deductible from the gross income of the taxpayer receiving them in the same proportion as if the corporation had had net income for such year. Dividends received by a taxpayer from stock in any insurance company of this State taxed under the provisions of § 105-228.5 shall be deductible from the gross income of such taxpayer, and a proportionate part of any dividends received from stock in any foreign insurance corporation shall be deductible, such part to be determined on the basis of the ratio of premiums reported for taxation in this State to total premiums collected both in and out of the State. Dividends received by a taxpayer from stock in any bank or trust company in this State taxed under the provisions of article 8C of subchapter I of this chapter. A taxpayer shall be allowed to deduct such proportionate part of dividends received by him from a North Carolina regulated investment company, as defined in § 105-138 as represents and corresponds to income received by such regulated investment company which would not be taxed by this State if received directly by the North Carolina corporation or resident.

Where a taxpayer is the beneficiary of a distributable trust and where dividend income is received by the trust and paid by the trustee to the beneficiary, the dividends or the portion of such dividends which would otherwise be deductible under the provisions of this section shall be deductible to the beneficiary if such dividends are distributed or distributable to the beneficiary during the taxable year and are included in the gross income of the beneficiary except that the deduction of the same dividends may not be claimed by both the fiduciary and the beneficiary. The amount of the deduction by the beneficiary shall be that portion of his income received from the trust as the deductible portion of dividends received as income by the trust bears to the gross income of the trust from all sources taxable under this article.

No deduction of dividends the income from which is separately allocated under the provisions of § 105-134 shall be made by a corporation in computing its net apportionable income. The deductible portion of such dividends shall be subtracted from the dividend income prior to the allocation of the latter either within or without this State as provided in subsection (2) of § 105-134.

6. Losses of such nature as designated below:

(a) Losses of capital or property used in trade or business actually sustained during the income year except that: No deduction shall be allowed for losses arising from personal loans, endorsements or other transactions of a personal nature not entered into for profit; and losses of such character as specified in subdivision (c) below shall be deductible only to the extent therein provided.

(b) Losses of property not connected with a trade or business sustained in the income year if arising from fire, storm, shipwreck or other casualties or theft to the extent such losses are not compensated for by insurance or otherwise.

(c) Losses incurred in the income year from the sale of corporate shares or bonds of corporations or governments, or from transactions in commodity futures contracts. Provided, that in the case of any loss claimed to have been sustained from any sale or other disposition of shares of stock or securities, other than transactions in commodity futures contracts, where it appears that, within a period beginning thirty days before the date of such sale or disposition and ending thirty days after such date, the taxpayer has acquired (by purchase or by an exchange on which the entire amount of gain or loss was recognized by law) or has entered

into a contract or option so to acquire substantially identical stock or securities then no deduction for the loss shall be allowed unless the taxpayer is a dealer in stocks or securities and the loss is sustained in a transaction made in the ordinary course of its business; if the property consists of stock or securities the acquisition of which (on the contract or option to acquire which) resulted in the non-deductibility under this section of the loss from the sale or other disposition of substantially identical stock or securities, then the basis shall be the basis of the stock or securities sold or disposed of, increased or decreased, as the case may be, by the difference, if any, between the price at which the stock was acquired and the price at which such substantially identical stock or securities were sold or otherwise disposed of; if the amount of stock or securities acquired (or covered by the contract or option to acquire) is greater than the amount of stock or securities sold or otherwise disposed of, then the provisions herein with respect to the adjustment of the basis of the stock or securities acquired (or covered by the contract or option to acquire) shall not apply to that portion of the amount of stock or securities acquired (or covered by the contract or option to acquire) which shall be in excess of the amount of the stock or securities sold; if the amount of the stock or securities acquired (or covered by the contract or option to acquire) is less than the amount of stock or securities sold or otherwise disposed of, then the provisions hereof with respect to disallowance of loss claimed to have been sustained from the sale or other disposition of stock or securities shall not apply to the portion of the amount thereof in excess of the amount of the stock or securities acquired (or covered by the contract or option to acquire).

(d) Losses in the nature of net economic losses sustained in any or all of the five preceding income years arising from business transactions or to capital or property as specified in (a) and (b) above subject to the following limitations:

First, the purpose in allowing the deduction of net economic loss of a prior year or years is that of granting some measure of relief to taxpayers who have incurred economic misfortune or who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income, and the deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to the extent that such loss or losses shall result in the impairment of the net economic situation of the taxpayer such as to result in a net economic loss as hereinafter defined.

Second, the net economic loss for any year shall mean the amount by which allowable deductions for the year other than contributions, personal exemptions, prior year losses, taxes on property held for personal use, and interest on debts incurred for personal rather than business purposes shall exceed income from all sources in the year including any income not taxable under this article.

Third, any net economic loss of a prior year or years brought forward and claimed as a deduction in any income year may be deducted from taxable income of the year only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable under this article received in the same year in which the deduction is claimed, except that in the case of taxpayers required to apportion to North Carolina their net apportionable income, as defined in this article, only such proportionate part of the net economic loss of a prior year shall be deductible from the income taxable in this State as would be determined by the use of the apportionment ratio computed under the provisions of G. S. 105-134 or of subsection (c) of G. S. 105-142, as the case may be, for the year of such loss.

Fourth, a net economic loss carried forward from any year shall first be applied to, or offset by, any income taxable or nontaxable of the next succeeding year before any portion of such loss may be carried forward to a succeeding year. If there is any income taxable or nontaxable in a succeeding year not otherwise offset only the balance of any carry-over loss may be carried forward to a subsequent year.

Fifth, the amount of any loss arising from sales or transactions as specified in subdivision (c) above and not allowed as a deduction for the year in which such loss occurred may be carried forward for deduction in either or both of the succeeding years but only to the extent that such loss when added to other deductions permitted in the second limitation above shall result in a net economic loss as defined in the said second limitation. Further, any portion of such loss from sales or transactions specified in subdivision (c) above which is carried forward to one or both of the two succeeding years may be deducted from taxable income in either year only to the extent of gain not otherwise offset from similar sales or transactions in the year in which such deduction is claimed, but not to exceed such amount as would be permitted as a deduction under the other limitations above. Provided, that this paragraph shall apply only to losses incurred during income years beginning prior to January 1, 1957.

Sixth, no loss shall either directly or indirectly be carried forward more than five years.

7½. Amounts expended by an individual during the year for medical care and insurance against illness or accident for himself, or herself, and dependents, and for funeral expenses for dependents leaving no net estate, to the extent that the total of such expenditures not compensated for by insurance or otherwise shall exceed five per centum of net income computed without the benefit of the deduction authorized in this subdivision. The deduction authorized in this subdivision shall apply only to amounts that were actually paid in the income year, and the total allowable deduction in any tax year shall not exceed five thousand dollars (\$5,000.00).

8. A reasonable allowance for depreciation and obsolescence of property used in the trade or business, which allowance shall be measured by the estimated life of such property; and in the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion.

The cost of property acquired on or since January 1, 1921, plus the cost of additions and improvements, shall be the bases for determining the amount of the allowance for depreciation and obsolescence. If the property was acquired prior to January 1, 1921, the book value of the property as of that date shall be the basis for determining the amount of the allowance for depreciation and obsolescence. Notwithstanding the provisions of the two preceding sentences, the basis for determining the amount of the allowance for depreciation and obsolescence shall be the book value of the property in all cases in which the federal government uses the book value to determine the deduction allowed by it for depreciation or obsolescence under the provisions of § 167 of the Internal Revenue Code of 1954.

For any income years ending after December 31, 1953, the amount of the deduction for depreciation and obsolescence shall be computed by the same method used by the taxpayer in computing the income tax due from the taxpayer to the United States for such income year if such method is pursuant to the provisions of § 167 of the Internal Revenue Code of 1954. If such taxpayer files no income tax return for such income year with the United States under the Internal Revenue Code of 1954 or files such a return but no deduction is claimed therein for depreciation or obsolescence or the deduction claimed therein for depreciation or obsolescence is not computed pursuant to § 167 of the Internal Revenue Code of 1954, a reasonable allowance for depreciation and obsolescence shall be determined in accordance with regulations to be established by the Commissioner of Revenue or, in the absence of such regulation, pursuant to the straight line method.

In determining a reasonable allowance for depletion of mines, oil and gas wells, and other natural deposits the cost of development not otherwise deducted will be allowed as depletion, and in the case of leases, the deduction allowed may be equitably apportioned between the lessor and the lessee.

The basis for determining the allowance for depletion shall be the book value

of the property in all cases in which the federal government uses the book value to determine the deduction allowed by it for depletion under the provisions of the Internal Revenue Code of 1954.

Notwithstanding any other provisions of this section, the allowances for depletion under this section in the case of certain mines and other natural deposits listed below shall be a certain per centum of the gross income from the property during the taxable year, as specified in the schedule below for the mines and natural deposits therein listed, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect to the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph. The schedule is as follows: (1) In the case of coal, asbestos, brucite, dolomite, magnesite, perlite, wollastonite, calcium carbonates, and magnesium carbonates, 10 per centum; (2) in the case of metal mines, aplite, bauxite, fluorspar, flake graphite, vermiculite, beryl, garnet, feldspar, mica, talc (including pyrophyllite), lepidolite, spodumene, barite, ball clay, sagger clay, china clay, phosphate rock, rock asphalt, trona, bentonite, gilsonite, thenardite, borax, fuller's earth, tripili, refractory and fire clay, quartzite, diatomaceous earth, metallurgical grade limestone, chemical grade limestone, potash, monazite, and other radioactive minerals, 15 per centum; and (3) notwithstanding any other provisions of this section, in the case of oil and gas wells the allowance for depletion under this section shall be 27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under this section be less than it would be if computed without reference to this paragraph. Federal rules and regulations shall be applicable in interpreting and applying per centum depletion allowances in accordance with the schedule set out above.

8¼. In lieu of any depreciation allowance pursuant to this section, at the option of the taxpayer, an allowance with respect to the amortization of the cost of any sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of water pollution resulting from the discharge of sewage and industrial wastes or other polluting materials or substances into streams, lakes, or rivers, based on a period of 60 months. The deduction provided for in this subsection shall be allowed by the Commissioner only upon condition that the person, firm, or corporation, claiming such allowance shall furnish to the Commissioner a certificate from the State Stream Sanitation Committee certifying that said Committee has found as a fact that the waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Committee with respect to such plants or equipment, that such plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the State Stream Sanitation Committee, and that the primary purpose thereof is to reduce water pollution resulting from the discharge of sewage and waste and not merely incidental to other purposes and functions. The deduction herein provided for shall also be allowed as to plants or equipment constructed or installed before January 1, 1955, but only with respect to the undepreciated value of such plants or equipment.

8½. An allowance with respect to the amortization of the cost of any emergency facility, as such facility is defined in § 168 of the Federal Internal Revenue Code of 1954, based on a period of 60 months, and an allowance with respect to

the amortization of the cost of a grain storage facility, as such facility is defined in § 169 of the Federal Internal Revenue Code of 1954, based on a period of 60 months. The amount of such allowance for the amortization of the cost of any such facility shall not exceed the amount of the allowance claimed therefor by the taxpayer in the taxpayer's income tax return filed with the United States for such income year or the amount allowable therefor pursuant to the provisions of § 168 or § 169 of the Federal Internal Revenue Code of 1954. This paragraph shall not relate to the determination of the liability of any taxpayer for income tax due to the State of North Carolina for any income year ending on or prior to December 31, 1954, nor shall it affect in any way the validity of any assessment for income taxes due for any such year to the State of North Carolina heretofore made by the Commissioner of Revenue or his authorized representative, or the liability of any taxpayer for the payment of any tax, interest, or penalty so assessed, and shall apply only to construction completed and/or assets acquired on or subsequent to January 1, 1955. Any deduction for the amortization of any such facility claimed and allowed pursuant to this subsection shall be in lieu of any deduction for the depreciation or obsolescence of such facility which would otherwise be allowed pursuant to the provisions of subsection 8 of this section. Provided, that the provisions of this subsection shall apply to any corporation engaged in the business of operating a railroad, express service, telephone or telegraph business, or other form of public service, when such company is required by the Interstate Commerce Commission, the Federal Communications Commission or any successor federal regulatory agency to keep records according to its standard classification of accounting or other prescribed accounting system only with respect to property acquired on, or subsequent to, January 1, 1957.

9. Contributions or gifts made by individuals, firms, partnerships and corporations within the income year to corporations, trusts, community chests, funds, foundations or associations organized, and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or contributions or gifts made by individuals, firms, partnerships and corporations within the income tax year to posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual: Provided, that in the case of such contributions or gifts by corporations and partnerships, the amount allowed as a deduction hereunder shall be limited to an amount not in excess of five (5%) per centum of the corporation's or partnership's net income, as computed without the benefit of this subdivision; and provided that in the case of such contributions or gifts by individuals, the amount allowed as a deduction shall be limited to an amount not in excess of fifteen (15%) per centum of the individual's net income, as computed without the benefit of this subsection.

9½. Contributions by persons and corporations to the State of North Carolina, any of its institutions, instrumentalities, or agencies, any county of this State, its institutions, instrumentalities, or agencies, any municipality of this State, its institutions, instrumentalities, or agencies.

10. Amounts actually expended by an individual, taxable under this article, in maintaining one or more relatives of the taxpayer, dependent upon the taxpayer for their chief support, in an institution for the care of mental or physical defectives irrespective of whether such dependent relatives be above or below the age of eighteen: Provided, that the deduction authorized in this subsection shall apply only to actual expenditures in excess of the amounts allowed as personal exemption for such dependents under the provisions of subdivision (5) of

subsection (a) of § 105-149, and the maximum amount that may be deducted by an individual under the authorization herein stated shall not exceed eight hundred dollars (\$800.00). Provided further, that any excess of such actual expenditures over the personal exemption for such dependents plus eight hundred dollars (\$800.00) may be construed as medical expenses and may be deducted subject to the provisions of subsection 7½ of this section.

12. In computing net income no deduction shall be allowed under this section for "ordinary and necessary expenses"; rental expense, interest expense, taxes or contributions being otherwise deductible under this section, if (1) the same are not actually paid within the taxable year or within the time fixed by statute for filing the taxpayer's return; and (2) if, by reason of the method of accounting of the person or corporation to whom the payment is to be made, the amount thereof is not, unless actually paid, includible in the gross income of such person or corporation for the taxable year in which or with which the taxable year of the taxpayer ends. In the case of taxpayers who keep their accounts and report for income tax purposes on a cash basis, items of expenditure of such nature as specified above in this subsection shall not be allowed as a deduction unless such were actually paid within the income year for which a report is made.

13. Reasonable amounts paid by employers within the income year to trusts which qualify for exemption under subsection ten of § 105-138; provided, that amounts which are deductible for federal income tax purposes shall be prima facie allowable as deductions hereunder; provided further, that, in the case of taxpayers on the accrual basis, they shall be deemed to have made payments on the last day of the year of accrual if actual payments are made within the time fixed by statute for filing the taxpayer's return. This subsection shall be effective from and after January first, one thousand nine hundred and forty-two.

14. Payments made by a divorced or estranged spouse to his or her spouse who is living separate and apart from the spouse making such payment for the separate support and maintenance of such spouse, except that only such amounts may be deducted under this subsection as are includable in the gross income of the spouse receiving such payments under the provisions of G. S. 105-141.2. Provided, that no deduction shall be allowed under this subsection with respect to any payment if, by reason of subsection (d) of G. S. 105-141.2 the amount is not includable in the gross income of the spouse claiming the deduction. Provided further, that any individual who reports his income to the State of North Carolina on the accrual basis may claim the deduction authorized by this subsection if the payments claimed as a deduction are actually made within the time fixed by statute for filing the taxpayer's return.

15. Individual income taxpayers whose income is reportable to the State for income tax purposes, may, at their option, under such rules and regulations as the Commissioner of Revenue may prescribe, elect to claim a standard deduction equal to ten per cent (10%) of their adjusted gross income or five hundred dollars (\$500.00), whichever is the lesser, in lieu of all deductions other than those incurred in the deriving of the income and other than personal exemptions and dependency deductions provided that where both spouses have income taxable in this State and one spouse elects to take credit for the standard deduction provided herein, the other spouse must also take such standard deduction; provided further, that for purposes of this subsection the phrase "adjusted gross income," shall mean gross income taxable under this article less all expenses incurred in deriving such gross income.

Provided, further, that the provisions of this subsection shall not apply to taxpayers who are not residents of this State.

16. As to employers, the amount of the salary or other compensation of an employee which is paid for a period of not more than twenty-four months after the employee's death to his estate, widow, or heirs provided such payment is made in recognition of services rendered by the employee prior to his death and is rea-

sonable in amount. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; 1953, c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8.)

Editor's Note.—

The first 1951 amendment, effective January 1, 1951, rewrote the last sentence of subsection 13 $\frac{1}{4}$ and made changes in subsection 14. The second 1951 amendment inserted the last sentence of subsection 5.

The first 1953 amendment added the last paragraph to subsection 8. The second 1953 amendment substituted "fifteen (15%)" in lieu of "ten (10%)" near the end of subsection 9 and added subsection 15.

The first 1955 amendment inserted subsection 8 $\frac{1}{4}$. The second 1955 amendment changed subsection 8. The third 1955 amendment added paragraph (d) of subsection 1 and inserted subsection 8 $\frac{1}{2}$. The fourth 1955 amendment changed former subsection 10, and the fifth 1955 amendment rewrote subsection 5.

The 1957 amendment added the second and third paragraphs of subsection 5, and inserted in the first paragraph the next to last sentence to be effective for income years beginning on and after January 1, 1957. The amendment rewrote subdivision (c) of subsection 6 and made changes in subdivision (d). It increased the amount at the end of subsection 7 $\frac{1}{2}$ from \$2,500 to \$5,000, and deleted from subsection 8 the former provision that it should "not apply to any corporation the net income of which is required to be computed under the provisions of § 105-136." It also deleted the same provision from the end of subsection 8 $\frac{1}{2}$ and added the proviso thereto. The amendment further redesignated subsection 9 $\frac{3}{4}$ as 9 $\frac{1}{2}$, deleted former subsection 10, rewrote former subsection 9 $\frac{1}{2}$ and redesignated it as 10. The amendment rewrote the first part of subsection 12, substituted "the time fixed by statute for filing the taxpayer's return" for the words "sixty days after the close of such year" in subsection 13, rewrote subsections 14 and 15 and added subsection 16. Subsection 14 refers to "subsection (d) of G. S. 105-141.2". There is no subsection (d) in such section.

As only the subsections mentioned above were affected by the amendments, the rest of the section is not set out.

For brief comment on the second 1951 amendment, see 29 N. C. Law Rev. 415.

For comment on the 1953 amendments, see 31 N. C. Law Rev. 436, 439.

For note on income tax consequences

of alimony payments, see 29 N. C. Law Rev. 319.

What are "ordinary and necessary" expenses necessarily vary in individual cases, and depend upon the nature of a particular business, its size, its location, its mode of operations, and to some extent the business customs and practices prevailing at the time and in the locality or area where the taxpayer operates. Therefore, in order to take care of the varying situations as they arise, this section should be left flexible in form for application in individual cases according to the practical meaning of the statutory language. *Wiscassett Mills Co. v. Shaw*, 235 N. C. 14, 68 S. E. (2d) 816 (1952).

In order for an item of expense to be deductible it must be both an "ordinary" expense and a "necessary" expense, since these words are used conjunctively. Also of controlling significance is this phrase appearing in the section: "in carrying on any trade or business." Here, the connotation is that the expense in order to be deductible must relate to the cost of "carrying on" the business, and carrying on a business in plain language means operating the business. Therefore, it would seem that an expense in order to be deductible within the purview of this section not only must be an "ordinary and necessary" business expense, but as a general rule it must relate in a substantial way to the costs of current operations,—to the cost of producing the gross income from which the deduction is sought. *Wiscassett Mills Co. v. Shaw*, 235 N. C. 14, 68 S. E. (2d) 816 (1952).

Capital Expenditures Not Deductible.—

This section does not sanction the deduction of an expenditure the underlying purpose and predominant effect of which are to provide permanent improvements or betterments reasonably calculated to enhance the value of the taxpayer's business or property for a period substantially beyond the year in which the outlay is made. Such an outlay is a capital expenditure, as distinguished from an item of normal operating business expense, and it is not deductible for income tax purposes. *Wiscassett Mills Co. v. Shaw*, 235 N. C. 14, 68 S. E. (2d) 861 (1952).

Ordinarily, the expense of installing sewers is treated as a capital expenditure

and is not deductible under this section. And the fact that the taxpayer does not own the property on which the mains were laid and did not by contractual arrangement with the city acquire some vested property rights therein in return for the sums paid to the city does not have the effect of transforming these capital expenditures into ordinary and necessary business expenses to be written off entirely within the year. *Wiscassett Mills Co. v. Shaw*, 235 N. C. 14, 68 S. E. (2d) 816 (1952).

Subsection 2 was intended to provide for the deduction only of "rentals or other payments" as and when the items accrue from year to year, and in no event may it be interpreted as authorizing the deduction in one year of a prepayment of rentals or other like charges for a period of years in advance. *Wiscassett Mills Co. v. Shaw*, 235 N. C. 14, 68 S. E. (2d) 816 (1952).

Advance Rentals, Bonuses, etc., to Be Spread Over Life of Lease.—Rentals required to be paid for the use or possession of business property, not owned by the taxpayer and in which he has no equity, may usually be deducted in computing income tax. However, where an expenditure made by a lessee is in the nature of an investment in property used in his trade or business, or is the cost, or part of the cost, of the lease itself, it cannot be deducted in toto from the lessee's taxable income as an expense for the year in which it occurred, but must be recovered in annual allowances. Thus, advances, rentals and bonuses, the price paid for an assignment of a lease, and other similar expenditures by a lessee are not deductible as ordinary and necessary business expenses in the year of payment, but are required to be

spread over the entire life of the lease. *Wiscassett Mills Co. v. Shaw*, 235 N. C. 14, 68 S. E. (2d) 816 (1952).

"Amount" of Gift.—Subsection 9 contains no technical language. Thus, it must be interpreted in accordance with the ordinary use and common understanding of the words used. According to ordinary use, the "amount" of a gift and the value of a gift have the same meaning and effect. It follows, then, that when a contribution is made in property rather than in cash, the amount of the gift, and the amount of the deduction, is the fair market value of the property at the time of the gift. *Wiscassett Mills Co. v. Shaw*, 235 N. C. 14, 68 S. E. (2d) 816 (1952).

Determination of Deduction of Loss for Prior Years.—Subsection (6) (d) requires the inclusion of nontaxable income in arriving at an allowable deduction for carry-over purposes to be deducted from taxable income in a succeeding year. *Dayton Rubber Co. v. Shaw*, 244 N. C. 170, 92 S. E. (2d) 799 (1956).

Regulation in Respect to Carry-Over Losses Held to Comply with Subsection (6) (d).—The Supreme Court found no conflict between the Income Tax Regulation No. 2, promulgated on 10 February, 1944, by the Commissioner of Revenue and followed by the Department of Revenue in its administrative practice with respect to carry-over losses, and the statutory provisions with respect thereto. *Dayton Rubber Co. v. Shaw*, 244 N. C. 170, 92 S. E. (2d) 799 (1956).

Taxes Accruing Prior to Effective Date of Section Not Deductible.—See *Wiscassett Mills Co. v. Shaw*, 235 N. C. 14, 68 S. E. (2d) 816 (1952).

§ 105-149. **Exemptions.**—(a) There shall be deducted from the net income the following exemptions:

- (1) In the case of a single individual, a personal exemption of one thousand dollars (\$1,000.00).
- (2) In the case of a married man with a wife living with him, two thousand dollars (\$2,000.00), or in the case of a person who is the head of a household and maintains the same and therein supports one or more dependent relatives, under eighteen years of age, or, if over eighteen years of age, incapable of self-support because mentally or physically defective, two thousand dollars (\$2,000.00). Provided, that when a husband living with his wife has a gross income of less than one thousand dollars (\$1,000.00), whether taxable under this article or not, and when the wife actually furnishes more than one-half the support for herself and her husband, the husband may by agreement with his wife allow her to claim the two thousand dollars (\$2,000.00) exemption provided in this subsection and the husband in such case shall be entitled to claim an exemption of only one thousand dollars (\$1,000.00): Provided, further, that if the two thousand dollars

(\$2,000.00) exemption is taken by the wife, the husband must file a return for the same year, regardless of whether he shall have a taxable income for such year.

- (3) A married woman having a separate and independent income, one thousand dollars (\$1,000.00).
- (4) In the case of a widow or widower having minor child or children, natural or adopted, two thousand dollars (\$2,000.00).
- (5) Three hundred dollars (\$300.00) for each individual (other than husband and wife) dependent upon and receiving his chief support from the taxpayer, if such dependent individual is under eighteen years of age or is incapable of self-support because mentally or physically defective or is regularly enrolled for full-time study in a school, college, or other institution of learning. Exemptions for the children of taxpayers shall be allowed under this subsection only to the person entitled to the \$2,000.00 exemption provided in subsection (2) of this subdivision; except, however, that where husband and wife are divorced and have children of their marriage for which they would otherwise be entitled to an exemption hereunder, the parent furnishing the chief support of his (or her) child during the income year shall be entitled to said exemption, irrespective of whether said parent has custody of said child or children or is the head of a household during said year.
- (6) In the case of a fiduciary filing a return for that part of the net income of estates or trusts which has not become distributable during the income year one thousand dollars (\$1,000.00). Provided, that in cases where two or more trusts have been established for the benefit of the same individual or beneficiaries the exemption allowed each of such trusts shall be such amount as would be determined by dividing one thousand dollars (\$1,000.00) ratably among such trusts in proportion to the corpus of each.

In the case of a fiduciary filing a return for the net income received during the income year of a deceased resident or nonresident individual who has died during the tax year or income year without having made a return, two thousand dollars (\$2,000.00) if the individual was a married man, and one thousand dollars (\$1,000.00) if the individual was single or a married woman not qualifying as "head of a household."

In the case of a fiduciary filing a return for an insolvent or incompetent individual resident or nonresident where the fiduciary has complete charge of such net income the same exemption to which the beneficiary would be entitled.

- (7) In the case of a divorced person having the sole custody of a minor child or children and receiving no alimony for the support of himself, herself, child, or children two thousand dollars (\$2,000.00).
- (8) In the case of any person who is totally blind, such person shall be entitled to an additional exemption of one thousand dollars (\$1,000.00) in addition to all other exemptions allowed by law. Provided, such person shall submit to the Department of Revenue a certificate from a physician, an optometrist or from the State Commission for the Blind certifying that such condition exists.

(b) The exemptions allowable under this section shall be denied to an individual having income both within and without this State unless the entire income of such individual is shown in his or her return to this State; and if the entire income of such individual is shown in his or her return, the exemptions allowable under this section shall be denied in the proportion that the income earned outside of this State bears to the total income both within and without

this State; provided, that when an individual includes in his or her gross income taxable in this State income earned in another state and no deduction is claimed under this article because said income is earned outside of this State, such individual shall be allowed the same exemption under this section as a person earning all of his or her income in this State.

(c) The status on the last day of the income year shall determine the right to the exemptions provided in this section, except that:

- (1) A taxpayer shall be entitled to the exemptions for a husband, wife or dependents who have died during the year,
- (2) A taxpayer who shall have been divorced or separated or shall cease to be "head of a household" during such year shall be entitled to the exemptions as though such event had not occurred if the taxpayer's status was unchanged for the major part of such income year,
- (3) A taxpayer shall be entitled to an exemption for a dependent if such taxpayer furnished the major part of the support of such dependent during the income year. (1939, c. 158, s. 324; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1947, c. 501, s. 4; 1949, c. 392, s. 3; c. 1173; 1951, c. 643, s. 4; 1957, c. 1340, s. 4.)

Editor's Note.—

The 1951 amendment added the provisos to subdivision (2) of subsection (a) and rewrote the proviso in subdivision (8) thereof.

The 1957 amendment changed subsec-

tion (a) by substituting "one thousand dollars (\$1,000.00)" for "five hundred dollars (\$500.00)" in line eight of subdivision (2) and adding the exception clause at the end of subdivision (5). The amendment also rewrote subsection (c).

§ 105-151. Tax credits for income taxes paid to other states by individuals.—(a) Individuals who are residents of this State shall be allowed a credit against the taxes imposed by this article for income taxes imposed by and paid to another state or country on income taxed under this article, subject to the following conditions:

- (1) The credit shall be allowed only for taxes paid to such other state or country on income derived from sources within such state or country which is taxed under the laws thereof irrespective of the residence or domicile of the recipient.
- (2) The credit shall not be allowed if such other state or country allows residents of this State a credit against the taxes imposed by such state or country for taxes paid or payable under this article, or to the extent, if any, to which the taxes imposed and paid to such other state or country are based on income which is not subject to the taxes imposed by this article.
- (3) The fraction of the gross income for North Carolina income tax purposes which is subject to income tax in another state or country shall be ascertained and the North Carolina net income tax before credit under this section shall be multiplied by such fraction. The credit allowed shall be either the product thus calculated or the income tax actually paid the other state or country whichever is smaller.
- (4) Receipts showing the payment of income taxes to another state or country and a true copy of a return or returns upon the basis of which such taxes are assessed must be filed with the Commissioner of Revenue at, or prior to, the time credit is claimed. If credit is claimed on account of a deficiency assessment, a true copy of the notice assessing or proposing to assess the deficiency, as well as a receipt showing the payment of the deficiency, must be filed.

(b) If a fiduciary is required to pay a tax to this State for an estate or trust for which he acts which estate or trust is resident in this State and is also resident in another state or country, he shall, notwithstanding the limitations contained in subsection (a) of this section, be allowed a credit against the taxes

imposed by this article for income taxes imposed by and paid to such other state or country in accordance with the formula contained in subdivision (3) of subsection (a) of this section and the requirements of subdivision (4) of subsection (a) of this section.

(c) A resident beneficiary of an estate or trust who is taxed under this article on the income received from the estate or trust shall be allowed a credit against the taxes imposed by this article on such income for income taxes paid by the fiduciary to another state or country on such income in accordance with the formula contained in subdivision (3) of subsection (a) of this section and the requirements of subdivision (4) of subsection (a) of this section.

(d) Whenever a taxpayer other than a resident of this State has become liable for income tax to the state or country where he resides upon his net income for the taxable year derived from sources within this State and subject to taxation under this article, the Commissioner of Revenue shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed: Provided, that such credit shall be allowed only if the laws of said state or country (1) grant a substantially similar credit to residents of this State subject to income tax under such laws, or (2) impose a tax upon the personal incomes of its residents derived from sources in this State and exempt from taxation the personal incomes of residents of this State. No credit shall be allowed against the amount of the tax on any income taxable under this article which is exempt from taxation under the laws of such other state or country.

(e) If any taxes paid to another state or country for which a taxpayer has been allowed a credit under this section are at any time credited or refunded to the taxpayer, a tax equal to that portion of the credit allowed for such taxes so credited or refunded shall be due and payable from the taxpayer within thirty (30) days from the date of the receipt of the refund or the notice of the credit. If the amount of such tax is not paid within thirty (30) days of receipt or notice the taxpayer shall be subject to the penalties and interest on delinquent payments provided for in subchapter I of this chapter.

(f) If a partnership is engaged in the practice of a profession which either under the laws of this State or under the code of ethics of such profession may not be practiced by a corporation, and such partnership maintains a place of business in this State and also a place of business in another state or country, no member of such partnership who is a resident of this State shall be required to include as a part of his income which is subject to the taxes imposed by this article any part of his share of the gross income of such partnership which is earned in such other state or country in the practice of such profession, and which is subject to income taxes imposed by such other state or country, and shall not be entitled to deduct under G. S. 105-147 his share of any of the expenses, taxes or losses which are attributable to such partnership's practice of such profession in such other state or country, but the income so excluded shall be shown in his return for the purpose of prorating the exemptions allowed by G. S. 105-149 as therein provided. (1939, c. 158, s. 325; 1941, c. 50, s. 5; c. 204, s. 1; 1943, c. 400, s. 4; 1957, c. 1340, s. 4.)

Editor's Note.—

The 1957 amendment rewrote this section.

§ 105-152. Returns.—1. The following persons shall file with the Commissioner of Revenue an income tax return under affirmation, showing therein specifically the items of gross income and the deductions allowed by this article, and such other facts as the Commissioner may require for the purpose of making any computation required by this article:

(a) Every resident or nonresident who has a gross income during the income year which is in excess of the personal exemption to which he or she is entitled under the provisions of G. S. 105-149 (a), without the inclusion of the exemptions for dependents provided under subdivision (5) of said subsection, any part of which is subject to taxation in this State.

(b) Every resident or nonresident required under the provisions of G. S. 105-149 (b) to prorate his exemption and who has a gross income during the income year from sources both within and without this State in excess of the prorated exemption, any part of which is subject to taxation in this State.

(c) Every partnership having a place of business in the State as provided in G. S. 105-154.

(d) Every corporation doing business in this State.

(e) Any person or corporation whom the Commissioner believes to be liable for a tax under this article, when so notified by the Commissioner of Revenue and requested to file a return.

3. The return of a corporation shall be signed by either its president, vice president, treasurer, assistant treasurer, secretary or assistant secretary. There shall be annexed to the return the affirmation of the officer signing the same, which shall be in the form prescribed in G. S. 105-155 of this article, and the same penalties prescribed in G. S. 105-155 shall apply to any person making willful misstatements in said returns.

(1951, c. 643, s. 4; 1957, c. 1340, s. 4.)

Editor's Note.—

The 1951 amendment inserted a new subdivision of subsection 1. The 1957 amendment rewrote all of subsection 1 ap-

pearing after the introductory paragraph and subsection 3 in its entirety. As only subsections 1 and 3 were changed the rest of the section is not set out.

§ 105-154. **Information at the source.**—1. Every individual, partnership, corporation, joint-stock company or association, or insurance company, being a resident or having a place of business or having one or more employees, agents or other representatives in this State, in whatever capacity acting, including lessors or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the State or of any political subdivision of the State and all officers and employees of the United States of America or of any political subdivision or agency thereof having the control, receipt, custody, disposal, or payment of interest (other than interest coupons payable to bearer), rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits, and incomes above exemptions allowed in this article, paid or payable during any year to any taxpayer, shall make complete return thereof to the Commissioner of Revenue under such regulations and in such form and manner and to such extent as may be prescribed by him. The filing of any report in compliance with the provisions of this section by a foreign corporation shall not constitute an act in evidence of and shall not be deemed to be evidence that such corporation is doing business in this State.

(1957, c. 1340, s. 4.)

Editor's Note.—

The 1957 amendment inserted immediately following the word "business" in line three of subsection 1 the words "or having one or more employees, agents or other representatives." It also inserted after "State," as last appearing in the first

sentence, the words "and all officers and employees of the United States of America or of any political subdivision or agency thereof." It further added the second sentence. As only subsection 1 was changed the rest of the section is not set out.

§ 105-155. **Time and place of filing returns.**—Returns shall be in such form as the Commissioner of Revenue may from time to time prescribe, and shall be filed with the Commissioner at his main office, or at any branch office which he may establish. The return of every person reporting on a calendar year

basis shall be filed on or before the fifteenth day of April in each year, and the return of every person reporting on a fiscal year basis shall be filed on or before the fifteenth day of the fourth month following the close of the fiscal year. The return of a corporation reporting on a calendar year basis shall be filed on or before the fifteenth day of March in each year, and the return of a corporation reporting on a fiscal year basis shall be filed on or before the fifteenth day of the third month following the close of the fiscal year. In case of sickness, absence, or other disability or whenever in his judgment good cause exists, the Commissioner may allow further time for filing returns. Any corporation which shall dissolve or withdraw from business in this State shall file its return for the then current income year within seventy-five days after the date of such dissolution or withdrawal.

There shall be annexed to the return the affirmation of the taxpayer making the return in the following form: "I hereby affirm that this return, including the accompanying schedules and statements (if any) has been examined by me, and, to the best of my knowledge and belief, is true and complete and is made in good faith covering the taxable period stated, pursuant to the Revenue Act of one thousand nine hundred and thirty-nine, as amended and the regulations issued under authority thereof, and that this affirmation is made under the penalties prescribed by law." Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine not to exceed one thousand dollars (\$1,000.00) or imprisonment not to exceed six months, or both, in the discretion of the court. The Commissioner shall cause to be prepared blank forms for the said returns, and shall cause them to be distributed throughout the State, and to be furnished upon application; but failure to receive or secure the form shall not relieve any taxpayer from the obligation of making any return herein required. (1939, c. 158, s. 329; 1943, c. 400, s. 4; 1951, c. 643, s. 4; 1953, c. 1302, s. 4; 1955, c. 17, s. 1; 1957, c. 1340, s. 4.)

Editor's Note.—

The 1951 amendment, effective January 1, 1951, inserted the second sentence of the first paragraph relating to fiduciary returns. And the 1953 amendment, effective July 1, 1953, rewrote the second paragraph.

The 1955 amendment omitted the former reference to fiduciary returns, and made the state law conform to the federal law

as to the time for filing returns.

The 1957 amendment added the last sentence of the first paragraph, and deleted the former sentence of the second paragraph which read: "The return shall also be signed by a competent witness of the signature."

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 441.

§ 105-156.1. Effective dates of 1957 amendments to article 4; determination of corporate income for income years beginning or ending in 1957.—Except as otherwise expressly provided herein, the amendments to this article by Session Laws 1957, c. 1340, s. 4, shall take effect for income years beginning on or after January first, one thousand nine hundred fifty-seven. Provided, however, that with reference to corporations having income years beginning subsequent to December 31, 1956, and before July 1, 1957, the amendments to G. S. 105-134 and the repeal of G. S. 105-136, and the deletion of former subsection 10 of G. S. 105-147 to the extent that it applies to corporations, shall not apply prior to July 1, 1957. Corporations having income years beginning subsequent to December 31, 1956, and prior to July 1, 1957, shall determine their net taxable income for such years both under the provisions, as applicable, of G. S. 105-134, subsection 10 (a) of G. S. 105-147, and G. S. 105-136, as in effect prior to the effective date of Session Laws 1957, c. 1340, s. 4, and under the provisions of G. S. 105-134 as amended by Session Laws 1957, c. 1340, s. 4. The amount of net taxable income ascertained under the provisions, as applicable, of G. S. 105-134, subsection 10 (a) of G. S. 105-147, and G. S. 105-136, as in effect prior to the effective date of Session Laws 1957, c.

1340, s. 4, shall be prorated according to the number of days in the income year occurring prior to July 1, 1957, and the amount of net taxable income ascertained under G. S. 105-134 as amended by Session Laws 1957, c. 1340, s. 4, shall be prorated according to the number of days in the income year subsequent to June 30, 1957, and the amounts so prorated shall be added together and shall be the net taxable income of such corporation for the income year.

Provided further, that corporations having income years ending subsequent to June 30, 1957, and prior to December 31, 1957, shall determine their net taxable income for such years both under the provisions, as applicable, of G. S. 105-134, subsection 10 (a) of G. S. 105-147, and G. S. 105-136, as in effect prior to the effective date of Session Laws 1957, c. 1340, s. 4, and under the provisions of G. S. 105-134 as amended by Session Laws 1957, c. 1340, s. 4. The amount of net taxable income ascertained under the provisions, as applicable, of G. S. 105-134, subsection 10 (a) of G. S. 105-147, and G. S. 105-136, as in effect prior to the effective date of Session Laws 1957, c. 1340, s. 4, shall be prorated according to the number of days in the income year occurring prior to July 1, 1957, and the amount of net taxable income ascertained under G. S. 105-134 as amended by Session Laws 1957, c. 1340, s. 4, shall be prorated according to the number of days in the income year subsequent to June 30, 1957, and the amounts so prorated shall be added together and shall be the net taxable income of such corporation for the income year.

Any corporation feeling that the above-prescribed method for determining taxes due for income years beginning subsequent to December 31, 1956, and prior to July 1, 1957, results in an improper determination of its taxes for said year may obtain a redetermination of its taxes for said year by showing by clear evidence to the satisfaction of the Tax Review Board its correct tax for said year. In order to obtain such a redetermination, the taxpayer must file, prior to March 1, 1958, with the Board a petition praying for said redetermination and setting forth the grounds therefor. After proper hearing, the Board shall enter an order denying the prayer or redetermining the tax due in accordance with its findings. To the extent practicable and consistent with the provisions of this section, the procedural provisions of G. S. 105-134 (6) g shall apply to the petition and hearing under this section. (1957, c. 1340, s. 4.)

Collection and Enforcement of Income Tax.

§ 105-157. Time and place of payment of tax.—(1) Except as otherwise provided in this section, the full amount of the tax payable as shown on the face of the return shall be paid to the Commissioner of Revenue at the office where the return is filed at the time fixed by law for filing the return.

If the taxpayer is a person reporting on a calendar year basis and the amount of tax exceeds fifty dollars (\$50.00), payment may be made in two equal installments: one-half at the time of filing the return, and one-half on or before the fifteenth day of September following the date the return was originally due to be filed, with interest on the deferred payment at the rate of four per cent (4%) per annum from the date the return was originally due to be filed. If the taxpayer is a person reporting on a calendar year basis and the amount of the tax exceeds four hundred dollars (\$400.00), payment may be made in four equal installments: one-fourth at the time of filing the return, one-fourth on or before the fifteenth day of June following the date the return was originally due to be filed, one-fourth on or before the fifteenth day of September following the date the return was originally due to be filed, and one-fourth on or before the fifteenth day of December following the date the return was originally due to be filed, with interest on deferred payments at the rate of four per cent (4%) per annum from the date the return was originally due to be filed.

If the taxpayer is a person reporting on a fiscal year basis or a corporation reporting on either a calendar year or fiscal year basis and the amount of the tax

exceeds fifty dollars (\$50.00), payment may be made in two equal installments: one-half on the date the return is filed, and one-half on or before the fifteenth day of the sixth month following the month in which the return was originally due to be filed, with interest on the deferred payment at the rate of four per cent (4%) per annum from the date the return was originally due to be filed. If the taxpayer is a person reporting on a fiscal year basis or a corporation reporting on either a calendar year or fiscal year basis and the amount of the tax exceeds four hundred dollars (\$400.00), payment may be made in four equal installments: one-fourth at the time of filing the return, one-fourth on or before the fifteenth day of the third month following the month in which the return was originally due to be filed, one-fourth on or before the fifteenth day of the sixth month following the month in which the return was originally due to be filed, and one-fourth on or before the fifteenth day of the ninth month following the month in which the return was originally due to be filed, with interest on deferred payments at the rate of four per cent (4%) per annum from the date the return was originally due to be filed.

In the event any deferred payment is not made when due, then the entire balance of the tax will immediately become due and collectible, and interest upon such outstanding balance shall be added at the rate of six per cent (6%) per annum from the date the return was originally due to be filed until paid.

(1951, c. 643, s. 4; 1955, c. 17, s. 2.)

Editor's Note.—

The 1951 and 1955 amendments rewrote subsection (1). As subsections (2) and

(3) were not changed by the amendments they are not set out.

See note to § 105-155.

§ 105-158. Examination of returns.—1. As soon as practicable after the return is filed, the Commissioner of Revenue shall examine and compute the tax and the amount so computed by the Commissioner shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the additional tax shall be assessed by the Commissioner and paid to the Commissioner as provided in § 105-241.1 and any overpayment of tax shall be returned as provided in § 105-266.

3. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency interest at the rate of one-half (½) of one per cent (1%) per month or fraction thereof from time said return was required by law to be filed until paid.

4. If the understatement is found by the Commissioner of Revenue to be false or fraudulent, with intent to evade the tax, the tax on the additional income discovered to be taxable shall be increased by an amount equal to fifty per cent (50%) of said tax plus interest at the rate of one-half (½) of one per cent (1%) per month or fraction thereof from time said return was required by law to be filed until paid. The provisions of G. S. 105-241.2, 105-241.3 and 105-241.4 with respect to review and appeal shall apply to the tax so assessed. (1939, c. 158, s. 333; 1951, c. 643, s. 4; 1955, c. 1350, s. 18; 1957, c. 1340, ss. 13, 14.)

Editor's Note. — The 1951 amendment, effective January 1, 1951, struck from subsection 3 the former five per cent penalty.

The 1955 amendment, effective July 1, 1955, rewrote the last sentence of subsection 4.

The 1957 amendment rewrote subsection

1. It also deleted the words "doubled and" from line three of subsection 4 and inserted in lieu thereof the words "increased by an amount equal to fifty per cent (50%) of said tax plus."

As subsection 2 was not affected by the amendments it is not set out.

§ 105-159. Corrections and changes.

If a refund of taxes paid is made under this section, interest thereon at four per cent (4%) per annum computed from ninety (90) days after the overpayment was made shall be added to such refund. If an assessment is made under this section, interest thereon at six per cent (6%) per annum computed from

the date set by the statute for the filing of the return shall be added.
(1957, c. 1340, s. 14.)

Editor's Note.—

The 1957 amendment changed the interest rate in the first sentence of the second paragraph from 6% to 4%. It substituted in the second sentence the words

“date set by the statute for the filing of the return” for the words “due date of the original return.” As the first and third paragraphs were not changed they are not set out.

§ 105-160: Repealed by Session Laws 1957, c. 1340, s. 10.

Revision and Appeal.

§ 105-162: Repealed by Session Laws 1957, c. 1340, s. 10.

§ 105-163: Repealed by Session Laws 1955, c. 1350, s. 14.

ARTICLE 5.

Schedule E. Sales and Use Tax.

§ 105-164: Repealed by Session Laws 1957, c. 1340, s. 5.

DIVISION I. TITLE, PURPOSE AND DEFINITIONS.

§ 105-164.1. **Short title.** — This article shall be known as the “North Carolina Sales and Use Tax Act.” (1957, c. 1340, s. 5.)

Editor's Note.—Section 5 of the act inserting this article became effective July 1, 1957. It provides that article 8 of chapter 105 of the General Statutes and all other laws and clauses of laws in conflict with the act are hereby repealed, but all the provisions of articles 5 and 9 of chap-

ter 105 of the General Statutes in force immediately prior to July 1, 1957 shall continue in force with respect to any liability for any sales or use taxes incurred with respect to any period of time prior to July 1, 1957.

§ 105-164.2. **Purpose.**—The taxes herein imposed shall be in addition to all other license, privilege or excise taxes and the taxes levied by this article are to provide revenue for the support of the public school system of this State and for other necessary uses and purposes of the government and State of North Carolina. (1957, c. 1340, s. 5.)

§ 105-164.3. **Definitions.**—The words, terms and phrases when used in this article shall have the meanings ascribed to them in this section except when the context clearly indicates a different meaning.

- (1) “Business” shall include any activity engaged in by any person or caused to be engaged in by him with the object of gain, profit, benefit or advantage, either direct or indirect. The term “business” shall not be construed in this article to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business.
- (2) “Commissioner” shall mean the Commissioner of Revenue of the State of North Carolina.
- (3) “Consumer” shall mean and include every person storing, using or otherwise consuming in this State tangible personal property purchased or received from a retailer either within or without this State.
- (4) “Cost price” means the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service costs, transportation charges or any expenses whatsoever.
- (5) “Engaged in business” shall mean maintaining, occupying or using permanently or temporarily, directly or indirectly, or through a sub-

subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business, for the selling or delivering of tangible personal property for storage, use or consumption in this State, or permanently or temporarily, directly or through a subsidiary, having any representative, agent, salesman, canvasser or solicitor operating in this State in such selling or delivering, and the fact that any corporate retailer, agent or subsidiary engaged in business in this State may not be legally domesticated or qualified to do business in this State shall be immaterial.

- (6) "Gross sales" means the sum total of all retail sales of tangible personal property as defined herein, whether for cash or credit without allowance for cash discount and without any deduction on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or any other expenses whatsoever and without any deductions of any kind or character except as provided in this article.
- (7) "In this (the) State" means within the exterior limits of the State of North Carolina and includes all territory within such limits owned by or ceded to the United States of America.
- (8) "Lease or rental" means the leasing or renting of tangible personal property and the possession or use thereof by the lessee or rentee for a consideration without transfer of the title of such property.
- (9) "Net taxable sales" shall mean and include the gross retail sales of the business of the retailer taxed under this article after deducting therefrom exempt sales and nontaxable sales.
- (10) "Nonresident retail merchant" shall mean every person whose business establishment is located outside North Carolina and who engages in the business of a "retailer" as defined herein and who has applied for and obtained from the Commissioner a certificate of registration in accordance with such rules and regulations as may be prescribed for the issuance thereof.
- (11) "Person" includes any individual, firm, co-partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate or other group, or combination acting as a unit, body politic, or political subdivision, whether public or private or quasipublic and the plural as well as the singular number.
- (12) "Purchase" means acquired for a consideration whether
 - a. Such acquisition was effected by a transfer of title or possession, or both, or a license to use or consume;
 - b. Such transfer shall have been absolute or conditional and by whatever means it shall have been effected; and
 - c. Such consideration be a price or rental in money or by way of exchange or barter.

It also includes the procuring of a retailer to erect, install or apply tangible personal property for use in this State.

- (13) "Retail" shall mean the sale of any tangible personal property in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale.
- (14) "Retailer" means and includes every person engaged in the business of making sales of tangible personal property at retail, either within or without this State, or peddling the same or soliciting or taking orders for sales, whether for immediate or future delivery, for storage, use or consumption in this State and every manufacturer, producer or contractor engaged in business in this State and selling, delivering, erecting, installing or applying tangible personal property

for use in this State notwithstanding that said property may be permanently affixed to a building or realty or other tangible personal property. Provided, however, that when in the opinion of the Commissioner it is necessary for the efficient administration of this article to regard any salesmen, solicitors, representatives, consignees, peddlers, truckers or canvassers as agents of the dealers, distributors, consignors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them regardless of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, employers or persons, the Commissioner may so regard them and may regard the dealers, distributors, consignors, supervisors, employers or persons as "retailers" for the purpose of this article.

- (15) "Sale" or "selling" shall mean any transfer of title or possession, or both, exchange, barter, lease, or rental of tangible personal property, conditional or otherwise, in any manner or by any means whatsoever, however effected and by whatever name called, for a consideration paid or to be paid, and includes the fabrication of tangible personal property for consumers by persons engaged in business who furnish either directly or indirectly the materials used in the fabrication work, and the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. A transaction whereby the possession of the property is transferred but the seller retains title or security for the payment of the price shall be deemed a sale. Provided, however, if a serviceman or repairman furnishes and attaches, annexes, installs, or affixes tangible personal property to the real or personal property of customers for a consideration, the furnishing, attachment, annexation, installation or affixation shall constitute a sale to the extent of the fair market value of the tangible personal property furnished, attached, annexed, installed or affixed.
- (16) "Sales price" means the total amount for which tangible personal property is sold including charges for any services that go into the fabrication, manufacture or delivery of such tangible personal property and that are a part of the sale valued in money whether paid in money or otherwise and includes any amount for which credit is given to the purchaser by the seller without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest charged, losses or any other expenses whatsoever. Provided, however, that where a manufacturer, producer or contractor, erects, installs or applies tangible personal property for the account of or under contract with the owner of realty or other property, the sales price shall be the fair market value of such property at the time and place of such erection, installation or application. Provided, further:
- a. The cost for labor or services rendered in erecting, installing or applying property sold when separately charged shall not be included as a part of the "sales price";
 - b. Finance charges, service charges or interest from credit extended under conditional sales contracts or other conditional contracts providing for deferred payments of the purchase price shall not be considered a part of the "sales price" when separately charged;
 - c. "Sales price" shall not include the amount of any tax imposed by the United States upon or with respect to retail sales.

whether imposed upon the retailer or consumer except that any manufacturers' or importers' excise tax shall be included in the term.

- (17) "Storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this State of tangible personal property purchased from a retailer.
- (18) "Use" means and includes the exercise of any right or power or dominion whatsoever over tangible personal property by a purchaser thereof and includes, but is not limited to, any withdrawal from storage, installation, affixation to real or personal property, exhaustion or consumption of tangible personal property by the owner or purchaser thereof, but shall not include the sale of tangible personal property in the regular course of business.
- (19) "Storage" and "Use"; Exclusion.—"Storage" and "use" do not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the State for use thereafter solely outside the State, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used solely outside the State.
- (20) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance or other obligations or securities, nor shall it include electricity, gas or water delivered by or through main lines or pipes either for commercial or domestic use or consumption.
- (21) "Taxpayer" means any person liable for taxes under this article.
- (22) "Use tax" means and includes the tax imposed by Part 3 in Division II of this article.
- (23) "Wholesale merchant" shall mean every person who engages in the business of buying any tangible personal property and selling same to registered retailers, wholesalers and nonresident retail merchants for resale. It shall also include persons making sales of tangible personal property which are classified as wholesale sales and subject to the wholesale rate of tax. For the purposes of this article any person, firm, corporation, estate or trust engaged in the business of manufacturing, producing, processing or blending any articles of commerce and maintaining a store or stores, warehouse or warehouses, or any other place or places, separate and apart from the place of manufacture or production, for the sale or distribution of its products to other manufacturers or producers, wholesale or retail merchants, for the purpose of resale shall be deemed a "wholesale merchant".
- (24) "Wholesale sale" shall mean a sale of tangible personal property by a wholesale merchant to a manufacturer, jobber or dealer, wholesale or retail merchant, for the purpose of resale but does not include a sale to users or consumers not for resale. The term "wholesale sale" shall include a sale of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of the tangible personal property which is manufactured. (1957, c. 1340, s. 5.)

Meaning of "sale" under former statute. 203, 69 S. E. (2d) 505 (1952); holding —Watson Industries v. Shaw, 235 N. C. that the word "sale" did not embrace a

transaction whereby a radio broadcasting station was given temporary custody of transcription tape or records in order to rebroadcast the programs contained thereon.

DIVISION II. TAXES LEVIED.

Part 1. Retail Sales Tax.

§ 105-164.4. **Imposition of tax; retailer.**—There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail, renting or furnishing tangible personal property or the renting and furnishing of rooms, lodgings and accommodations to transients, in this State, the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:

- (1) At the rate of three per cent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State, the tax to be computed on total net taxable sales for the purpose of remitting the amount of tax due the State and to include each and every taxable retail sale or amount of taxes collected whichever be the greater. Provided, however, that in the case of the sale of any airplane, or the sale of any motor vehicle, the tax shall be only at the rate of one per cent (1%) of the sales price and the maximum tax with respect to any one such airplane or motor vehicle, including all accessories attached thereto at the time of delivery thereof to the purchaser, shall be eighty dollars (\$80.00).

For the purposes of this section, the words "motor vehicle" mean any vehicle which is self-propelled and designed primarily for use upon the highways, any vehicle which is propelled by electric power obtained from trolley wires but not operated upon rails, and any vehicle designed to run upon the highways which is pulled by a self-propelled vehicle, but shall not include any implement of husbandry, farm tractor, road construction or maintenance machinery, or equipment, special mobile equipment as defined in G. S. 20-38, nor any vehicle designed primarily for use in work off the highway. For the purposes of this subsection, the sale separately of a new motor vehicle chassis and a new motor vehicle body to be installed thereon, whether by the same retailer or different retailers, shall be subject only to the tax herein prescribed with respect to a single motor vehicle, and the tax applicable with respect to the sale of the new chassis and/or the new body shall be computed at the rate of one per cent (1%) of the sales price thereof, but in no event shall the total tax as to both such chassis and body exceed eighty dollars (\$80.00).

Provided further, in addition to all other taxes, there is hereby levied and imposed upon every person, for the privilege of using the streets and highways of this State, a tax of one per cent (1%) of the sales or purchase price of any motor vehicle, new chassis and/or new body as defined, described and limited in this section, including all accessories attached thereto at the time of delivery thereof to the purchaser, purchased or acquired for use on the streets and highways of this State, which said amount shall not exceed eighty dollars (\$80.00), and shall be paid to the Commissioner of Revenue at the time of applying for certificate of title or registration of such motor vehicle. No certificate of title or registration plate shall be issued for same unless and until said tax has been paid: Provided, however, if such person so applying for certificate of title or registration and license plate for such motor vehicle shall furnish to the Commissioner

of Revenue a certificate from a motor vehicle dealer licensed to do business in this State, upon a form furnished by the Commissioner, certifying that such person has paid the tax thereon levied in this article, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this article. It is not the intention of this section to impose any tax upon a body mounted upon the chassis of a motor vehicle which temporarily enters the State for the purpose of having such body mounted thereon by the manufacturer thereof.

The tax levied under this subsection shall not apply to the owner of a motor vehicle who purchases or acquires said motor vehicle from some person, firm or corporation who or which is not a dealer in new and/or used motor vehicles if the tax levied under this article has been paid with respect to said motor vehicle.

- (2) At the rate of three per cent (3%) of the gross proceeds derived from the lease or rental of tangible personal property as defined herein, where the lease or rental of such property is an established business, or the same is incidental or germane to said business.
- (3) Operators of hotels, motels, tourist homes and tourist camps shall be considered "retailers" for the purposes of this article. There is hereby levied upon every person, firm or corporation engaged in the business of operating hotels, and every person, firm or corporation engaged in the business of operating tourist homes, tourist camps and similar places of business, a tax of three per cent (3%) of the gross receipts derived from the rental of any room or rooms, lodgings, or accommodations furnished to transients at any hotel, motel, inn, tourist camp, tourist cabin or any other place in which rooms, lodgings or accommodations are regularly furnished to transients for a consideration. The tax shall not apply, however, to any room, lodging or accommodation supplied to the same person for a period of 90 continuous days or more. Every person subject to the provisions of this section shall register and secure a license in the manner provided in paragraph (6) of this section, and, insofar as practicable, all other provisions of this article shall also be applicable with respect to the tax herein provided for.
- (4) The said tax shall be collected from the retailer as defined herein and paid by him at the time and in the manner as hereinafter provided. Provided, however, that any person engaging or continuing in business as a retailer shall pay the tax required on the net taxable sales of such business at the rates specified when proper books are kept showing separately the gross proceeds of taxable and nontaxable sales of tangible personal property in such form as may be accurately and conveniently checked by the Commissioner or his duly authorized agent. If such records are not kept separately the tax shall be paid as a retailer on the gross sales of business and the exemptions and exclusions provided by this article shall not be allowed.
- (5) The tax so levied is and shall be in addition to all other taxes whether levied in the form of excise, license or privilege or other taxes.
- (6) Any person who shall engage or continue in any business for which a privilege tax is imposed by this article shall immediately after July 1, 1957, apply for and obtain from the Commissioner upon payment of the sum of one dollar (\$1.00) a license to engage in and conduct such business upon the condition that such person shall pay the tax accruing to the State of North Carolina under the provisions of this article and he shall thereby be duly licensed and registered to engage in and conduct such business. The license tax levied in this sec-

tion shall be a continuing license until revoked for failure to comply with the provisions of this article. Provided, however, that any person who has heretofore applied for and obtained such license and the same is in force and effect as of July 1, 1957, shall not be required to apply for and obtain a new license. (1957, c. 1340, s. 5.)

Former Statute. — For decisions under Shaw, 235 N. C. 203, 69 S. E. (2d) 505 former § 105-187, relating to tax on build- (1952); Robinson & Hale, Inc. v. Shaw, ing materials, see Watson Industries v. 242 N. C. 486, 87 S. E. (2d) 909 (1955).

Part 2. Wholesale Tax.

§ 105-164.5. **Imposition of tax; wholesale merchant.** — There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at wholesale in this State as defined herein, the same to be collected and the amount to be determined in the following manner, to wit:

- (1) Every wholesale merchant as defined in this article shall apply for and obtain an annual license and pay tax therefor of ten dollars (\$10.00). Such annual license shall be paid for in advance within the first fifteen days of July in each year or, in the case of a new business, within fifteen days after business is commenced. There is also levied on each wholesale merchant a tax of one-twentieth of one per cent (1/20 of 1%) of the total gross sales of the business. For the purposes of this article sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants, sales of machines and machinery and parts and accessories for such machines and machinery to farmers, sales of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of tangible personal property which is manufactured, sales of wrapping paper, labels, bags, etc., sold to manufacturers, producers, and retailers when such materials are used for packaging, shipment or delivery of tangible personal property which is sold at wholesale or retail shall be classified as wholesale sales and subject to the wholesale rate of tax.
- (2) The sale of any tangible personal property by any wholesale merchant to anyone other than to a registered retailer, wholesale merchant or nonresident retail merchant as defined for resale shall be taxable at the rate of tax provided in this article upon the retail sale of tangible personal property.
- (3) The sale of any tangible personal property by any wholesale merchant to a nonresident retail merchant must be in strict compliance with such regulations as may be promulgated by the Commissioner and which are applicable to such sales. Any sale which does not conform to such regulations shall be taxable at the rate of tax provided in this article upon the retail sale of tangible personal property.
- (4) Every wholesale merchant who sells tangible personal property to retailers or nonresident retail merchants for resale shall deliver to such customer a bill of sale for each sale of such tangible personal property whether sold for cash or on credit and shall make and retain a duplicate or carbon copy of each such bill of sale and shall keep on file all such duplicate bills of sale for at least three years from the date of sale. Failure to comply with the provisions of this subsection shall subject the wholesale merchant to liability for tax upon such sales at the rate of tax levied in this article upon retail sales.
- (5) The tax so levied is and shall be in addition to all other taxes whether

levied in the form of excise, license or privilege or other taxes. (1957, c. 1340, s. 5.)

Former statute held applicable to sales by a wholesale secondhand car dealer in this State to retail merchants of another state for the purpose of resale out of this State. *Phillips v. Shaw*, 238 N. C. 518, 78 S. E. (2d) 314 (1953).

§ 105-164.5a. **Exemptions and exclusions.**—Sales of tangible personal property which are exempt from the retail rate of tax by Division III, § 105-164.13, are also exempt from the wholesale rate of tax except:

- (1) Sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants.
- (2) Sales of farm machines and machinery, whether animal or motor drawn or operated, and parts and accessories for such machines and machinery, to farmers for use by them in the planting, cultivating, harvesting or curing of farm crops and sales of machines and machinery and parts and accessories for such machines and machinery to dairy operators, poultry farmers, egg producers, and livestock farmers for use by them in the production of dairy products, poultry, eggs or livestock.
- (3) A sale of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of the tangible personal property which is manufactured.
- (4) Sales by a person or firm engaged in the business of manufacturing, producing, processing or blending any article of commerce from a store or stores, warehouse or warehouses, or any other place or places, separate and apart from the place of manufacture or production for the purpose of resale.
- (5) Sales of central office equipment and switchboard and private branch exchange equipment to telephone and telegraph companies which are under the regulation and supervision of the North Carolina Utilities Commission.
- (6) Sales of medicines, drugs, medical supplies and equipment for resale.
- (7) Sales of food and food products for resale.
- (8) Sales of coffins, caskets, vaults for resale.
- (9) Sales of wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail or when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer. (1957, c. 1340, s. 5.)

Part 3. Use Tax.

§ 105-164.6. **Imposition of tax.**—An excise tax is hereby levied and imposed on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State, the same to be collected and the amount to be determined by the application of the following rates against the sales price, to wit:

- (1) At the rate of three per cent (3%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed, distributed or stored for use or consumption in this State.
- (2) At the rate of three per cent (3%) of the monthly lease or rental price

- paid by the lessee or rentee, or contracted or agreed to be paid by the lessee or rentee, to the owner of the tangible personal property.
- (3) There is hereby levied and there shall be collected from every person, firm, or corporation, an excise tax of three per cent (3%) of the purchase price of all tangible personal property purchased or used which shall enter into or become a part of any building or other kind of structure in this State, including all materials, supplies, fixtures and equipment of every kind and description which shall be annexed thereto or in any manner become a part thereof. Provided, however, the taxes levied in this section shall be levied against the purchaser of the articles named. If purchases of building materials that are not exempt from tax are made by a contractor there shall be joint liability for the tax against both contractor and owner, but the liability of the owner shall be satisfied if affidavit is required of the contractor, and furnished by him, before final settlement is made, showing that the tax herein levied has been paid in full.
 - (4) Where a retail sales tax has already been paid with respect to said tangible personal property in this State by the purchaser thereof, said tax shall be credited upon the tax imposed by this article.
 - (5) Every person storing, using or otherwise consuming in this State tangible personal property purchased or received at retail either within or without this State shall be liable for the tax imposed by this article and the liability shall not be extinguished until the tax has been paid to this State. Provided, however, that a receipt from a registered retailer engaged in business in this State given to the purchaser in accordance with the provisions of this article shall be prima facie sufficient to relieve the purchaser from liability for the tax to which such receipt may refer and the liability of the purchaser shall be extinguished upon payment of the tax by any retailer from whom he has purchased said property. Provided, further, that the Commissioner may, by rule and regulation, provide that a similar receipt from a nonresident retail merchant shall also be sufficient to relieve the purchaser of further liability for the tax to which such receipt may refer.
 - (6) Except as provided herein the tax so levied is and shall be in addition to all other taxes whether levied in the form of excise, license, privilege or other taxes.
 - (7) Every retailer engaged in business in this State selling or delivering tangible personal property for storage, use or consumption in this State shall immediately after July 1, 1957, apply for and obtain from the Commissioner upon the payment of the sum of one dollar (\$1.00) a license to engage in and conduct such business upon the condition that such person shall pay the tax accruing to the State of North Carolina under the provisions of this article, and he shall thereby be duly licensed and registered to engage in and conduct such business. Provided, however, that any person who has heretofore applied for and obtained such license and the same is in force and effect as of July 1, 1957, shall not be required to apply for and obtain a new license.
 - (8) Notwithstanding any other provisions of this article, a use tax, at the applicable use tax rate, as hereinbefore provided, is hereby levied upon the storage or use in this State of any motor vehicles, machines, machinery, tools or other equipment brought, imported or caused to be brought into this State for use in constructing, building or repairing any building, highway, street, sidewalk, bridge, culvert, sewer or water system, drainage or dredging system, electric or steam rail-

way system, reservoir or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement or structure, or any part thereof. The owner or, if the property is leased the lessee of any such motor vehicle, machine, machinery, tools or other equipment shall be liable for the tax provided for in this paragraph, to be computed as set out below. The useful life of such motor vehicles, machines, tools or other equipment shall be determined by the Commissioner in accordance with the experience and practices of the building and construction trades. Said use tax shall be computed on the basis of such proportion of the original purchase price of such property as the duration of time of use in this State bears to the total useful life thereof. Such tax shall become due immediately upon such property's being brought into this State, and in the absence of satisfactory evidence as to the period of use intended in this State, it shall be presumed that such property will remain in this State for the remainder of its useful life. All provisions of this article not directly in conflict with the provisions of this paragraph shall be applicable with respect to the matters herein set forth. The provisions of this paragraph shall not be applicable with respect to sales of such property within this State or to the use, storage or consumption of such property when purchased for use in this State, and in such cases the full sales or use tax shall be paid as in all other cases, irrespective of the period of intended use in this State. (1957, c. 1340, s. 5.)

Editor's Note.—The case cited to the paragraphs of this annotation was decided under former § 105-220, relating to the levy of compensating use taxes.

The purpose of this tax is to remove, insofar as possible, the discrimination against local merchants resulting from the imposition of a sales tax, and to equalize the burden of the tax on property sold locally and that purchased without the State. *Watson Industries v. Shaw*, 235 N. C. 203, 69 S. E. (2d) 505 (1952).

The provisions of this section cannot be extended beyond the clear import of the language used, or their operation enlarged so as to embrace matters not specifically pointed out. *Watson Industries v. Shaw*, 235 N. C. 203, 69 S. E. (2d) 505 (1952).

Prerequisites to Assessment of Tax.—*Watson Industries v. Shaw*, 235 N. C. 203, 69 S. E. (2d) 505 (1952).

Dominion over, Possession of, or Title to Property Must Be Acquired by Purchaser.—*Watson Industries v. Shaw*, 235 N. C. 203, 69 S. E. (2d) 505 (1952).

Lease of Transcription Tape to Broadcasting Station.—The former statute could not be construed to impose a tax on a broadcasting station where it purchased the right to rebroadcast programs recorded on a transcription tape and was given temporary custody of the tape in order to make use of the purchase. *Watson Industries v. Shaw*, 235 N. C. 203, 69 S. E. (2d) 505 (1952).

Part 4. General Provisions.

§ 105-164.7. **Sales tax part of purchase price.** — Every retailer engaged in the business of selling or delivering or taking orders for the sale or delivery of tangible personal property for storage, use or consumption in this State shall at the time of selling or delivering or taking an order for the sale or delivery of said tangible personal property or collecting the sales price thereof or any part thereof, add to the sales price of such tangible personal property the amount of the tax on the sale thereof and when so added said tax shall constitute a part of such purchase price, shall be a debt from the purchaser to the retailer until paid and shall be recoverable at law in the same manner as other debts. Said tax shall be stated and charged separately from the sales price and shown separately on the retailer's sales records and shall be paid by the purchaser to the retailer as trustee for and on account of the State and the retailer shall be liable for the collection thereof and for its payment to the Com-

missioner and the retailer's failure to charge to or collect said tax from the purchaser shall not affect such liability. It is the purpose and intent of this article that the tax herein levied and imposed shall be added to the sales price of tangible personal property when sold at retail and thereby be borne and passed on to the customer, instead of being borne by the retailer. (1957, c. 1340, s. 5.)

§ 105-164.8. Retailer to collect tax regardless of place sale consummated.—Every retailer engaged in business in this State as defined in this article shall collect said tax notwithstanding

- (1) That the purchaser's order or the contract of sale is delivered, mailed or otherwise transmitted by the purchaser to the retailer at a point outside this State as a result of solicitation by the retailer through the medium of a catalogue or other written advertisement; or
- (2) That the purchaser's order or the contract of sale is made or closed by acceptance or approval outside this State, or before said tangible personal property enters this State; or
- (3) That the purchaser's order or the contract of sale provides that said property shall be or is in fact procured or manufactured at a point outside this State and shipped directly to the purchaser from the point of origin; or
- (4) That said property is mailed to the purchaser in this State or a point outside this State or delivered to a carrier outside this State f.o.b. or otherwise and directed to the purchaser in this State regardless of whether the cost of transportation is paid by the retailer or by the purchaser; or
- (5) That said property is delivered directly to the purchaser at a point outside this State; or
- (6) Any combination in whole or in part of any two or more of the foregoing statements of fact, if it is intended that the tangible personal property purchased be brought to this State for storage, use or consumption in this State. (1957, c. 1340, s. 5.)

§ 105-164.9. Advertisement to absorb tax unlawful.—Any retailer who shall by any character or public advertisement offer to absorb the tax levied in this article or in any manner directly or indirectly advertise that the tax herein imposed is not considered an element in the price to the purchaser shall be guilty of a misdemeanor. Any violations of the provisions of this section reported to the Commissioner shall be reported by him to the Attorney General of the State to the end that such violations may be brought to the attention of the solicitor of the court of the county or district whose duty it is to prosecute misdemeanors in the jurisdiction. It shall be the duty of such solicitor to investigate such alleged violations and if he finds that this section has been violated prosecute such violators in accordance with the law. (1957, c. 1340, s. 5.)

§ 105-164.10. Retail bracket system.—For the convenience of the retailer in collecting the tax and to facilitate the administration of this article, every retailer engaged in or continuing within this State in a business for which a license, privilege or excise tax is required by this article shall add to the sale price and collect from the purchaser on all taxable retail sales an amount equal to the following:

- (1) No amount on sales of less than 10¢.
- (2) 1¢ on sales of 10¢ and over but not in excess of 35¢.
- (3) 2¢ on sales of 36¢ and over but not in excess of 70¢.
- (4) 3¢ on sales of 71¢ and over but not in excess of \$1.16.
- (5) Sales over \$1.16—straight 3% with major fractions governing.

Use of the above bracket does not relieve the retailer from the duty and liability to remit to the Commissioner an amount equal to three per cent (3%) of the

gross receipts derived from all taxable retail sales during the taxable period. (1957, c. 1340, s. 5.)

§ 105-164.11. **Collections in excess of three per cent.**—When the tax collected for any period is in excess of three per cent (3%) of the net taxable sales the total tax collected must be paid over to the Commissioner less the compensation to be allowed the retailer as hereinafter set forth. This provision shall be construed with other provisions of this article and given effect so as to result in the payment to the Commissioner of the total tax collected if it is in excess of 3% of net taxable sales. (1957, c. 1340, s. 5.)

§ 105-164.12. **Freight or delivery transportation charges.**—Freight delivery, or other like transportation charges connected with the sale of tangible personal property are subject to the sales and use tax if title to the tangible personal property being transported passes to the purchaser at the destination point. Where title to the tangible personal property being transported passes to the purchaser at the point of origin, the freight or other transportation charges are not subject to the sales and use tax. For the purposes of this section it is immaterial whether the retailer or purchaser actually pays for any charges made for transportation, whether the charges were actually paid by one for the other, or whether a credit or allowance is made or given for such charges. Nothing in this section shall operate to exclude from the use tax any freight delivery or other like transportation charges. Such charges shall be included as a portion of the cost price and subject to the use tax. (1957, c. 1340, s. 5.)

DIVISION III. EXEMPTIONS AND EXCLUSIONS.

§ 105-164.13. **Retail sales and use tax.**—The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this article:

Agricultural Group.

- (1) Commercial fertilizer on which the inspection tax is paid and lime and land plaster used for agricultural purposes whether the inspection tax is paid or not.
- (2) Seeds, feeds for livestock and poultry, and insecticides for livestock, poultry and agriculture.
- (3) Products of farms, forests, and mines when such sales are made by the producers in their original or unmanufactured state.
- (4) Cotton, tobacco, peanuts or other farm products sold to manufacturers for further manufacturing or processing.
- (5) Horses or mules by whomsoever sold.
- (6) Semen to be used in the artificial insemination of animals.
- (7) Sales of fuels to farmers to be used by them for any farm purposes other than preparing food, heating dwellings and other household purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to any of the taxes imposed by this article.
- (8) Sales of machines and machinery, whether animal or motor drawn or operated, and parts and accessories for such machines and machinery to farmers for use by them in the planting, cultivating, harvesting or curing of farm crops and sales of machines and machinery and parts and accessories for such machines and machinery to dairy operators, poultry farmers, egg producers, and livestock farmers for use by them in the production of dairy products, poultry, eggs or livestock.

The term "machines and machinery" as used in this subsection is defined as follows:

The term shall include all vehicular implements, designed and sold for any use defined in this subsection, which are operated, drawn or propelled by motor or animal power, but shall not include vehicular implements which are operated wholly by hand, and shall not include any motor vehicles required to be registered under chapter 20 of the General Statutes.

The term shall include all non-vehicular implements and mechanical devices designed and sold for any use defined in this subsection, which have moving parts, or which require the use of any motor or animal power, fuel, or electricity in their operation but shall not include non-vehicular implements which have no moving parts and are operated wholly by hand.

Industrial Group.

- (9) Manufactured products produced and sold by manufacturers or producers to other manufacturers, producers, wholesale or retail merchants, for the purpose of resale except as modified by Division I, § 105-164.3, subsection (23). Provided, however, this exemption shall not extend to or include retail sales to users or consumers not for resale.
- (10) Ice, whether sold by the manufacturer, producer, wholesale or retail merchant.
- (11) Sales of fuel to manufacturing industries and manufacturing plants for use in connection with the operation of such industries and plants other than sales of fuel to be used for residential heating purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to any of the taxes imposed by this article.
- (12) Sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants.
- (13) Sales of products of waters in their original or unmanufactured state when such sales are made by the producers. Fish and seafoods shall be likewise exempt when sold by the fishermen.
- (14) Sales of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of tangible personal property which is manufactured.
- (15) Sales of central office equipment and switchboard and private branch exchange equipment to telephone and telegraph companies which are under the regulation and supervision of the North Carolina Utilities Commission.
- (16) Sales of boats, fuel oil, lubricating oils, machinery, equipment, nets, rigging, paints, parts, accessories and supplies to commercial fishermen for use by them in the taking or catching commercially of shrimp, crab, oysters, clams, scallops, and fish, both edible and non-edible.
- (17) Sales to commercial laundries or to pressing and dry cleaning establishments of machinery used in the direct performance of the laundering or the pressing and cleaning service and of parts and accessories thereto and of wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the performance of said services.
- (18) Sales to freezer locker plants of machinery used in the direct operation of said freezer locker plant and of parts and accessories thereto and of wrapping paper, cartons and supplies consumed directly in the operation of such plant.

Motor Fuels Group.

- (19) Gasoline or other motor fuel on which the tax levied in § 105-434

and/or § 105-435 of the General Statutes is due and has been paid, and the fact that a refund of the tax levied by either of said sections is made pursuant to the provisions of subchapter V of chapter 105 shall not make the sale or the seller of such fuels subject to the tax levied by this article.

Medical Group.

- (20) Crutches, artificial limbs, artificial eyes, hearing aids, false teeth, eye glasses ground on prescription of physicians or optometrists and other orthopedic appliances when the same are designed to be worn on the person of the owner or user.
- (21) Medicines sold on prescription of physicians and medicines compounded, processed or blended by the druggist offering the same for sale at retail.
- (22)
 - a. Sales of drugs or medical supplies to physicians or hospitals, or by physicians and hospitals to patients in connection with medical treatments.
 - b. Sales of dental supplies, dentures, artificial restoration of teeth and similar devices to dentists.
 - c. Sales of ophthalmic instruments to physicians and optometrists.
- (23) Sales of drugs or medical supplies to veterinarians or veterinary hospitals or sales by veterinarians and veterinary hospitals of drugs or medical supplies in connection with medical treatments of animals being treated by any such veterinarian or veterinary hospital.

Food Group.

- (24) Food and food products for human consumption as included herein as follows:
 - a. This term shall include food products packaged by the manufacturer thereof in the usual and customary container used for the particular type of food product and delivered intact in such container by the retailer to the purchaser for consumption off the premises of the retailer.
 - b. This term shall include essential foods for home consumption consisting of fruit, vegetables, meat, dairy and poultry products, cereals, bread and other bakery products, canned goods, frozen foods, and various other food and food products used in the home except those specifically excluded in this subsection.
 - c. Lunches to school children when such sales are made within school buildings and are not for profit.
 - d. Meals and food products served in dining rooms regularly operated by State or private educational institutions or student organizations thereof when such meals are served exclusively for students of such institutions.
 - e. This term shall not include malt or vinous beverages, soft or carbonated drinks, sodas or beverages, candies or confectioneries, medicines, tonics and preparations in liquid, powdered, granular, tablet, capsule, or pill form sold as dietary supplements.
 - f. This term shall not include prepared meals or foods sold or served on or off the premises by restaurants, cafes, cafeterias, hotel dining rooms, drug stores or any other similar place where prepared meals are sold or served. Provided, however, that prepared meals furnished employees in restaurants, cafes, cafeterias, hotel dining rooms, drug stores or any other similar places as a part of their compensation shall not be taxable.

- g. Prepared meals sold in a boarding house which does not advertise the sale of meals when such meals are sold only to permanent roomers of such boarding house and the charge for such meals is included in the weekly or monthly charge for the room of each boarder.
- h. This term shall include coffee and other foods sold through vending machines located at places maintaining no facilities for serving prepared meals or foods, or sold at filling stations, service stations, garages and other similar places of business maintaining no facilities for serving prepared meals or foods.

Printed Materials Group.

- (25) Holy Bibles, public school books on the adopted list the selling price of which is fixed by State contract, newsprint paper and newspapers, and subscriptions to periodicals the principal articles in which primarily and regularly deal with news, history, traditions, customs, agricultural, farm-home, or religious subjects which articles pertain particularly to North Carolina and promote pride and interest in the State.
- (26) Sales to manufacturers of photographs, instruction sheets, booklets, catalogues, pamphlets, and other printed matter when such photographs, instruction sheets, booklets, catalogues, pamphlets or other printed matter are to accompany items of tangible personal property produced, processed or assembled by such manufacturer when ultimately sold for use of consumption, or, are to be used to advertise or otherwise promote the sale of items of tangible personal property produced, processed, or assembled by such manufacturer. Provided, however, that this subsection shall not apply to the sale of any item of tangible personal property which has any use other than advertising the products of the purchaser or giving instructions as to the proper use of the products of the purchaser.

Transactions Group.

- (27) Accounts of purchasers, representing taxable sales, on which the tax imposed by this article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales, provided, however, they must be added to gross sales if afterwards collected.
- (28) Sales of used articles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied in this article is paid on the gross sales price of the new article. In the interpretation of this subsection, new article shall be taken to mean the original stock in trade of the merchant, and shall not be limited to newly manufactured articles. The resale of articles repossessed by the vendor shall likewise be exempt from gross sales taxable under this article.

Exempt Status Group.

- (29) Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State.
- (30) Sales made to the State of North Carolina or any of its subdivisions, including sales of tangible personal property to agencies of State or local governments for distribution in public welfare or relief work. This exemption shall not apply to sales made to organizations, corporations, and institutions that are not governmental agencies, owned and controlled by the State or local governments. Sales of building

materials made directly to State and local governments in this State shall be exempt from the tax on building materials levied in this article, and sales of building materials to contractors to be used in construction work for State or local governments shall be construed as direct sales.

- (31) Sales of tangible personal property to hospitals not operated for profit, churches, orphanages, and other charitable or religious institutions or organizations not operated for profit, and educational institutions not operated for profit, when such tangible personal property is purchased for use in carrying on the work of such institutions or organizations. Sales of building materials to contractors to be used in construction and repair work for the institutions and agencies described in this subsection shall be construed as sales to said institutions or agencies for the purposes of this subsection.

Unclassified Group.

- (32) Funeral expenses, including coffins and caskets, not to exceed one hundred and fifty dollars (\$150.00). All other funeral expenses, including gross receipts for services rendered, shall be taxable at the rate of three per cent (3%). Where coffins, caskets or vaults are purchased direct and a separate charge is paid for services the provisions of this subsection shall apply to the total for both.
- (33) Sales by concession stands operated by the State prison system within the confines of the prisons where such sales are made to prison inmates and guards therein while on duty.
- (34) Sales by blind merchants operating under supervision of the Commission for the Blind.
- (35) The lease or rental of motion picture films used for exhibition purposes where the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to said business of the lessee.
- (36) The lease or rental of films, motion picture films, transcriptions and recordings to radio stations and television stations operating under a certificate from the Federal Communications Commission.
- (37) Sales of wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail or when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.
- (38) Sales of broadcasting equipment and parts and accessories thereto and towers to commercial radio and television companies which are under the regulation and supervision of the Federal Communications Commission. (1957, c. 1340, s. 5.)

§ 105-164.14. Certain refunds authorized with respect to interstate commerce.—Any person engaged in transporting persons or property in interstate commerce for compensation who is subject to regulation by, and to the jurisdiction of, the Interstate Commerce Commission or the Civil Aeronautics Board and who is required by either such Commission or Board to keep records according to its standard classification of accounting may secure a refund from the Commissioner of Revenue with respect to sales or use tax paid by such person on purchases or acquisitions of lubricants, repair parts and accessories in this State for motor vehicles, railroad cars, locomotives, and airplanes oper-

ated by such person, upon the conditions described below. The Commissioner of Revenue shall prescribe the periods of time, whether monthly, quarterly, semi-annually or otherwise, with respect to which refunds may be claimed, and shall prescribe the time within which, following such periods, an application for refund may be made. An applicant for refund shall furnish such information as the Commissioner may require, including detailed information as to lubricants, repair parts and accessories wherever purchased, whether within or without the State, acquired during the period with respect to which a refund is sought, and the purchase price thereof, detailed information as to sales and use tax paid in this State thereon, and detailed information as to the number of miles such motor vehicles, railroad cars, locomotives, and airplanes were operated both within this State, and without this State, during such period, together with satisfactory proof thereof. The Commissioner shall thereupon compute the tax which would be due with respect to all lubricants, repair parts and accessories acquired during the refund period as though all such purchases were made in this State, but only on such proportion of the total purchase prices thereof as the total number of miles of operation of such applicant's motor vehicles, railroad cars, locomotives, and airplanes within this State bears to the total number of miles of operation of such applicant's motor vehicles, railroad cars, locomotives and airplanes within and without this State, and such amount of sales and use tax as the applicant has paid in this State during said refund period in excess of the amount so computed shall be refunded to the applicant. (1957, c. 1340, s. 5.)

DIVISION IV. REPORTING AND PAYMENT.

§ 105-164.15. **Commissioner shall provide forms.** — The Commissioner shall design, prepare, print and furnish to all retailers and wholesale merchants all necessary forms for filing returns and instructions to insure a full collection from retailers and wholesale merchants and an accounting for taxes due. But the failure of any retailer or wholesale merchant to obtain or receive forms shall not relieve such taxpayer from the payment of said tax at the time and in the manner herein provided. (1957, c. 1340, s. 5.)

§ 105-164.16. **Taxes due monthly; reports and payment of tax.**— The taxes levied under the provisions of this article shall be due and payable in monthly installments on or before the 15th day of the month next succeeding the month in which the tax accrues. Every taxpayer liable for the tax imposed by this article shall on or before the 15th day of the month next succeeding the month in which the tax accrues make out, prepare and render a return on the form prescribed by the Commissioner, containing a true and correct statement showing the total gross sales, accompanied by an itemized statement showing the amount of sales in each group of exemptions and exclusions covered by G. S. 105-164.13 which are not subject to the tax or are not used as a measurement of the taxes due by such taxpayer together with such other information as the Commissioner may require and at the time of making such monthly return such taxpayer shall compute the taxes due and shall pay to the Commissioner the amount of taxes shown to be due. Returns shall be signed by the retailer or his duly authorized agent.

Any return which does not conform strictly to the requirements in respect to its content shall not be a lawful return and the Commissioner shall require the immediate filing of a proper return in default of which he shall assess a deficiency as hereinafter provided. (1957, c. 1340, s. 5.)

§ 105-164.17. **Reports and payment of use tax.**—Every person storing, using or consuming tangible personal property in this State shall file with the Commissioner a return for the preceding month in such form as may be prescribed by him showing the total cost price of the tangible personal property purchased or received by such person during such preceding month, the storage,

use or consumption of which is subject to the tax imposed by this article and such other information as the Commissioner may deem necessary for the proper administration of this article. The returns shall be accompanied by a remittance of the amount of tax herein imposed during the month covered by the return. Returns shall be signed by the person liable for the tax or his duly authorized agent. (1957, c. 1340, s. 5.)

§ 105-164.18. **Remittances; how made.**—All remittances of taxes imposed by this article shall be made to the Commissioner by bank draft, check, cashiers check, money order or money, who shall issue his receipts therefor to the taxpayers when requested and shall deposit daily all monies received to the credit of the State Treasurer as required by law for other taxes. Provided, no payment other than cash shall be final discharge of liability for the tax herein assessed and levied unless and until it has been paid in cash to the Commissioner; provided, further, that cash remittances must not be made by mail. The Commissioner shall keep full and accurate records of all monies received by him and how disbursed and shall preserve all returns filed with him under this article for a period of three years. (1957, c. 1340, s. 5.)

§ 105-164.19. **Extension of time for making returns and payment.**—The Commissioner for good cause may extend the time for making any return under the provisions of this article and may grant such additional time within which to make such return as he may deem proper but the time for filing any such return shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such return. If the time for filing a return be extended, interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month from the time the return was due to be filed to the date of payment shall be added and paid. (1957, c. 1340, s. 5.)

§ 105-164.20. **Cash or accrual basis of reporting.** — Any retailer taxable under this article having both cash and credit sales may report such sales on either the cash or accrual basis of accounting upon making application to the Commissioner for permission to use such basis of reporting under such rules and regulations as shall be promulgated from time to time by the Commissioner. Such permission shall continue in force and effect unless revoked by the Commissioner but he may grant written permission to any such taxpayer upon application therefor to change from one basis to another under such rules and regulations. (1957, c. 1340, s. 5.)

§ 105-164.21. **Discount for payment of taxes when due.** — Every retailer who pays the retail sales or use tax imposed by this article shall be entitled to deduct from the amount of the tax for which he is liable and which he actually pays a discount of three per cent (3%). Provided, however, the Commissioner may deny a taxpayer the benefits of this section for failure to pay the full tax when due as well as in cases of fraud, evasion, failure to keep accurate and clear records as hereinafter required. Provided, further, that in order to receive the discount the taxpayer must deduct the three per cent (3%) at the time of making his monthly remittance of tax to the Department of Revenue. (1957, c. 1340, s. 5.)

DIVISION V. RECORDS REQUIRED TO BE KEPT.

§ 105-164.22. **Retailer must keep records.** — Every retailer shall keep and preserve suitable records of the gross income, gross receipts and/or gross receipts of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable under the provisions of this article. And it shall be the duty of every retailer to keep and preserve for a period of three years all invoices of goods, wares and merchandise purchased for resale and all such books, invoices and other records shall be

open for examination at all reasonable hours during the day by the Commissioner or his duly authorized agent. (1957, c. 1340, s. 5.)

§ 105-164.23. **Consumer must keep records.** — Every consumer shall keep such records, receipts, invoices and other pertinent papers in such form as may be required by the Commissioner and all such books, invoices and other records shall be open for examination by the Commissioner or any of his duly authorized agents. In the event the retailer, user or consumer has imported the tangible personal property and fails to produce an invoice showing the cost price of the tangible personal property as defined in this article which is subject to tax or the invoices do not reflect the true or actual cost as defined herein, then the Commissioner shall ascertain in any manner feasible the true cost price and assess and collect the tax with interest, plus penalties, if such have accrued, on the true cost price as determined by him. (1957, c. 1340, s. 5.)

§ 105-164.24. **Separate accounting required.** — Every retailer shall keep separate records disclosing sales of tangible personal property taxable under this article and sales transactions not taxable because exempt under G. S. 105-176 or elsewhere excluded from taxation. Such records shall be kept in such form as may be accurately and conveniently checked by the Commissioner or his authorized agents and unless such records shall be kept the exemptions and exclusions provided in this article shall not be allowed and it shall be the duty of the Commissioner or his agents to assess a tax upon the total gross sales at the rate levied upon retail sales and if records are not kept disclosing gross sales, it shall be the duty of the Commissioner to assess a tax upon an estimation of sales based upon the best information available. (1957, c. 1340, s. 5.)

§ 105-164.25. **Wholesale merchant must keep records.** — Every wholesale merchant selling tangible personal property to other merchants for resale or tangible personal property the sale of which is otherwise defined as a wholesale sale under the terms of this article shall deliver to the customer a bill of sale for each sale of such tangible personal property whether sold for cash or on terms of credit, and shall make and retain a duplicate or carbon copy of each bill of sale and shall keep a file of all such duplicate bills of sale for at least three years from the date of sale. Such bills of sale shall contain and include the name and address of the purchaser, the date of the purchase, the article purchased and the price at which the article is sold to the customer. These records shall be kept for a period of three years and shall be open for inspection by the Commissioner or his duly authorized agents at all reasonable hours. Failure to comply with the provisions of this section shall subject the wholesale merchant to liability for tax upon such sales at the rate of tax levied in this article upon retail sales. (1957, c. 1340, s. 5.)

§ 105-164.26. **Presumption that sales are taxable.** — For the purpose of the proper administration of this division of this article and to prevent evasion of the retail sales tax, it shall be presumed that all gross receipts of wholesale merchants and retailers are subject to the retail sales tax until the contrary is established by proper records as required herein. It shall be prima facie presumed that tangible personal property sold by any person for delivery in this State, however made, and by carrier or otherwise, is sold for storage, use or other consumption in this State, and a like presumption shall apply to tangible personal property delivered without this State and brought to this State by the purchaser thereof. (1957, c. 1340, s. 5.)

§ 105-164.27. **Exemption certificate.** — No retailer shall sell and no user shall use any tangible personal property under the claim that the same is exempt from the sales or use tax levied by this article where the exemption from taxation is claimed because purchased by or for an educational, religious, or

charitable institution or organization unless such institution or organization shall have issued to it by the Commissioner an exemption certificate declaring that such institution or organization is entitled to the exemption as provided in Division III of this article.

The Commissioner is authorized to make a final determination, after hearing, if demanded, as to whether any institution or organization is entitled to the benefit of the exemption certificates to institutions and organizations which in his judgment are entitled thereto. The final determination of the Commissioner shall be subject to review and appeal in the same manner as provided by §§ 105-241.2, 105-241.3, and 105-241.4 of the General Statutes. (1957, c. 1340, s. 5.)

§ 105-164.28. Resale certificate. — The burden of proof that a sale of tangible personal property is not a sale at retail is upon the wholesale merchant or retailer who makes the sale unless he takes from the purchaser a certificate to the effect that the property is for resale. With respect to sales for resale the certificate relieves the wholesale merchant from the burden of proof only if taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds the license provided for in this article. The certificate shall be signed by and bear the name and address of the purchaser, shall indicate the registration number issued to the purchaser and shall indicate the general character of the tangible personal property generally sold by the purchaser in the regular course of business. The certificate of resale shall be in such form as the Commissioner shall prescribe. It shall be the duty of every wholesale merchant selling tangible personal property to a retailer for resale to make reasonable and prudent inquiry concerning the type and character of the tangible personal property as it relates to the principal business of the retailer. (1957, c. 1340, s. 5.)

§ 105-164.29. Application for licenses by wholesale merchants and retailers.—Every application for a license by a wholesale merchant or retailer shall be made upon a form prescribed by the Commissioner and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the Commissioner may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some other person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. Provided, however, that persons, firms, or corporations, whose business extends into more than one county shall be required to secure only one license under the provisions of this article which license shall cover all operations of such company throughout the State of North Carolina.

When the required application has been made the Commissioner shall grant and issue to each applicant such license. A license is not assignable and is valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall be at all times conspicuously displayed at the place for which issued.

A retailer whose license has been previously suspended or revoked shall pay the Commissioner the sum of one dollar (\$1.00) for the reissuance or renewal of such license. A wholesale merchant whose license has been previously suspended or revoked shall pay the Commissioner the sum of ten dollars (\$10.00) for the reissuance or renewal of such license for the year or fraction thereof for which said license is reissued or renewed.

Whenever any wholesale merchant or retailer fails to comply with any provision of this article or any rule or regulation of the Commissioner relating thereto, the Commissioner, upon hearing, after giving the wholesale merchant or retailer ten days' notice in writing, specifying the time and place of hearing and

requiring him to show cause why his license should not be revoked, may revoke or suspend the license held by such wholesale merchant or retailer. The notice may be served personally or by registered mail directed to the last known address of the person. All provisions with respect to review and appeals of the Commissioner's decisions as provided by §§ 105-241.2, 105-241.3, and 105-241.4 of the General Statutes shall be applicable to this section.

Any wholesale merchant or retailer who engages in business as a seller in this State without a license or after his license has been suspended or revoked, and each officer of any corporation which so engages in business shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars (\$500.-00) for each such offense. (1957, c. 1340, s. 5.)

DIVISION VI. EXAMINATION OF RECORDS.

§ 105-164.30. **Commissioner or agent may examine books, etc.** — For the purpose of enforcing the collection of the tax levied by this article, the Commissioner or his duly authorized agent is hereby specifically authorized and empowered to examine at all reasonable hours during the day the books, papers, records, documents or other data of all retailers or wholesale merchants bearing upon the correctness of any return or for the purpose of making a return where none has been made as required by this article, and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons. If any person summoned as a witness shall fail to obey any summons to appear before the Commissioner or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper, or other data when required to do so, such failure or refusal shall be reported to the Attorney General or the district solicitor, who shall thereupon institute proceedings in the superior court of the county where such witness resides to compel obedience to any summons of the Commissioner or his authorized agent. Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the superior courts, to be paid from the proper appropriation for the administration of this article.

In the event any retailer or wholesale merchant shall fail or refuse to permit examination of his books, papers, accounts, records, documents or other data by the Commissioner or his authorized agents as aforesaid, the Commissioner shall have the power to proceed by citing said retailer or wholesale merchant to show cause before the superior court of the county in which said taxpayer resides or has its principal place of business as to why such books, records, papers, or documents should not be examined and said superior court shall have jurisdiction to enter an order requiring the production of all necessary books, records, papers, or documents and to punish for contempt of such order any person violating the same. (1957, c. 1340, s. 5.)

§ 105-164.31. **Complete records must be kept for three years.** — Every retailer, wholesale merchant or consumer as defined by this article shall secure, maintain and keep for a period of three years a complete record of tangible personal property received, used, sold at retail or wholesale, distributed or stored, leased or rented within this State by said retailer, wholesale merchant or consumer together with invoices, bills of lading and other pertinent papers and records as may be required by the Commissioner for the reasonable administration of this article and all such records shall be open for inspection by the Commissioner or his duly authorized agent at all reasonable hours during the days. (1957, c. 1340, s. 5.)

§ 105-164.32. **Incorrect returns; estimate.** — In the event any retailer, wholesale merchant or consumer fails to make a return and to pay the tax as provided by this article or in case any retailer, wholesale merchant or con-

sumer makes a grossly incorrect return or a report that is false or fraudulent, it shall be the duty of the Commissioner or his authorized agent to make an estimate for the taxable period of wholesale and/or retail sales of such retailer or wholesale merchant or of the gross proceeds of rentals or leases of tangible personal property by the retailer and to estimate the cost price of all articles of tangible personal property imported by the consumer for use, storage, or consumption in this State and to assess and collect the tax and interest, plus penalties, if such have accrued, upon the basis of such estimate. (1957, c. 1340, s. 5.)

DIVISION VII. FAILURE TO MAKE RETURNS; DEFICIENCIES AND OVERPAYMENTS.

§ 105-164.33. **Failure to make returns.**—If any taxpayer shall fail or refuse to make the returns required under this article, then such returns shall be made by the Commissioner or his duly authorized agents from the best information available and such returns shall be prima facie correct for the purposes of this article and the amount of tax due thereby shall be a lien against the property of the taxpayer until discharged by payment. And if payment not be made within thirty days after demand therefor by the Commissioner or his duly authorized agents there shall be added not more than twenty-five per cent (25%) as damages together with interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month from the date such tax was due. If such tax is paid within thirty days after notice by the Commissioner then there shall be added not more than ten per cent (10%) as damages together with interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month from the time such tax was due until paid. (1957, c. 1340, s. 5.)

§ 105-164.34. **Delayed returns.**—If the taxpayer shall file a delinquent return or a return without remittance covering the amount of tax shown thereon to be due, such taxpayer shall be assessed with a penalty of five per cent (5%) plus interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month from the date the tax was due. The penalty provided herein shall in no case be less than one dollar (\$1.00). (1957, c. 1340, s. 5.)

§ 105-164.35. **Assessment of deficiencies.** — As soon as practicable after a return is filed, the Commissioner shall examine it. If it then appears that the correct amount of tax is greater or less than the amount shown in the return, the tax shall be recomputed.

- (1) **Excessive Payments.**—If the amount already paid exceeds that which should have been paid on the basis of the tax so recomputed, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of this article.
- (2) **Deficiency of Amount.** — If the amount already paid is less than the amount which should have been paid, the difference to the extent not covered by any credits under this article, together with interest thereon at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month from the date the tax was due shall be paid upon notice and demand by the Commissioner.
- (3) **Negligence or Intentional Disregard.**—If any part of the deficiency is due to negligence or intentional disregard to authorized rules and regulations, with knowledge thereof, but without intent to defraud, there shall be added as damages ten per cent (10%) of the total amount of tax and interest shall be collected at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month of the amount of such deficiency in tax from the time it was due, which interest and damages shall become due upon notice and demand by the Commissioner.
- (4) **Fraudulent Returns.**—If any part of the deficiency is due to fraud with

intent to evade the tax, then there shall be added as damages fifty per cent (50%) of the total amount of the deficiency in the tax and in such case the whole amount of tax unpaid including charges so added shall become due and payable upon notice and demand by the Commissioner and an additional amount of one-half of one per cent ($\frac{1}{2}$ of 1%) per month on the tax shall be added from the date such tax was due until paid.

- (5) **Notice of Deficiency.** — If the amount already paid is less than the amount which should have been paid, the Commissioner or his duly authorized agents shall notify the taxpayer of the balance due plus such interest and damages as are set forth in subsections (2), (3) and (4) just preceding and if this total amount is not paid and no hearing on such assessment is requested under the general administrative provisions of the Revenue Act within thirty days from the date of notice, such action shall be considered as a refusal on the part of the taxpayer to make a correct return and shall subject him to such penalties or provisions as are provided in this article for failure to make a return. (1957, c. 1340, s. 5.)

§ 105-164.36. **Limitations of time.** — (a) Licensed Wholesale Merchant or Retailer or Consumer.—No assessment authorized by this article shall extend to sales made by a licensed wholesale merchant or retailer or purchases by a consumer more than three years prior to the date of assessment and in cases where an audit shall have been made under the direction of the Commissioner, any assessment in respect to such audit shall be made within one year after the completion of the audit.

(b) **Returns Not Filed.**—When the returns required under this article have not been filed the Commissioner shall proceed to determine the total amount of tax due based upon sales or purchases made not more than five years prior to such determination and any assessment made as a result of such determination shall extend to and include sales and purchases made within such period.

(c) **Fraudulent Returns.**—There shall be no limitation of time in respect to the assessment of a deficiency of tax, penalty and interest where such deficiency in tax is due in whole or in part to fraud with intent to evade the tax. (1957, c. 1340, s. 5.)

§ 105-164.37. **Bankruptcy, receivership, etc.** — If any taxpayer subject to the provisions of this article goes into bankruptcy, receivership or turns over his stock of merchandise by voluntary transfer to creditors, the tax liability under this article shall constitute a prior lien upon such stock of merchandise and shall become subject to levy under execution and it shall be the duty of the transferee in any such case to retain the amount of the tax due from the first sales of such stock of merchandise and pay the same to the Commissioner. (1957, c. 1340, s. 5.)

§ 105-164.38. **Tax shall be a lien.** — The tax imposed by this article shall be a lien upon the stock of goods and/or any other property of any person subject to the provisions of this article who shall sell out his business or stock of goods or shall quit business, and such person shall be required to make out the return provided for under Division IV of this article within thirty days after the date he sold out his business or stock of goods or quit business and his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the Commissioner showing that the taxes have been paid or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, and the taxes shall be due and unpaid after the thirty-day period allowed, he shall be person-

ally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner. (1957, c. 1340, s. 5.)

§ 105-164.39. **Attachment.**—In the event any retailer or wholesale merchant is delinquent in the payment of the tax herein provided for, the Commissioner may give notice of the amount of such delinquency by registered mail to all persons having in their possession or under their control any credits or other personal property belonging to such retailer or wholesale merchant or owing any debts to such taxpayer at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property or debts until the Commissioner shall have consented to a transfer or disposition or until thirty days shall have elapsed from and after the receipt of such notice. All persons so notified must within five days after receipt of such notice advise the Commissioner of any and all such credits, other personal property or debts in their possession, under their control or owing by them as the case may be. The remedy provided by this section shall be cumulative and optional and in addition to all other remedies now provided by law for the collection of taxes due the State. (1957, c. 1340, s. 5.)

§ 105-164.40. **Jeopardy assessment.** — If the Commissioner is of the opinion that the collection of any tax or any amount of tax required to be collected and paid to the State under this article will be jeopardized by delay, he shall make an assessment of the tax or amount of tax required to be collected and shall mail or issue a notice of such assessment to the taxpayer together with a demand for immediate payment of the tax or of the deficiency in tax declared to be in jeopardy including interest and penalties. In the case of a tax for a current period, the Commissioner may declare the taxable period of the taxpayer immediately terminated and shall cause notice of such finding and declaration to be mailed or issued to the taxpayer together with a demand for immediate payment of the tax based on the period declared terminated and such tax shall be immediately due and payable, whether or not the time otherwise allowed by law for filing a return and paying the tax has expired. Assessments provided for in this section shall be immediately due and payable and proceedings for the collection shall commence at once and if any such tax, penalty or interest is not paid upon demand of the Commissioner, he shall forthwith cause a levy to be made on the property of the taxpayer or, in his discretion the Commissioner may require the taxpayer to file such indemnity bond as in his judgment may be sufficient to protect the interest of the State. (1957, c. 1340, s. 5.)

§ 105-164.41. **Excess payments; refunds.** — If upon examination of any monthly return made under this article, it appears that an amount of tax has been paid in excess of that properly due, then the amount in excess shall be credited against any tax or installment thereof then due from the taxpayer, under any other subsequent monthly return, or shall be refunded to the taxpayer by certificate of overpayment issued by the Commissioner to the State Auditor, which shall be investigated and approved by the Attorney General, and the Auditor shall issue his warrant on the Treasurer, which warrant shall be payable out of any funds appropriated for that purpose. (1957, c. 1340, s. 5.)

§ 105-164.42. **Refusal to comply with law; penalties.** — It shall be unlawful for any retailer or wholesale merchant to fail or refuse to make the return provided to be made in this article, or for any person to make any false or fraudulent return or false statement in any return of the tax, or any part thereof, imposed by this article; or for any person to aid or abet another in any attempt to evade the payment of the tax or any part thereof, imposed by this article; or for the president, vice president, secretary or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this article, with the intent to evade the

payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any books, papers, accounts, records, or other data by the Commissioner or his duly authorized agent, as required by this article, or to fail or refuse to permit the inspection or appraisal of any property by the Commissioner or his duly authorized agent, or to refuse to offer testimony or produce any record as required in this article. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars (\$500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment, at the discretion of the court within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent aforesaid, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not to exceed one thousand dollars (\$1,000.00) or imprisonment not to exceed six months, or both, in the discretion of the court. Any company for which a false return or a return containing a false statement shall be made as aforesaid, shall be guilty of a misdemeanor, and may be punished by a fine of not more than one thousand dollars (\$1,000.00). The penalties imposed by this section shall be in addition to any other penalties imposed by this subchapter. (1957, c. 1340, s. 5.)

DIVISION VIII. ADMINISTRATION AND ENFORCEMENT.

§ 105-164.43. **Commissioner to make regulations.** — Subject to the provisions of G. S. 105-262 the Commissioner shall from time to time promulgate such rules and regulations not inconsistent with this article for making returns and for the ascertainment, assessment, and collection of the tax imposed hereunder as he may deem necessary to enforce its provisions, and upon request shall furnish any taxpayer with a copy of such rules and regulations. All provisions with respect to reviews and appeals from the Commissioner's decisions as provided by G. S. 105-241.2, 105-241.3 and 105-241.4 shall be applicable to this section. (1957, c. 1340, s. 5.)

§ 105-164.44. **Penalty and remedies of article 9 applicable.** — All provisions not inconsistent with this article in Article 9, entitled "General Administration—Penalties and Remedies" of Subchapter I of Chapter 105 of the General Statutes, including but not limited to, administration, auditing, making returns, promulgation of rules and regulations by the Commissioner, additional taxes, assessment procedure, imposition and collection of taxes and the lien thereof, assessments, refunds and penalties are hereby made a part of this article and shall be applicable thereto. (1957, c. 1340, s. 5.)

§§ 105-165 to 105-176: Repealed by Session Laws 1957, c. 1340, s. 5.

§§ 105-177, 105-178: Repealed by Session Laws 1951, c. 643, s. 5.

§ 105-179: Repealed by Session Laws 1957, c. 1340, s. 5.

§ 105-180: Repealed by Session Laws 1951, c. 643, s. 5.

§ 105-181: Repealed by Session Laws 1957, c. 1340, s. 5.

§ 105-182: Repealed by Session Laws 1955, c. 1350, s. 19.

§§ 105-183 to 105-187: Repealed by Session Laws 1957, c. 1340, s. 5.

ARTICLE 6.

*Schedule G. Gift Taxes.***§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax.**

Gifts to any one donee not exceeding a total value of three thousand dollars (\$3,000.00) in any one calendar year shall not be considered gifts taxable under this article, and where gifts are made to any one donee in any one calendar year in excess of three thousand dollars (\$3,000.00), only that portion of said gifts exceeding three thousand dollars (\$3,000.00) in value shall be subject to the tax levied by this article. The three thousand dollars (\$3,000.00) exclusion herein provided shall not apply to gifts of future interests in property. For the purposes of determining the exclusion herein provided, no part of a gift to an individual, or in trust for an individual, who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest in property if the property and the income therefrom may be expended by, or for the benefit of, the donee before his attaining the age of 21 years, and will to the extent not so expended pass to the donee on his attaining the age of 21 years, and in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment.

(1957, c. 1340, s. 6.)

Editor's Note.—

The 1957 amendment substituted "three thousand dollars" for "one thousand dollars" in the fourth paragraph and added the last two sentences thereto. The amendatory act provided that it shall take effect

with gifts reportable for the 1957 calendar year and thereafter. As only the fourth paragraph was affected by the amendment the rest of the section is not set out.

§ 105-191. Manner of determining tax; time of payment; application to Department of Revenue for correction of assessment.—The tax imposed by this article shall be paid by the donor on or before the fifteenth day of April following the close of the calendar year.

Report of the gifts shall be made by the donor to the State Department of Revenue on blank forms prepared by the State Department of Revenue and furnished on application to any taxpayer, and the amount of tax due shall be paid at the time such report is made. The Department of Revenue shall audit the returns made under this article, and if it is found that the amount of tax paid is less than the amount lawfully due under the provisions of this article shall forward a statement of the taxes determined to the person or persons primarily chargeable with the payment thereof, such additional taxes to be collected under the same rules and regulations contained in this subchapter for the collection of other taxes. If an overpayment should be found to have been made, refund of such overpayment shall be made to the taxpayer within sixty (60) days of the discovery thereof if the amount of the overpayment is three dollars (\$3.00) or more. If such overpayment is less than three dollars (\$3.00), the overpayment shall be refunded only upon receipt by the Commissioner of a written demand for such refund from the taxpayer. No overpayment shall be refunded, irrespective of whether based upon discovery or receipt of written demand, if such discovery was not made or such demand was not received within three (3) years from the date set by the statute for the filing of the return or within six (6) months of payment of the tax, whichever is the later. Within one year after the tax has been determined, any person aggrieved by the determination, may apply in writing to the Department of Revenue, which may make such corrections of the taxes as it may determine proper: Provided, that a taxpayer aggrieved by the rejection of the application in whole or in part by the Department of Revenue may seek administrative review or appeal under the provisions of G. S. 105-241.2,

105-241.3 or 105-241.4. (1939, c. 158, s. 603; 1955, c. 22, s. 1; c. 1350, s. 20; 1957, c. 1340, s. 14.)

Editor's Note.—The first 1955 amendment substituted "April" for "March" in the first paragraph. And the second 1955 amendment, effective July 1, 1955, rewrote the proviso at the end of the section.

The 1957 amendment changed the second paragraph by deleting the latter portion of the second sentence and inserting the third, fourth and fifth sentences.

§ 105-195. Tax to be assessed upon actual value of property; manner of determining value of annuities, life estates and interests less than absolute interest.—Said taxes shall be assessed upon the actual value of the property at the time of the transfer by gift. If the gift subject to said tax be given to a donee for life or for a term of years, or upon condition or contingency, with remainder to take effect upon the termination of the life estate or term of years or the happening of the condition or contingency, the tax on the whole amount shall be due and payable as in other cases, and said tax shall be apportioned between such life tenant or tenant for years and the remainderman, such apportionment to be made by computation based upon the mortuary and annuity tables set out in §§ 8-46 and 8-47 of the General Statutes, and upon the basis of six per centum (6%) of the gross value of the property for the period of expectancy of the life tenant or for the term of years in determining the value of the respective interests. When property is transferred or limited in trust or otherwise, and the rights or interests of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the Commissioner of Revenue, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this section, and such tax so imposed shall be due and payable forthwith by the donor, and the Commissioner of Revenue shall assess the tax on such transfers. (1939, c. 158, s. 607; 1943, c. 400, s. 7; 1955, c. 1353, s. 1.)

Editor's Note.—

The 1955 amendment rewrote this section.

§ 105-196. Application for relief from taxes assessed; appeal.—A taxpayer may apply to the Commissioner of Revenue for revision of the tax assessed against him at any time within three years from the time of the filing of the return or from the date of the notice of assessment of any additional tax. The Commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to law and the facts, and adjust the computation of tax accordingly. The Commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. The provisions of G. S. 105-241.2, 105-241.3 and 105-241.4 with respect to review and appeal shall be available to any taxpayer aggrieved by the Commissioner's decision. (1939, c. 158, s. 608; 1955, c. 1350, s. 20.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote the last sentence.

§ 105-197. Returns; time of filing; extension of time for filing.—Any person who within the calendar year nineteen hundred thirty-nine, after March 24, 1939, or any calendar year thereafter, makes any gift or gifts taxed by this article shall report in duplicate, under oath, to the Department of Revenue, on forms provided for that purpose, showing therein an itemized schedule of all such gifts, the name and residence of each donee and the actual value of the gift to each, the relationship of each of such persons to the donor, and any other infor-

mation which the Department of Revenue may require. Such returns shall be filed on or before the fifteenth day of April following the close of the calendar year. The Department of Revenue may grant a reasonable extension of time for filing a report whenever in its judgment good cause exists. (1939, c. 158, s. 609; 1955, c. 22, s. 1.)

Editor's Note.—The 1955 amendment substituted "April" for "March" in line eight.

ARTICLE 7.

Schedule H. Intangible Personal Property.

§ 105-198. Intangible personal property.

Cited in *Jamison v. Charlotte*, 239 N. C. 682, 80 S. E. (2d) 904 (1954).

§ 105-199. Money on deposit.

The tax levied in this section upon money on deposit shall be paid by the cashier, treasurer or other officer or officers of every such bank or other corporation, firm or person doing a banking business in this State by report and payment to the Commissioner of Revenue on or before April fifteenth of each year; any taxes so paid as agent for the depositor shall be recovered from the owners thereof by the bank or other corporation, firm or person doing a banking business in this State by deduction from the account of the depositor on November sixteenth of each year or on such date thereafter as in the ordinary course of business it becomes convenient to make such charge. The bank may immediately report and pay the tax due on any account closed out during any quarter in which the bank has withheld the amount of the tax. The tax on deposits represented by time certificates shall be chargeable to the original depositor unless such depositor has given notice to the depository bank of transfer of such certificate of deposit. Accounts that have been closed during the year, leaving no credit balance against which the tax can be charged, may be reported separately to the Commissioner of Revenue and the tax due on such accounts shall become a charge directly against the depositor, and such tax may be collected by the Commissioner of Revenue from the depositor in the same manner as other taxes levied in this act; the bank or other corporation, firm or person doing a banking business in this State shall not be held liable for the payment of the tax due on accounts so reported. None of the provisions of this section shall be construed to relieve any taxpayer of liability for a full and complete return of postal savings and of all money on deposit outside this State having business, commercial or taxable situs in this State.

(1955, c. 19, s. 1.)

Editor's Note.—

The 1955 amendment substituted "April" for "March" in line four of the third para-

graph. As the first, second and fourth paragraphs were not affected by the amendment they are not set out.

§ 105-200. **Money on hand.**—All money on hand (including money in safe deposit boxes, safes, cash registers, etc.) on December thirty-first of each year, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars (\$100.00) of the total amount of such money on hand without deduction for any indebtedness or liabilities of the taxpayer; except that taxpayers reporting on a fiscal year basis for income tax purposes under the provisions of article 4 shall report all money on hand on the last day of such fiscal year ending during the year prior to that December 31 as of which such property would otherwise be reported. (1939, c. 158, s. 702; 1957, c. 1340, s. 7.)

Editor's Note.—The 1957 amendment added the exception clause.

§ 105-201. **Accounts receivable.**—All accounts receivable on December thirty-first of each year, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars (\$100.00) of the face value of such accounts receivable, except that taxpayers reporting on a fiscal year basis for income tax purposes under the provisions of article 4 shall report accounts receivable on the last day of such fiscal year ending during the year prior to that December 31 as of which such property would otherwise be reported: Provided, that from the face value of such accounts receivable there may be deducted the accounts payable of the taxpayer: Provided further, that no deduction in any case shall be allowed under this section of any indebtedness of the taxpayer on account of capital outlay, permanent additions to capital or purchase of capital assets.

The term "accounts payable" as used in this section shall not include:

- (1) Reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability;
- (2) Taxes of any kind owing by the taxpayer;
- (3) Debts owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation unless the credits created by such debts are listed if so required by law for ad valorem or property taxation, for taxation at the situs of such credits; or
- (4) Debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

From the total face value of accounts receivable returned to this State for taxation by or in behalf of any taxpayer who or which also owns other such accounts receivable as have situs outside of this State, accounts payable of the taxpayer may be deducted only in the proportion which the total face value of accounts receivable taxable under this section bears to the total face value of all accounts receivable of the taxpayer.

The term "accounts payable" as used in this section shall be deemed to include current notes payable of the taxpayer incurred to secure funds which have been actually paid on his current accounts payable within one hundred and twenty days prior to the date as of which the intangible tax return is made.

Indebtedness of commercial factors incurred directly for the purchase of accounts receivable may be deducted from the total value of such accounts receivable. (1939, c. 158, s. 703; 1941, c. 50, s. 8; 1951, c. 643, s. 6; 1957, c. 1340, s. 7.)

Editor's Note.—

The 1951 amendment added the last paragraph.

The 1957 amendment inserted the exception clause in the first sentence of the first paragraph.

§ 105-202. **Bonds, notes, and other evidences of debt.**—All bonds, notes, demands, claims and other evidences of debt however evidenced, whether secured by mortgage, deed of trust, judgment or otherwise, or not so secured, having a business, commercial or taxable situs in this State on December thirty-first of each year shall be subject to annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars (\$100.00) of the actual value thereof, except that taxpayers reporting on a fiscal year basis for income tax purposes under the provisions of article 4 shall report evidences of debt on the last day of such fiscal year ending during the year prior to the December 31 as of which such property would otherwise be reported: Provided, that from the actual value of such bonds, notes, demands, claims and other evidences of debt there may be deducted like evidences of debt owed by the taxpayer on December thirty-first of the same year. The term "like evidences of debt" deductible under

this section shall not include: (a) accounts payable; (b) taxes of any kind owing by the taxpayer; (c) reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability; (d) evidences of debt owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation, unless the credits created by such evidences of debt are listed, if so required by law for ad valorem or property taxation, for taxation at the situs of such credits; or (e) debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

(1957, c. 1340, s. 7.)

Editor's Note.—

The 1957 amendment inserted the exception clause in the first sentence of the first

paragraph. As only the first paragraph was changed the rest of the section is not set out.

§ 105-203. Shares of stock.—All shares of stock owned by residents of this State or having a business, commercial or taxable situs in this State on December thirty-first of each year, with the exception herein provided, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars (\$100.00) of the total fair market value of such stock on December thirty-first of each year less such proportion of such value as is equal to the proportion of the dividends upon such stock deductible by such taxpayer in computing his income tax liability under the provisions of subsection 5 of § 105-147.

The tax herein levied shall not apply to shares of stock in building and loan associations which pay a tax as levied under article 8D of chapter 105 of the General Statutes.

Indebtedness incurred directly for the purchase of shares of stock may be deducted from the total value of such shares: Provided, the specific shares of stock so purchased are pledged as collateral to secure said indebtedness; provided, further, that only so much of said indebtedness may be deducted as is in the same proportion as the taxable value of said shares of stock is to the total value of said shares of stock. (1939, c. 158, s. 705; 1941, c. 50, s. 8; 1945, c. 708, s. 8; c. 752, s. 4; 1947, c. 501, s. 7; 1951, c. 937, s. 5; 1955, c. 1343, s. 2; 1957, c. 1340, s. 9.)

Editor's Note.—

The 1951 amendment changed the second paragraph.

The 1955 amendment, effective December 31, 1955, rewrote the first and second paragraphs.

The 1957 amendment substituted in the second paragraph the words "article 8D of chapter 105 of the General Statutes" for "§ 105-73."

For brief comment on the 1951 amendment, see 29 N. C. Law Rev. 415.

§ 105-205. Funds on deposit with insurance companies.

The tax levied in this section shall be paid by the treasurer, cashier or other officer or officers of every insurance company doing business in this State by report and payment to the Commissioner of Revenue on or before April fifteenth of each year; any taxes so paid as agent for the party or parties entitled to receive such funds shall be recovered from the owners thereof by deduction from the account of the owner on December thirty-first of each year or at such other time as in the ordinary course of business it becomes convenient to make such charge. (1939, c. 158, s. 707; 1941, c. 50, s. 8; 1947, c. 501, s. 7; 1955, c. 19, s. 1.)

Editor's Note.—

The 1955 amendment substituted "April" for "March" in line three of the second

paragraph. As the first paragraph was not affected by the amendment it is not set out.

§ 105-206. When taxes due and payable; date lien attaches; non-residents; forms for returns; extensions.—All taxes levied in this article or schedule shall become due and payable on the fifteenth day of April of each

year, and the lien of such taxes shall attach annually to all real estate of the taxpayer within this State as of December thirty-first next preceding the date that such taxes become due and payable, regardless of the time at which liability for the tax may arise or the exact amount thereof be determined; and said lien shall continue until such taxes, with any interest, penalty and costs which shall accrue thereon, shall have been paid.

Every person, firm, association, corporation, clerk of court, guardian, trustee, executor, administrator, receiver, assignee for creditors, trustee in bankruptcy or other fiduciary owning or holding any intangible personal properties defined and classified and/or liable for or required to pay any tax levied, in this article or schedule, either as principal or agent, shall make and deliver to the Commissioner of Revenue in such form as he may prescribe a full, accurate and complete return of such tax liability; such return, together with the local amount of tax due, shall be filed on or before the fifteenth day of April in each year.

For the purpose of protecting the revenue of this State and to avoid discrimination and prevent evasion of the tax imposed by this article, every resident or nonresident person, firm, association, trustee or corporation, foreign or domestic, engaged in this State, either as principal or as agent or representative of or on behalf of another, in buying, selling, collecting, discounting, negotiating or otherwise dealing in or handling any of the intangible property defined in this article, shall be deemed to be doing business in this State for the purposes of this article, and the principal, superior or person on whose behalf such business is carried on in this State shall likewise be deemed to be doing business in this State, for the purpose of this article, and where such business is carried on in this State by a corporation, foreign or domestic, it and its parent corporation or the corporation which substantially owns or controls it, by stock ownership or otherwise, shall be deemed to be doing business in this State, for the purpose of this article, and in all such cases the said intangible property acquired in the conduct of such business in this State, and outstanding on December 31 of each year, shall be deemed to have a situs in this State and subject to the tax imposed by this article, notwithstanding any transfer between any of such parties and notwithstanding that the same may be kept or may then be outside of this State, and any of the intangible property defined in this article and acquired in the conduct of any business carried on in this State, and/or having a business, commercial or taxable situs in this State, shall be subject to said tax and returned for taxation by the owner thereof or by the agent, person, or corporation in this State employed by such owner to handle or collect the same.

The Commissioner of Revenue shall cause to be prepared blank forms for said returns and shall cause them to be distributed throughout the State, and to be furnished upon application; but failure to receive or secure form shall not relieve any taxpayer from the obligation of making full and complete return of intangible personal properties as provided in this article or schedule.

The return required by this article or schedule shall be due on or before the date specified unless written application for extension of time in which to file, containing reasons therefor, is made to the Commissioner of Revenue on or before due date of return. The Commissioner of Revenue for good cause may extend the time for filing any such return, provided interest at the rate of six per cent (6%) per annum from due date of return is paid upon the total amount of tax due. (1939, c. 158, s. 708; 1941, c. 50, s. 8; 1953, c. 1302, s. 6; 1955, c. 19, s. 1.)

Editor's Note.—

The 1955 amendment substituted "April" for "March" in line two of the first para-

graph and the last line of the second paragraph. It also deleted the paragraph which had been inserted by the 1953 amendment.

§ 105-207. Penalties; unlawful to refuse to make returns.

It shall be unlawful for any person to fail or refuse to make the return provided for in this article or schedule, or make any false or fraudulent return or false statement in any return of the tax, or any part thereof, imposed by this

article; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this article; or for the president, vice-president, secretary, or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this article, with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the Commissioner of Revenue or his duly appointed agent, or to refuse to offer testimony or produce any record as required. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars (\$500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment, at the discretion of the court within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent aforesaid, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not to exceed one thousand dollars (\$1,000.00) or imprisonment not to exceed six months, or both, in the discretion of the court. Any company for which a false return shall be made or a return containing a false statement as aforesaid, shall be guilty of a misdemeanor, and may be punished by a fine of not more than one thousand dollars (\$1,000.00). (1939, c. 158, s. 709; 1953, c. 1302, s. 6.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote the next to the last sentence of the last paragraph. As only the last paragraph was affected by

the amendment the rest of the section is not set out.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 441.

§ 105-208. Examination of returns; additional taxes.—As soon as practicable after the return is filed the Commissioner of Revenue shall examine same together with any other facts within his knowledge, and shall compute the tax, and the amount so computed shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the deficiency shall be paid to the Commissioner of Revenue within thirty days after date of notice to the taxpayer of such deficiency. If the tax found due shall be less than the amount theretofore paid, the overpayment, if in the amount of three dollars (\$3.00) or more, shall be refunded to the taxpayer within sixty (60) days of the date of discovery thereof. If the overpayment is less than three dollars (\$3.00) the overpayment shall be refunded only upon receipt by the Commissioner of Revenue of written demand for such refund from the taxpayer. No overpayment shall be refunded irrespective of whether based upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three (3) years from the date set by the statute for the filing of the return or within six (6) months of the payment of the tax alleged to be an overpayment, whichever date is the later.

If the return is made in good faith and the understatement of the tax is not due to any fault of the taxpayer, there shall be no penalty or additional tax added because of such understatement, but interest shall be added to the amount of the deficiency at the rate of six per cent (6%) per annum until paid. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five per cent (5%) thereof, together with interest at the rate of six per cent (6%) per annum until paid. If the understatement is found by the Commissioner of Revenue to be false or fraudulent, with intent to evade the tax, any additional tax found to be due and payable shall be increased by an amount equal to fifty per cent (50%) of said tax together with interest at the rate of six per cent (6%) per annum upon the total amount of tax so found. The interest provided for in this section shall in all cases be computed from the date the tax was originally due to the date of payment.

If the Commissioner of Revenue discovers from the examination of the re-

turn or otherwise that the intangible personal property of any taxpayer, or any portion thereof, has not been assessed, he may, at any time within three years after the time when the return was due, give notice in writing to the taxpayer of such deficiency. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the Commissioner of Revenue, if within thirty days after giving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to same. If no request for such hearing is so made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the Commissioner of Revenue, and after such hearing the Commissioner of Revenue shall render his decision. The taxpayer shall be advised of his decision and such amount shall be due within ten days after notice is given. The provisions of G. S. 105-241.2, 105-241.3 and 105-241.4 with respect to review and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns nor upon failure to file returns. (1939, c. 158, s. 710; 1955, c. 1350, s. 21; 1957, c. 1340, ss. 13, 14.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote the next to the last sentence of the third paragraph.

The 1957 amendment deleted the latter part of the second sentence of the first paragraph and added the third, fourth and

fifth sentences. The amendment also substituted in the third sentence of the second paragraph the words "be increased by an amount equal to fifty per cent (50%) of said tax" for the words "be doubled."

§ 105-209. Information from the source.—In addition to the other requirements of this article or schedule it shall be the duty of every domestic corporation and every foreign corporation doing business and/or owning property in this State, the shares of stock and bonds of which are subject to tax under the provisions of this article or schedule, to report not later than the fifteenth day of April of each year to the Commissioner of Revenue, in such form and manner as he may prescribe, the name and address of each registered stockholder or bondholder resident in this State as of the thirty-first day of December of each year; such report shall also include the number of shares of stock and/or the number of bonds, the par or face value of each, the dividends or interest paid on each such security during the calendar year next preceding date of report, all transfers of record made from residents of this State between the first and thirty-first days of December next preceding the date of the report herein required, and such other and further information as the Commissioner of Revenue may require. (1939, c. 158, s. 711; 1955, c. 19, s. 1; c. 1350, s. 21.)

Editor's Note.—The first 1955 amendment substituted "April" for "March" in line six. The second 1955 amendment, effective July 1, 1955, deleted the former

second paragraph relating to power of Commissioner of Revenue to make rules and regulations.

§ 105-211. Conversion of intangible personal property to evade taxation not to defeat assessment and collection of proper taxes; taxpayer's protection.

Taxpayers making a complete return on or before April fifteenth of each year of all their holdings of intangible personal property as provided by this article or schedule (or by similar provisions of prior Revenue Act) shall not thereafter be held liable for failure to list such intangible personal property with the local taxing units of this State in previous years; the taxes levied in this article or schedule shall be in lieu of all other property taxes in this State on such intangible personal property. (1939, c. 158, s. 713; 1945, c. 708, s. 8; 1955, c. 19, s. 1.)

Editor's Note.—The 1955 amendment substituted "April" for "March" in line one of the second

paragraph. As the first paragraph was not affected by the amendment it is not set out.

§ 105-212. Institutions exempted; conditional and other exemptions.—None of the taxes levied in this article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit, nor to trusts established for religious, educational, charitable or benevolent purposes where none of the property or the income from the property owned by such trust may inure to the benefit of any individual or any organization conducted for profit, nor to any funds held irrevocably in trust exclusively for the maintenance and care of places of burial; nor, on or after January first, one thousand nine hundred and forty-two, to any funds, evidences of debt, or securities held irrevocably in pension, profit sharing, stock bonus, or annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, if such trusts qualify for exemption from income tax under the provisions of § 105-138, subsection 10; insurance companies reporting premiums to the Insurance Commissioner of this State and paying a tax thereon under the provisions of Article 8B, Schedule I-B shall not be subject to the provisions of §§ 105-201, 105-202 and 105-203; building and loan associations paying a tax under the provisions of article 8D of chapter 105 of the General Statutes shall not be subject to the provisions of §§ 105-201, 105-202 and 105-203; State credit unions organized pursuant to the provisions of subchapter III, chapter fifty-four, paying the supervisory fees required by law, shall not be subject to any of the taxes levied in this article or schedule; banks, banking associations and trust companies shall not be subject to the tax levied in this article or schedule on evidences of debt held by them when said evidences of debt represent investment of funds on deposit with such banks, banking associations and trust companies: Provided, that each such institution must, upon request by the Commissioner of Revenue, establish in writing its claim for exemption as herein provided. The exemptions in this section shall apply only to those institutions, and only to the extent, specifically mentioned, and no other.

Any North Carolina corporation which in the opinion of the Commissioner of Revenue of North Carolina qualifies as a "regulated investment company" under the provisions of United States Code Annotated Title 26, section 361, and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company", shall not be subject to any of the taxes levied in this article or schedule.

If any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section from the tax imposed by this article, such intangible personal property shall be partially or wholly exempt from taxation under the provisions of this article in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which the taxes levied by this article are imposed, bears to the entire net income derived from such intangible personal property during such calendar year. "Net income" shall be deemed to have the same meaning that it has in the income tax article. Where the intangible personal property for which this exemption is claimed is held or controlled with other property as a unit, allocation of appropriate deductions from gross income shall be made to that part of the entire gross income which is derived from the intangible personal property by direct method to the extent practicable; and otherwise by such other method as the Commissioner of Revenue shall find to be reasonable: Provided, that each fiduciary claiming the exemption provided in this paragraph shall, upon the request of the Commissioner of Revenue, establish in writing its claim to such exemption. No provision of law shall be construed as exempting trust funds or trust property from the taxes levied by this article except in the specific cases covered by this section.

A clerk of any court of this State may, upon written application therefor, obtain from the Commissioner of Revenue a certificate relieving the depository bank of such clerk from the duty of collecting the tax levied in this article or schedule from deposits of said clerk: Provided, that such clerk of court shall be liable under his official bond for the full and proper remittance to the Commissioner of Revenue under the provisions of this article or schedule of taxes due on any deposits so handled. (1939, c. 158, s. 714; 1943, c. 400, s. 8; 1945, c. 708, s. 8; 1947, c. 501, s. 7; 1951, c. 937, s. 2; 1957, c. 1340, ss. 7, 9)

Editor's Note.—

The 1951 amendment inserted the second paragraph of this section.

The 1957 amendment inserted near the beginning of the first paragraph the clause relating to trusts established for religious,

etc., purposes. The amendment also substituted in the paragraph the words "article 8D of chapter 105 of the General Statutes" for "§ 105-73."

For brief comment on the 1951 amendment, see 29 N. C. Law Rev. 415.

§ 105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax.—The Commissioner of Revenue shall keep a separate record by counties of tax collected under the provisions of this article or schedule, and shall not later than the twentieth day of July of each year submit to the State Board of Assessment an accurate account of such taxes collected during the fiscal year ending June thirtieth next preceding, showing separately by sections the total collections less refunds in each county of the State. The State Board of Assessment shall examine such reports and, if found to be correct, shall certify a copy of same to the State Auditor and State Treasurer. From the total collections less refunds so certified shall be deducted an amount determined by the State Board of Assessment to be sufficient to defray the cost to the State of collecting such revenues for the fiscal year and the tax credit specified in paragraph 2 of G. S. 105-122 (4), which funds shall be retained by the State, and the net collections after such deduction shall be distributed to the counties and municipalities of the State on the following basis:

The amount distributable to each county and to the municipalities therein from the revenue collected under §§ 105-200, 105-201, 105-202 to 105-204 shall be determined upon the basis of the amounts collected in each county; the amount distributable to each county and to the municipalities therein from the revenue collected under §§ 105-199 and 105-205 shall be determined upon the basis of population in each county as shown by the latest federal decennial census. The amounts so allocated to each county shall in turn be divided between the county and all municipalities therein in proportion to the total amount of ad valorem taxes levied by each during the fiscal year preceding such distribution. Upon certification by the State Board of Assessment of the allocations herein provided for, it shall be the duty of the State Auditor to issue a warrant on the State Treasurer to the treasurer or other officer authorized to receive public funds of each county and municipality in the amount so allocated to each such county and municipality. It shall be the duty of the chairman of the board of county commissioners of each such county and the mayor of each such municipality therein to report to the State Board of Assessment such information as it may request for its guidance in making said allotments to said units; and upon failure of any such county or municipality to make such report within the time prescribed by said State Board of Assessment, said Board may disregard such defaulting unit in making said allotments. The amounts so allocated to each county and municipality shall be distributed and used by said county or municipality in proportion to other property tax levies made for the various funds and activities of the taxing unit receiving said allotment. (1939, c. 158, s. 715; 1941, c. 50, s. 8; 1947, c. 501, s. 7; 1957, c. 1340, s. 7.)

Editor's Note.—

The 1957 amendment rewrote the third sentence of the first paragraph. The

amendatory act provided that it shall apply to distributions of taxes falling due on and after July 1, 1957.

ARTICLE 8.

Schedule I. Compensating Use Tax.

§§ 105-218 to 105-228: Repealed by Session Laws 1957, c. 1340, s. 5.

Cross Reference.—For present statutes relating to use tax, see G. S. 105-164.1 et seq.

ARTICLE 8A.

Schedule I-A. Gross Earnings Taxes in Lieu of Ad Valorem Taxes.

§ 105-228.2. Tax upon freight car line companies.

(8) Upon the filing of such reports it shall be the duty of the Commissioner of Revenue to inspect and verify the same and assess the amount of taxes due from freight line companies therein named. Any freight line company against which a tax is assessed under the provisions of this article may at any time within fifteen days after the last day for the filing of reports by railroad companies, appear before the Commissioner of Revenue at a hearing to be granted by the Commissioner and offer evidence and argument on any matter bearing upon the validity or correctness of the tax assessed against it, and the Commissioner shall review his assessment of such tax and shall make his order confirming or modifying the same as he shall deem just and equitable, and if any overpayment is found to have been made it shall be refunded by the Commissioner. Provided, however that such payment if in the amount of three dollars (\$3.00) or more shall be refunded to the taxpayer within sixty (60) days of the discovery thereof; if the amount of overpayment is less than three dollars (\$3.00) then such overpayment shall be refunded only upon receipt by the Commissioner of Revenue of a written demand for such refund from the taxpayer. Provided further, that no overpayment shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three (3) years from the filing date of the return or within six (6) months of the payment of the tax alleged to be an overpayment, whichever date is the later.

(1957, c. 1340, s. 14.)

Editor's Note.—The 1957 amendment changed the rest of the section is not added the two provisos at the end of subsection (8). As only this subsection was set out.

ARTICLE 8B.

Schedule I-B. Taxes upon Insurance Companies.

§ 105-228.4. Annual registration fees for insurance companies.—

Each and every insurance company shall, as a condition precedent for doing business in this State, on or before the first day of March of each year apply for and obtain from the Commissioner of Insurance a certificate of registration, or license, effective the first day of July, and shall pay for such certificate the following annual fees except as hereinafter provided in subdivisions (a) and (b):

For each domestic farmer's mutual assessment fire insurance company or association, and each branch thereof	\$ 10.00
For each fraternal order	25.00
For each of all other insurance companies, except mutual burial associations taxed under § 105-121.1	300.00

The fees levied above shall be in addition to those specified in § 58-63.

(a) When the paid in capital stock and/or surplus of an insurance company other than a farmer's mutual assessment company or a fraternal order does not exceed one hundred thousand dollars (\$100,000.00), the fee levied in this section shall be one-half the amount above specified.

(b) Upon payment of the fee specified above and the fees and taxes elsewhere specified each insurance company, exchange, bureau, or agency, shall be entitled to do the types of business specified in chapter fifty-eight, of the General Statutes of North Carolina as amended, to the extent authorized therein, except that: Insurance companies authorized to do either the types of business specified for (A) life insurance companies, or (B) for fire and marine companies, or (C) for casualty and fidelity and surety companies, in § 58-77, which shall also do the types of business authorized in one or both of the other of the above classifications shall in addition to the fees above specified pay one hundred dollars (\$100.00) for each such additional classification of business done.

(c) Any rating bureau established by action of the General Assembly of North Carolina shall be exempt from the fees above levied. (1945, c. 752, s. 2; 1947, c. 501, s. 8; 1955, c. 179, s. 5.)

Editor's Note.—

The 1955 amendment changed the last day for making application for the certifi-

cate or license from April 1 to March 1. It also inserted the words "effective the first day of July" in the first paragraph.

§ 105-228.5. Taxes measured by gross premiums.—Each and every insurance company shall annually pay to the Commissioner of Insurance at the time and at the rates hereinafter specified, a tax measured by gross premiums as hereinafter defined from business done in this State during the preceding calendar year.

Gross premiums from business done in this State in the case of life insurance and annuity contracts, including any supplemental contracts thereto providing for disability benefits, accidental death benefits, or other special benefits, shall for the purposes of the taxes levied in this section mean any and all premiums collected in the calendar year (other than for contracts for reinsurance) for policies the premiums on which are paid by or credited to persons, firms or corporations resident in this State, or in the case of group policies for any contracts of insurance covering persons resident within this State, with no deduction for considerations paid for annuity contracts which are subsequently returned except as below specified, and with no other deduction whatsoever except for premiums returned under one or more of the following conditions: premiums refunded on policies rescinded for fraud or other breach of contract; premiums which were paid in advance on life insurance contracts and subsequently refunded to the insured, premium payer, beneficiary or estate; and in the case of group annuity contracts the premiums returned by reason of a change in the composition of the group covered. Said gross premiums shall be deemed to have been collected for the amounts as provided in the policy contracts for the time in force during the year, whether satisfied by cash payment, notes, loans, automatic premium loans, applied dividend or in any other manner whatsoever, except in the case of premiums waived by any of said companies pursuant to a contract for waiver of premium in case of disability.

Gross premiums from business done in this State in the case of contracts for fire insurance, casualty insurance, and any other type of insurance except life and annuity contracts as above specified, including contracts of insurance required to be carried by the Workmen's Compensation Act, shall for the purposes of the taxes levied in this section mean any and all premiums written during the calendar year, or the equivalent thereof in the case of self-insurers under the Workmen's Compensation Act, for contracts covering property or risks in this State, other than for contracts of reinsurance, whether such premiums are designated as premiums, deposits, premium deposits, policy fees, membership fees, or assessments. Gross premiums shall be deemed to have been written for the amounts as provided in the policy contracts, new and renewal, becoming effective during the year irrespective of the time or method of making payment or settlement for such premiums, and with no deduction for dividends whether returned in cash or allowed in payment or reduction of premiums or for additional insurance, and

without any other deduction except for return of premiums, deposits, fees or assessments for adjustment of policy rates or for cancellation or surrender of policies.

In determining the amount of gross premiums from business in this State all gross premiums received in this State, or credited to policies written or procured in this State, or derived from business written in this State shall be deemed to be for contracts covering persons, property or risks resident or located in this State except for such premiums as are properly reported and properly allocated as being received from business done in some other nation, territory, state or states, and except for premiums from policies written in federal areas for persons in military service who pay premiums by assignment of service pay.

On the basis of the gross amount of premiums, as above defined, each company or self-insurer shall pay as to:

The amounts collected on contracts applicable to liabilities under the Workmen's Compensation Act, a tax at the rate of one and six-tenths per cent (1.6%) in the case of domestic insurance companies; and on the amounts collected on contracts applicable to liabilities under the Workmen's Compensation Act in the case of foreign and alien insurance companies, or the equivalent thereof in the case of self-insurers, a tax at the rate of four per cent (4%).

The amounts collected on annuities and all other contracts of insurance issued by domestic life insurance companies a tax at the rate of one and one-half per cent (1½%).

The amounts collected on contracts of insurance issued by domestic insurance companies other than life insurance companies and other than corporations organized under chapter 57 of the General Statutes, a tax of one per cent (1%) or, in lieu thereof, any such company shall pay an income tax computed as in the case of other corporations, whichever is the greater.

The amounts collected on annuities and all other contracts of insurance a tax at the rate of two and one-half per cent (2½%) in the case of foreign and alien companies.

The premium tax rates herein provided shall be applicable with respect to all premiums collected during the calendar year, 1955, and each subsequent year.

The taxes levied herein measured by premiums shall be in lieu of all other taxes upon insurance companies except: Fees and licenses under this article, or as specified in chapter 58 of the General Statutes of North Carolina as amended; taxes imposed by chapter 118 of the General Statutes of North Carolina; taxes imposed by article 5 of chapter 105 of the General Statutes of North Carolina as amended; and ad valorem taxes upon real property and personal property owned in this State.

For the tax above levied as measured by gross premiums the president, secretary, or other executive officer of each insurance company doing business in this State shall within the first fifteen days of March in 1946 and in each year thereafter file with the Commissioner of Insurance a full and accurate report of the total gross premiums as above defined collected in this State during the preceding calendar year. The report shall be in such form and contain such information as the Commissioner of Insurance may specify, and the report shall be verified by the oath of the company official transmitting the same or by some principal officer at the home or head office of the company or association in this country. At the time of making such report the taxes above levied with respect to the gross premiums shall be paid to the Commissioner of Insurance. The provisions above shall likewise apply as to reports and taxes for any firm, corporation, or association exchanging reciprocal or interinsurance contracts, and said reports and taxes shall be transmitted by their attorneys in fact.

The provisions as to reports and taxes as measured by gross premiums shall not apply to farmers' mutual assessment fire insurance companies above specified

or to fraternal orders or societies that do not operate for a profit and do not issue policies on any person except members.

With respect to the taxes levied in this section on the equivalent of premiums of self-insurers under the provisions of the Workmen's Compensation Act, the reports required herein shall be transmitted to and the taxes collected by the North Carolina Industrial Commission as provided in subdivision (j) of § 97-100 of the General Statutes of North Carolina. (1945, c. 752, s. 2; 1947, c. 501, s. 8; 1951, c. 643, s. 8; 1955, c. 1313, s. 5; 1957, c. 1340, s. 12.)

Editor's Note.—

The 1951 amendment rewrote the sixth paragraph. The 1955 amendment rewrote the seventh paragraph to appear as the

seventh through tenth paragraphs. And the 1957 amendment rewrote the eleventh paragraph.

§ 105-228.7. Registration fees for agents, brokers and others.—

Each and every manager, organizer, adjuster, broker or agent of whatever kind representing in this State any company referred to in this article, shall on or before the first day of April of each year apply for and obtain from the Commissioner of Insurance an annual certificate of registration, or license, and shall pay for said certificate an annual fee at the following rates, with no additional fee for affixing of seal to the certificate:

Insurance agent (local for each company represented)	\$ 5.00
General agent or manager, for each company represented	6.00
Special agent or organizer, for each company represented	5.00
Insurance broker	2.50
Nonresident broker	25.00
Insurance adjuster (other than adjuster for hail damage to crops)	25.00
Insurance adjuster for hail damage to crops	5.00

The above fees shall be in lieu of any and all other license fees.

In cases where temporary license may be issued pursuant to law the fee for a temporary certificate shall be at the same rates as above specified, and any amounts so paid for temporary license may be credited against the fees required for issuance of the annual license or certificate.

Any person not registered who is required by law to pass examination as a condition for securing of license shall upon application for registration pay to the Commissioner of Insurance an examination fee of ten dollars (\$10.00), and in case more than two examinations in any one kind of insurance are requested, an additional fee of ten dollars (\$10.00) shall be paid for each added examination above two for the same kind of insurance. The requirement for examination and examination fee shall not apply to agents for domestic farmers' mutual assessment fire insurance companies or associations specified in § 105-228.4.

In the event a certificate issued under this section is lost or destroyed the Commissioner of Insurance for a fee of fifty cents (\$0.50) may certify to its issuance, giving number, date, and form, which may be used by the original party named thereon in lieu of the annual certificate. There shall be no charge for the seal attached to such certification. (1945, c. 752, s. 2; 1947, c. 1023, s. 2; 1949, c. 958, s. 2; 1951, c. 105, s. 2; 1955, c. 1313, s. 5.)

Editor's Note.—

The 1951 amendment struck out the words "independent adjuster", formerly appearing after the word "organizer" near the beginning of the section, and revised

the schedule of fees.

The 1955 amendment, effective July 1, 1955, substituted "5.00" for "2.50" in line one of the schedule of fees.

§ 105-228.9. Powers of the Commissioner of Insurance.—All provisions of this chapter, not inconsistent with this article, relating to administration, auditing and making returns, the imposition and collection of tax and the lien thereof, assessments, refunds and penalties, shall be applicable to the fees and taxes imposed by this article; and with respect thereto, the Commissioner of

Insurance is hereby given the same power and authority as is given to the Commissioner of Revenue under the provisions of this chapter. The Commissioner of Insurance may, from time to time, make, prescribe, and publish such rules and regulations, not inconsistent with law, as may be needful to enforce the provisions of this article. (1945, c. 752, s. 2; 1955, c. 1350, s. 22.)

Editor's Note.—The 1955 amendment, the words "promulgation of rules and regulations" formerly appearing after the tence, and deleted from the first sentence the word "returns" in line three.

ARTICLE 8C.

Schedule I-C. Excise Tax on Banks.

§ 105-228.11. **To whom this article shall apply.**—The provisions of this article shall apply to every bank or banking association, including each national banking association, that is organized and operating in this State as a commercial bank, an industrial bank, a savings bank, a trust company, or any combination of such facilities or services, and whether such bank or banking association, hereinafter to be referred to as a bank or banks, be organized, under the laws of the United States or the laws of North Carolina, in the corporate form or in some other form of business organization. (1957, c. 1340, s. 8.)

§ 105-228.12. **Imposition of an excise tax.**—An annual excise tax is hereby levied on every bank located and doing business within this State, including each national banking association, for the privilege of transacting business in this State during the calendar year, according to or measured by its entire net income as defined herein received or accrued from all sources during the preceding calendar year hereinafter referred to as taxable year, at the rate of four and one-half per cent ($4\frac{1}{2}\%$) of such entire net income. The minimum tax assessable to any one bank shall be ten dollars (\$10.00). The liability for the tax imposed by this section shall arise upon the first day of each calendar year, and shall be based upon and measured by the entire net income of each bank or trust company for the preceding calendar year, including all income received from government securities (whether or not taxable under article 4 of this chapter) in such year except for any interest that may be allowed as deductible from gross income under G. S. 105-228.16. As used in this article the words "taxable year" shall mean the calendar year next preceding the calendar year for which and during which the excise tax is levied. (1957, c. 1340, s. 8.)

§ 105-228.13. **Method of taxation adopted.**—The State of North Carolina hereby adopts the method of taxation of banks authorized by an Act of Congress relating to taxation of national banks, being method number (4) as provided in § 548, as amended, of Title 12 of the Code of Laws of the United States, formerly known as § 5219, of the Revised Statutes of the United States.

The excise tax levied under G. S. 105-228.12 shall be in lieu of the intangible personal property tax levied under article 7 of this chapter, the franchise tax imposed by article 3 of this chapter, the income tax levied by article 4 of this chapter, taxes levied upon the shares of stock of banks assessed under G. S. 105-346, and taxes levied upon tangible personal property by local taxing jurisdictions. All real property of each bank located or doing business within this State, including national banking associations, shall be assessed and taxed (in the same manner as other real estate is taxed in this State) by the counties, municipalities, and other local taxing jurisdictions in which such real estate is located.

It is the purpose and intent of the General Assembly to levy taxes on banks so that all banks, both State and national, doing business in this State will be taxed uniformly in a just and equitable manner in accordance with the provisions of § 548 of Title 12 of the Code of the United States cited above and article V,

§ 3 of the Constitution of North Carolina. The intent in this article is to exercise the powers of classification and of taxation on property, franchises, and trades conferred by the above constitutional provision cited in this section. (1957, c. 1340, s. 8.)

§ 105-228.14. **Entire net income defined.**—The words “entire net income” shall mean the gross income of a taxpayer less the deductions allowed by this article. (1957, c. 1340, s. 8.)

§ 105-228.15. **Gross income defined.**—For purposes of this article the words “gross income” shall mean the income of a bank received or accrued from whatever source during the taxable year as follows: Interest and discount on loans; interest from bonds, notes, mortgages and other investments, including interest from all government bonds issued direct by any level of government or through any government agency, any exclusion provided in article 4 of chapter 105 notwithstanding; dividends from securities owned; service charges; collection fees; exchange charges; trust department earnings; rents; commissions; gains or profits from the sale or other disposition of property, either real or personal, tangible or intangible; recoveries from losses previously written off or deducted from income in prior taxable years; and all other recoveries, gains, profits, income, or receipts regardless of nature and from whatever source derived, except that gifts received shall be excluded from gross income. (1957, c. 1340, s. 8.)

§ 105-228.16. **Deductions from gross income.**—In computing entire net income there shall be allowed as deductions the following items:

- (1) All ordinary and necessary expenses as defined in subsection 1 of G. S. 105-147 paid or accrued during the taxable year.
- (2) Rental expense as defined in subsection 2 of G. S. 105-147.
- (3) Unearned discount and interest paid as provided in subsection 3 of G. S. 105-147 for income tax purposes.
- (4) Taxes paid or accrued except income taxes, taxes levied under this article, taxes assessed for local benefit of a kind tending to increase the value of the property assessed and any other taxes not deductible for income tax purposes under the provisions of subsection 4 of G. S. 105-147.
- (5) Dividends received from stock issued by any corporation to the extent provided under subsection 5 of G. S. 105-147.
- (6) Losses shall be deductible as provided for income tax purposes in G. S. 105-144, 105-144.1, 105-145, and subsection 6 of G. S. 105-147.
- (7) Loans or debts ascertained to be worthless and actually charged off during the taxable year, if connected with business and, if the amount has previously been included in gross income in a return under this article; or, in the discretion of the Commissioner of Revenue, a reasonable addition to a reserve for bad debts.
- (8) A reasonable allowance for depreciation and obsolescence as provided for income tax purposes in subsection 8 of G. S. 105-147.
- (9) Contributions to religious, charitable, educational and like organizations as provided in subsection 9 of G. S. 105-147, provided such contributions not exceed five per cent (5%) of the net income of the bank without any deduction for such contributions.
- (10) Contributions to the State of North Carolina, any of its institutions, instrumentalities, agencies, or political subdivisions.
- (11) Reasonable contributions to employees pension trusts within the taxable year which qualify under subsection 10 of G. S. 105-138.
- (12) Premiums paid by banks upon the purchase of bonds shall for the purposes of this article be treated the same as is provided by G. S. 105-144.3.

- (13) Interest upon the obligations of the State of North Carolina or a political subdivision thereof received or accrued during the taxable year. Provided, that the deduction of accrued interest shall be permitted only if the taxpayer has included accrued income in his gross income for the taxable year. Provided further, that in the event that any court of competent jurisdiction shall rule that the deduction of the interest of the obligations of the State of North Carolina or a political subdivision thereof from the base of the tax levied by this article violates the Constitution of this State or the Constitution of the United States such deduction shall be disallowed and such interest included in the entire net income of the taxpayer.
- (14) Payments made to the beneficiaries or to the estate of a deceased employee, paid by reason of the death of the employee as provided under subsection 16 of G. S. 105-147 for income tax purposes.
- (15) Deduction of accrued expenses, contributions, taxes, rental expense, or interest expense shall be subject to the limitations imposed upon income taxpayers under subsection 12 of G. S. 105-147. (1957, c. 1340, s. 8.)

§ 105-228.17. **Returns and payment of the excise tax.**—On or before June 1 of each year, the executive officer or officers of each bank, or trust company, located and doing business in this State, shall file with the Commissioner of Revenue a full and accurate report of all income as defined in G. S. 105-228.15 received or accrued during the taxable year, and also an accurate record of the legal deductions in the same calendar year as allowed by G. S. 105-228.16 to the end that the correct entire net income of the bank may be determined. This report shall be in such form and contain such information as the Commissioner of Revenue may specify, and shall contain such information with respect to branch offices as the Commissioner of Revenue may designate. At the time of making such report by each bank, the taxes levied by this article with respect to an excise tax on banks shall be paid to the Commissioner of Revenue. (1957, c. 1340, s. 8.)

§ 105-228.18. **Effective date.**—The initial report and payment for each bank shall be made on June 1, 1958, and shall be based on the calendar year of 1957. In the interim each bank shall make a return to the State Board of Assessment for 1957 with respect to the value of shares as of December 31, 1956, as provided in G. S. 105-346, and said Board shall determine the value of shares and certify such values to the respective local taxing jurisdictions. Each bank shall in turn pay the tax on its shares, in case of liability, for levies made by the respective North Carolina local tax jurisdiction during or prior to August, 1957. After the 1957 levies on the shares of banks, such shares shall not be taxable so long as the excise tax levied by this article remains in effect and no longer. (1957, c. 1340, s. 8.)

§ 105-228.19. **Powers of the Commissioner of Revenue.**—All provisions of subchapter I of this chapter, not inconsistent with this article, relating to administration, auditing and making returns, the imposition and collection of tax and the lien thereof, assessments, refunds, penalties, and appeal and review, shall be applicable to the tax imposed by this article. The Commissioner of Revenue may, from time to time, make, prescribe and publish such rules and regulations, not inconsistent with law, as may be needful to enforce the provisions of this article. (1957, c. 1340, s. 8.)

§ 105-228.20. **Competing moneyed capital.**—It is not the intent of this article to tax banks at a greater effective rate than competing moneyed capital. In case the Commissioner of Revenue or a court, of competent jurisdiction,

should find as a fact that any individual, firm or corporation, who or which is competing in major respects with the banks and trust companies taxed herein, is taxed at a lower rate than banks, including national banks, the Commissioner of Revenue shall assess and levy a tax under this article upon any such individual, firm, or corporation. (1957, c. 1340, s. 8.)

§ 105-228.21: Omitted.

ARTICLE 8D.

Schedule I-D. Taxation of Building and Loan Associations.

§ 105-228.22. **To whom this article shall apply.**—The provisions of this article shall apply to every building and loan association or savings and loan association organized under the laws of this State or organized under the laws of another state and which maintains one or more places of business in this State and to every savings and loan association organized and existing under the “Home Owners Loan Act of 1933” and which maintains one or more places of business in this State, all such associations hereinafter to be referred to as building and loan associations. (1957, c. 1340, s. 9.)

Editor’s Note.—The act inserting this article provides that so much of the article as applies to the excise tax shall be effective with income years beginning on and after January 1, 1957, and so much as applies to the capital stock tax shall be effective on and after June 1, 1957.

§ 105-228.23. **Capital stock tax.**—There is hereby imposed upon every building and loan association for the privilege of conducting business in this State a tax of six cents (6¢) on each one hundred dollars (\$100.00) of the liability of such association on its shares of stock outstanding on December 31 of the preceding year. For purposes of this article “liability of such association on its shares of stock outstanding” shall mean the aggregate dollar amount which such association is obligated to pay to its shareholders in cancellation of outstanding shares of capital stock of the association at any designated date. The words “capital stock of the association” shall mean all classes and kinds of stock which the association is authorized by its charter to issue from time to time, including, but not limited to, full paid shares, optional shares, and serial shares. (1957, c. 1340, s. 9.)

§ 105-228.24. **Excise tax.**—In addition to the taxes levied under G. S. 105-228.23 every building and loan association shall pay annually an excise tax equivalent to six per cent (6%) of the net taxable income, as herein defined, of such corporation during the income year. For purposes of this article “net taxable income” shall mean net income as the same is defined for purposes of the income tax levied against corporations as provided in article 4 of subchapter I of chapter 105 of the General Statutes less all dividends paid or accrued by an association during the income year on all of its outstanding shares of capital stock. “Dividends” shall mean the amounts paid to, or credited to the accounts of shareholders, if such amounts paid or credited are withdrawals on demand subject only to customary notice of intention to withdraw. The words “income year” shall mean the calendar year or fiscal year upon the basis of which the net taxable income is computed under this article. (1957, c. 1340, s. 9.)

§ 105-228.25. **Limitations.**—The taxes levied under this article shall be in lieu of all other taxes and fees except those imposed by subchapter I of chapter 54 of the General Statutes and amendments thereto, and except ad valorem taxes imposed upon real property and tangible personal property, and except sales and/or use taxes levied by this State, and except taxes levied on intangible property under G. S. 105-199, 105-200, 105-204 and 105-205.

Counties, cities, and towns shall not, after the effective date of this article,

levy any license tax on the business of any building and loan association subject to taxation under this article. (1957, c. 1340, s. 9.)

Cross Reference.—As to effective date, see note to G. S. 105-228.22.

§ 105-228.26. **Filing of returns.**—Every association taxed under this article shall file annually with the Commissioner of Insurance a capital stock tax return and an excise tax return upon such forms as the Commissioner of Insurance shall from time to time prescribe. The capital stock tax return shall be filed and the tax levied under G. S. 105-228.23 shall be paid to the Commissioner of Insurance on or before the 15th day of March of each year. The excise tax returns shall be filed and the tax levied under G. S. 105-228.24 shall be paid on or before the fifteenth day of the third month following the close of the income year. The returns shall contain such information as the Commissioner of Insurance shall deem to be necessary for the computation and verification of the amount of the tax. (1957, c. 1340, s. 9.)

§ 105-228.27. **Powers of the Commissioner of Insurance.**—All provisions of subchapter I of this chapter not inconsistent with this article, relating to administration, auditing and making returns, the imposition and collection of tax and the lien thereof, assessments, refunds, penalties, and appeal and review, shall be applicable to the fees and taxes imposed by this article; and with respect thereto, the Commissioner of Insurance is hereby given the same power and authority as is given to the Commissioner of Revenue under the provisions of this chapter. The Commissioner of Insurance may, from time to time, make, prescribe, and publish such rules and regulations, not inconsistent with law, as may be needful to enforce the provisions of this article. The Commissioner of Revenue shall render such assistance in the audit of returns and the collection of the taxes levied hereunder as the Commissioner of Insurance shall request. (1957, c. 1340, s. 9.)

ARTICLE 9.

Schedule J. General Administration—Penalties and Remedies.

§ 105-230. **Charter canceled for failure to report.**—If a corporation required by the provisions of this subchapter to file any report or return or to pay any tax or fee, either as a public utility (not as an agency of interstate commerce) or as a corporation incorporated under the laws of this State, or as a foreign corporation domesticated in or doing business in this State, or owning and using a part or all of its capital or plant in this State, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this subchapter for making such report or return, or for paying such tax or fee, the Commissioner of Revenue shall certify such fact to the Secretary of State. The Secretary of State shall thereupon suspend the articles of incorporation of any such corporation which is incorporated under the laws of this State by appropriate entry upon the records of his office, or suspend the certificate of authority of any such foreign corporation to do business in this State by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall cease and determine. The Secretary of State shall immediately notify by certified mail every such domestic or foreign corporation of the action taken by him, and also shall immediately certify such suspension to the clerk of superior court of the county in which the principal office or place of business of such corporation is located in this State with instructions to said clerk, and it shall be the clerk's duty, to make appropriate entry upon the rec-

ords of his office indicating suspension of the corporate powers of the corporation in question. (1939, c. 158, s. 901; 1957, c. 498.)

Editor's Note.—The 1957 amendment substituted "certified" for "registered" in line seventeen.

§ 105-232. Corporate rights restored; receivership and liquidation.
—Any corporation whose articles of incorporation or certificate of authority to do business in this State has been suspended by the Secretary of State, as provided in § 105-230, or similar provisions of prior Revenue Acts, upon the filing, within five years after such suspension or cancellation under previous acts, with the Secretary of State, of a certificate from the Commissioner of Revenue that it has complied with all the requirements of this subchapter and paid all State taxes, fees, or penalties due from it (which total amount due may be computed, for years prior and subsequent to said suspension or cancellation, in the same manner as if said suspension or cancellation had not taken place), shall be entitled to exercise again its rights, privileges, and franchises in this State; and the Secretary of State shall cancel the entry made by him under the provisions of § 105-230 or similar provisions of prior Revenue Acts, and shall issue his certificate entitling such corporation to exercise again its rights, privileges, and franchises, and certify such reinstatement to the clerk of superior court in the county in which the principal office or place of business of such corporation is located with instructions to said clerk, and it shall be his duty to cancel from his records the entry showing suspension of corporate privileges.

When the certificate or articles of incorporation in this State have been suspended by the Secretary of State, as provided in G. S. 105-230, or similar provisions of prior or subsequent Revenue Acts, and there remains property held in the name of the corporation, or undisposed of at the time of such suspension, or there remain possibilities of reverters, reversionary interests, rights of re-entry or other future interests that may accrue to the corporation or its successors or stockholders, and the time within which the corporate rights might be restored as provided by this section has expired, any stockholder or any bona fide creditor or other interested party may apply to the superior court for the appointment of a receiver. Application for such receiver may be made in a civil action to which all stockholders or their representatives or next of kin shall be made parties. Stockholders whose whereabouts are unknown and unknown stockholders and unknown heirs and next of kin of deceased stockholders may be served by publication, as well as creditors, dealers and other interested persons, and a guardian ad litem may be appointed for any stockholders or their representatives who may be an infant or incompetent. The receiver shall enter into such bond with such sureties as may be set by the court and shall give such notice to creditors by publication or otherwise as the court may prescribe. Any creditor who shall fail to file his claim with the receiver within the time set shall be barred of the right to participate in the distribution of the assets. Such receiver shall have authority to sell such property or possibilities of reverters, reversionary interests, rights of re-entry, or other future interests, upon such terms and in such manner as shall be ordered by the court, apply the proceeds to the payment of any debts of such corporation, and distribute the remainder among the stockholders or their representatives in proportion to their interests therein. Shares due to any stockholder who is unknown or whose whereabouts are unknown shall be paid into the office of the clerk of the superior court, by him to be disbursed according to law. In the event the stockbooks of the corporation shall be lost or shall not reflect the latest stock transfers, the court shall determine the respective interests of the stockholders from the best evidence available, and the receiver shall be protected in acting in accordance with such finding. Such proceeding is authorized for the sole purpose of providing a procedure for disposing of the corporate assets by the payment of corporate debts, including franchise taxes which had accrued prior to the suspension of the corporate charter and any other taxes the assessment or

collection of which is not barred by a statute of limitations, and by the transfer to the stockholders or their representatives their proportionate shares of the assets owned by the corporation. (1939, c. 158, s. 903; c. 370, s. 1; 1943, c. 400, s. 9; 1947, c. 501, s. 9; 1951, c. 29.)

Editor's Note.—

The 1951 amendment added the second paragraph.

§ 105-236. Penalty for bad checks.—When the bank upon which any uncertified check tendered to the Department of Revenue in payment of any obligation due to the Department, shall refuse payment upon such check on account of insufficient funds of the drawer in such bank, and such check shall be returned to the Department of Revenue, an additional tax shall be imposed, which additional tax shall be equal to ten per cent (10%) of the obligation for the payment of which such check was tendered: Provided, however, that in no case shall the additional tax so imposed be less than one dollar (\$1.00) nor more than two hundred dollars (\$200.00). Provided, further, no additional tax shall be imposed if the Commissioner of Revenue shall find that the drawer of such check, at the time it was presented to the drawee, had funds deposited to his credit in any bank of this State sufficient to pay such check, and, by inadvertence, failed to draw the check upon the bank in which he had such funds on deposit. The additional tax hereby imposed shall not be waived or diminished by the Commissioner of Revenue. This section shall apply to all taxes levied or assessed by the State. (1939, c. 158, s. 907; 1953, c. 1302, s. 7.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote this section

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 440.

§ 105-237.1. Compromise of liability.—The Commissioner of Revenue, with the approval of the Attorney General, is authorized to compromise the amount of liability of any taxpayer for taxes due under subchapters I or V of this chapter or under chapter 18 of the General Statutes and to accept in full settlement of such liability a lesser amount than that asserted to be due when in the opinion of the Commissioner and the Attorney General such compromise settlement is in the best interest of the State. When made other than in the course of litigation in the courts of the State on an appeal from an administrative determination or in a civil action brought to recover from the Commissioner, the basis for such compromise must also conform to the conditions set out in this section. Such compromise settlement may be made only after a final administrative or judicial determination of the liability of the taxpayer.

Such a compromise settlement may be made only upon a finding that:

- (1) There is a reasonable doubt as to the amount of the liability of the taxpayer under the law and the facts; or
- (2) The taxpayer is insolvent and the Commissioner probably could not otherwise collect an amount equal to or in excess of the amount offered in compromise; or
- (3) Collection of a greater amount than that offered in compromise settlement is improbable, and the funds offered in the settlement, or a substantial portion thereof, come from sources from which the Commissioner could not otherwise collect; or
- (4) A federal tax assessment arising out of the same facts has been compromised with the federal government on the same or a similar basis as that proposed to the State and the Commissioner could probably not collect an amount equal to or in excess of that offered in compromise.

For the purposes of this section a taxpayer may be considered insolvent only if there is an established status of insolvency by either a judicial declaration of a status necessarily or ordinarily involving insolvency or by a legal proceeding in

which the insolvency of the taxpayer would ordinarily be determined or thereby be made evident or if it is plain and indisputable that the taxpayer is clearly insolvent and will remain so in the reasonable future. Whenever a compromise is made by the Commissioner pursuant to this section, there shall be placed on file in the office of the Commissioner a written opinion, signed by the Commissioner and the Attorney General, setting forth the amount of tax or additional tax assessed, the amount actually paid in accordance with the terms of the compromise, and a summary of the facts and reasons upon which acceptance of the compromise is based, provided, however, that such opinion shall not be required with respect to the compromise of any taxpayer's liability where the unpaid amount of tax assessed (including interest, penalty and additional tax) is less than one hundred dollars (\$100.00). (1957, c. 1340, s. 10.)

§ 105-239.1. **Transferee liability.**—(a) Property transferred for an inadequate consideration to a donee, heir, legatee, devisee, distributee, stockholder of a liquidated corporation, or any other person at a time when the transferor is insolvent or is rendered insolvent by reason of the transfer shall be subject to a lien for any taxes owing by the transferor to the State of North Carolina at the time of such transfer whether or not the amount of such taxes shall have been ascertained or assessed at the time of such transfer. Such lien shall be subject to the provisions of the first proviso contained in G. S. 105-241. In the event the transferee shall have disposed of such property so that it cannot be subjected to the State's tax lien, the transferee shall be personally liable for the difference between the fair market value of such property at the time of the transfer and the actual consideration, if any, paid to the transferor by the transferee.

Upon a foreclosure of the State's tax lien upon property in the hands of a transferee, the value of any consideration which the transferee shall have established as having been given to the transferor shall be paid to the transferee out of the proceeds of the foreclosure sale before applying such proceeds toward the satisfaction of the State's tax lien.

In order to proceed against the transferee or property in his hands, the Commissioner shall cause to be docketed in the office of the clerk of the superior court of the county wherein the transferee resides or the property is located, as the case may be, a certificate of tax liability as provided in G. S. 105-242 or a lien certificate which shall set forth the amount of the lien as determined by the Commissioner or as finally determined upon appeal and a description of the property subject to the lien. Thereafter, execution may be issued against the transferee as in the case of other money judgments except that no homestead or personal exemption shall be allowable or, upon a lien certificate, an execution may be issued directing the sheriff to seize the property subject to the lien and sell same in the same manner as property is sold under execution. Such procedure and collection shall be subject to the provisions of subsection (c) of this section.

(b) The period of limitations for assessment of any liability against a transferee or enforcing the lien against the transferred property shall expire one year after the expiration of the period of limitations for assessment against the transferor.

(c) The provisions of G. S. 105-241.1, 105-241.2, 105-241.3, 105-241.4, 105-266.1 and 105-267 with respect to assessment procedure, demand for refund, review, and appeal shall apply to the liability of any transferee assessed under this section or of any property subject to the liability imposed by this section and to the assertion of a lien upon property in the hands of the transferee.

(d) In any proceeding before the Tax Review Board or in any court of the State the burden of proof shall be upon the Commissioner of Revenue to show that a person is liable as a transferee of property of a taxpayer under this section. (1957, c. 1340, s. 10.)

§ 105-240.1. **Agreements with respect to domicile.**—Whenever reasonably necessary in order to facilitate the collection of any tax, the Commissioner of Revenue with the consent and approval of the Attorney General, is authorized to make agreements with the taxing officials of other states of the United States or with taxpayers in cases of disputes as to the domicile of a decedent. (1957, c. 1340, s. 10.)

§ 105-241. **Taxes payable in national currency; for what period, and when a lien; priorities.**

Provided, however, that the lien of State taxes shall not be enforceable as against bona fide purchasers for value, and as against duly recorded mortgages, deeds of trust and other recorded specific liens, as to real estate, except upon docketing of a certificate of tax liability or a judgment in the office of the clerk of the superior court of the county wherein the real estate is situated, and as to personalty, except upon a levy upon such property under an execution or a tax warrant, and the priority of the State's tax lien against property in the hands of bona fide purchasers for value, and as against duly recorded mortgages, deeds of trust and other recorded specific liens, shall be determined by reference to the date and time of the docketing of judgment or certificate of tax liability or the levy under execution or tax warrant. Provided further, that in the event any taxpayer shall execute an assignment for the benefit of creditors, or if receivership, a creditor's bill or other insolvency proceedings are instituted against any taxpayer indebted to the State on account of any taxes levied by the State, the lien of State taxes shall attach to any and all property of such taxpayer or of such insolvent's estate as of the date and time of the execution of the assignment for the benefit of creditors or of the institution of proceedings herein mentioned and shall be subject only to prior recorded specific liens and reasonable costs of administration. Notwithstanding the provisions of this paragraph, the provisions contained in § 105-164.38 shall remain in full force and effect with respect to the lien of sales taxes.

(1957, c. 1340, s. 5.)

Editor's Note.—

The 1957 amendment substituted "§ 105-164.38" for "§ 105-174 and § 105-176" in the last sentence of the second paragraph.

As the rest of the section was not affected by the amendment only the second paragraph is set out.

§ 105-241.1. **Additional taxes; assessment procedure.**—(a) If the Commissioner of Revenue discovers from the examination of any return or otherwise that any tax or additional tax is due from any taxpayer, he shall give notice to the taxpayer in writing of the kind and amount of tax which is due and of his intent to assess the same, which notice shall contain advice to the effect that unless application for a hearing is made within the time specified in subsection (c), the proposed assessment will become conclusive and final.

If the Commissioner is unable to obtain from the taxpayer adequate and reliable information upon which to base such assessment, the assessment may be made upon the basis of the best information available and, subject to the provisions hereinafter made, such assessment shall be deemed correct.

(b) The notice required to be given in subsection (a) may be delivered to the taxpayer by an agent of the Commissioner or may be sent by mail to the last known address of the taxpayer and such notice will be deemed to have been received in due course of the mail unless the taxpayer shall make an affidavit to the contrary within ninety days after such notice is mailed, in which event the taxpayer shall be heard by the Commissioner in all respects as if he had made timely application.

(c) Any taxpayer who objects to a proposed assessment of tax or additional tax shall be entitled to a hearing before the Commissioner of Revenue provided application therefor is made in writing within thirty (30) days after the mailing

or delivery of the notice required by subsection (a). If application for a hearing is made in due time, the Commissioner of Revenue shall set a time and place for the hearing and after considering the taxpayer's objections shall give written notice of his decision to the taxpayer. The amount of tax or additional tax due from the taxpayer as finally determined by the Commissioner shall thereupon be assessed and upon assessment shall become immediately due and collectible.

Provided, the taxpayer may request the Commissioner at any time within thirty days of notice of such proposed assessment for a written statement, or transcript, of the information and the evidence upon which the proposed assessment is based, and the Commissioner of Revenue shall furnish such statement, or transcript, to the taxpayer. Provided, further, after request by the taxpayer for such written statement, or transcript, the taxpayer shall have thirty days after the receipt of the same from the Commissioner of Revenue to apply in writing for such hearing, explaining in detail his objections to such proposed assessment. If no request for such hearing is so made, such proposed assessment shall be final and conclusive.

(d) If no timely application for a hearing is made within 30 days after notice of a proposed assessment of tax or additional tax is given pursuant to subsection (a), such proposed tax or additional tax assessment shall become final without further notice and shall be immediately due and collectible.

(e) Where a proper application for a license or a return has been filed and in the absence of fraud, the Commissioner of Revenue shall assess any tax or additional tax due from a taxpayer within three (3) years after the date upon which such application or return is filed or within three (3) years after the date upon which such application or return was required by law to be filed, whichever is the later. If no proper application for a license or no return has been filed, and in the absence of fraud, any tax or additional tax due from a taxpayer may be assessed at any time within five (5) years after the date upon which such application or return was required by law to be filed. In the event a false and fraudulent application or return has been filed or there has been an attempt in any manner to fraudulently defeat or evade tax, any tax or additional tax due from the taxpayer may be assessed at any time.

(f) Except as hereinafter provided in subsection (g), the Commissioner of Revenue shall have no authority to assess any tax or additional tax under this section until the notice required by subsection (a) shall have been given and the period within which an application for a hearing may be filed has expired, or if a timely application for a hearing is filed, until written notice of the Commissioner's decision has been given to the taxpayer, provided, however, that if the notice required by subsection (a) shall be mailed or delivered within the limitation prescribed in subsection (e), such limitation shall be deemed to have been complied with and the proceeding may be carried forward to its conclusion.

(g) Notwithstanding any other provision of this section, the Commissioner of Revenue shall have authority at any time within the applicable period of limitations to proceed at once to assess any tax or additional tax which he finds is due from a taxpayer if, in his opinion, the collection of such tax is in jeopardy and immediate assessment is necessary in order to protect the interest of the State, provided, however, that if an assessment is made pursuant to the authority set forth in this subsection before the notice required by subsection (a) is given, such assessment shall not be valid unless the notice required by subsection (a) shall be given within thirty (30) days after the date of such assessment.

(h) The provisions of G. S. 105-241.2, 105-241.3, and 105-241.4 with respect to review and appeal shall apply to any tax or additional tax assessed pursuant to this section.

(i) This section is in addition to and not in substitution of any other provision of the General Statutes relative to the assessment and collection of taxes and

shall not be construed as repealing any other provision of the General Statutes. (1949, c. 392, s. 6; 1951, c. 643, s. 9; 1955, c. 1350, s. 23; 1957, c. 1340, s. 10.)

Editor's Note. — The 1951 and 1955 amendments rewrote the provision of the former section similar to present subsection (h). The 1957 amendment rewrote and enlarged the section. Cited in *Gill v. Smith*, 233 N. C. 50, 62 S. E. (2d) 544 (1950).

§ 105-241.2. **Administrative review.**—(a) Without having to pay the tax or additional tax assessed by the Commissioner under this chapter, any taxpayer may secure from the Tax Review Board an administrative review with respect to his liability for the tax or additional tax assessed by the Commissioner. Such a review may be obtained only if the taxpayer has obtained a hearing before the Commissioner and the Commissioner has rendered a final decision with respect to the taxpayer's liability. To obtain such review the taxpayer shall:

- (1) File with the Tax Review Board, with a copy to the Commissioner, notice of intent to file a petition for review, such notice to be filed within thirty (30) days after notice of the Commissioner's final decision is issued; and
- (2) File with the Tax Review Board, with a copy to the Commissioner, a petition requesting administrative review and stating in concise terms the grounds upon which review is sought, such petition to be filed within sixty (60) days after the expiration of the period provided in subparagraph (1) for filing of notice of intent to petition for review.

(b) Upon receipt by the Commissioner of the taxpayer's petition, the Commissioner shall transmit to the Tax Review Board all of the records, data, evidence and other materials which he has pertaining to the matters which the Tax Review Board is being requested by the taxpayer to review. He shall also transmit to the Board a copy of his decision respecting such matters. The Tax Review Board shall fix a time for reviewing the Commissioner's decision and shall hear the same in the city of Raleigh. The Board shall give notice of the time and place of such hearing to the petitioner and to the Commissioner at least ten (10) days prior thereto. Officers and employees of the Revenue Department, when so requested by the Board, shall attend hearings on such reviews and shall furnish the Board with all information they have respecting the asserted liability. The Tax Review Board may establish by regulation the procedure to be followed in hearings before it and is authorized to establish by regulations a schedule of costs of the proceedings. At least two members of the Board shall sit at the hearing and all members shall consider and decide the matters on review. The Board shall confirm, modify, reverse, reduce, or increase the assessment or decision of the Commissioner; and it shall furnish a written copy of its order to the Commissioner and shall serve a written copy of its order upon the taxpayer by personal service or by registered mail (return receipt requested). In the event the decision of the Tax Review Board should not result in a reduction of the tax liability asserted by the Commissioner to be due, or if the Tax Review Board should dismiss the petition under the provisions of subsection (c) of this section, the costs of the proceeding shall be added to and shall become a part of the tax liability to be collected by the Commissioner. In the event the decision of the Tax Review Board should result in a reduction of the tax liability asserted by the Commissioner to be due, no costs shall be taxed against the taxpayer.

(c) Upon receipt of a petition requesting administrative review as provided in the preceding subsection, the Tax Review Board shall examine the petition and the records and other data transmitted by the Commissioner pertaining to the matter for which review is sought, and if it should appear from such records and data that the petition is frivolous or filed for purpose of delay, the Tax Review Board shall dismiss the petition for review and, in addition, is authorized,

in its discretion, to impose a penalty not to exceed one hundred dollars (\$100.00) which penalty shall be in addition to the tax, penalties, interests, and costs, and shall be collected in the same manner as the principal tax liability.

(d) Any taxpayer may also apply to the Tax Review Board under the provisions of this section for administrative review of the decision of the Commissioner of Revenue with respect to an alleged overpayment of tax imposed by this chapter provided such taxpayer has filed a demand in writing for refund of such overpayment within the time allowed by law for the filing of such demand and the Commissioner has issued a decision denying the claimed refund. To obtain such review the taxpayer shall file notice of intent to petition for review with the Tax Review Board, with copy to the Commissioner, within thirty (30) days after issuance of the Commissioner's decision. The taxpayer shall also perfect the application for review by filing with the Tax Review Board, with a copy to the Commissioner, a petition requesting administrative review and stating in concise terms the grounds upon which review is sought. Such petition shall be filed within sixty (60) days after expiration of the period provided for filing notice of intent to petition for review. The Tax Review Board shall consider and dispose of the petition for review in the manner provided in subsection (b) for the consideration and disposition of petitions for review of any tax or additional tax assessed by the Commissioner. No costs shall, however, be taxed against the taxpayer if the decision of the Tax Review Board results in a refund to the taxpayer. Any overpayment of tax determined by the decision of the Tax Review Board, together with interest thereon at the rate and for the period provided under G. S. 105-266, shall be refunded by the State.

(e) At any time the Commissioner of Revenue shall have authority, if in his opinion, such action is necessary for the protection of the interest of the State, to proceed at once to levy the assessment for the amount of the tax against the property of the taxpayer seeking the administrative review. In levying said assessment the Commissioner shall make a certificate setting forth the essential parts relating to the tax, including the amount thereof asserted to be due, the date when same is asserted to have become due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax. Under his hand and seal the Commissioner shall transmit said certificate to the clerk of the superior court of any county in which the taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and to index the same on the cross index of judgments. When so docketed and indexed, said certificate of tax liability shall constitute a lien upon the property of the taxpayer to the same extent as that provided for by G. S. 105-241. No execution shall issue on said certificate before final determination of the administrative review by the Tax Review Board; provided, however, if the Commissioner determines that the collection of the tax would be jeopardized by delay, he may cause execution to be issued, as provided in this chapter, immediately against the personal property of the taxpayer unless the taxpayer files with the Commissioner a bond in the amount of the asserted liability for tax, penalty and interest. If upon such final administrative determination the tax asserted or any part thereof is sustained, execution may issue on said certificate at the request of the Commissioner of Revenue, and the sheriff shall proceed to advertise and sell the property of the taxpayer.

(f) Taxpayers seeking administrative review of liability decisions of the Commissioner of Insurance under article 8B of this subchapter shall follow the procedure prescribed in subsection (a) of this section for taxpayers seeking administrative review of decisions of the Commissioner of Revenue. In such cases all provisions of this section referring to the Commissioner of Revenue shall be considered as applying to the Commissioner of Insurance. (1955, c. 1350, s. 5; 1957, c. 1340, s. 10.)

Editor's Note.—The 1957 amendment rewrote this section.

§ 105-241.3. Appeal without payment of tax from Tax Review Board decision.—(1) Any taxpayer aggrieved by the decision of the Tax Review Board may, upon payment of the tax, penalties and interest asserted to be due or upon filing with the Commissioner a bond in such form as the Commissioner may prescribe in the amount of said taxes, penalties and interest conditioned on payment of any liability found to be due on an appeal, appeal said decision to the superior court under the provisions of article 33 of chapter 143 of the General Statutes; provided, neither this section nor the provisions of article 33 of chapter 143 shall be construed to prohibit a jeopardy assessment and execution made in accordance with the provisions of G. S. 105-241.2.

(2) When an appeal is taken under this section from the Tax Review Board's dismissal of a petition for administrative review under the provisions of G. S. 105-241.2 (c), the question of appeal shall be limited to a determination of whether the Tax Review Board erred in its dismissal, and in the event that the court finds error, the case shall be remanded to the Tax Review Board to be heard. (1955, c. 1350, s. 6; 1957, c. 1340, s. 10.)

Editor's Note.—The 1957 amendment graph (1) which formerly provided for an changed "(2)" in line three of paragraph appeal without prior payment of the tax. (2) to read "(c)". It also changed para-

§ 105-241.4. Action to recover tax paid.—Within thirty days after notification of the Commissioner's decision with respect to liability under this subchapter or under article 36 of subchapter V, any taxpayer aggrieved thereby, in lieu of petitioning for administrative review thereof by the Tax Review Board under G. S. 105-241.2, may pay the tax and bring a civil action for its recovery as provided in G. S. 105-267.

Any taxpayer who has obtained an administrative review by the Tax Review Board as provided by G. S. 105-241.2 and who is aggrieved by the decision of the said Board may, in lieu of appealing pursuant to the provisions of G. S. 105-241.3, within thirty days after notification of the Board's decision with respect to liability pay the tax under protest and bring a civil action for its recovery as provided in G. S. 105-267.

Either party may appeal to the Supreme Court from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that the Commissioner, if he should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal.

Any taxes, interest or penalties paid and found by the court to be in excess of those which can be properly assessed shall be ordered refunded to the taxpayer with interest from time of payment. (1955, c. 1350, s. 7; 1957, c. 1340, s. 10.)

Editor's Note.—The 1957 amendment erly appearing after the words "pay the deleted the words "under protest" form- tax" in line five of the first paragraph.

§ 105-242. Warrant for the collection of taxes; certificate or judgment for taxes.

2. Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this subchapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this subchapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the set-off of any matured or unmatured indebtedness of the taxpayer to the garnishee. To effect such attachment or garnishment the Commissioner of Revenue shall serve or

cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the Commissioner of Revenue or by any officer having authority to serve summonses. Said notice shall show:

- (1) The name of the taxpayer and his address, if known;
- (2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and
- (3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no set-off against the taxpayer, he shall within ten days after service of said notice, answer the same by sending to the Commissioner of Revenue by registered mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the Commissioner with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the Commissioner upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or set-off, he shall state the same in writing under oath, and, within ten days after service of said notice, shall send two copies of said statement to the Commissioner by registered mail; if the Commissioner admits such defense or set-off, he shall so advise the garnishee in writing within ten days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or set-off, and any amount attached or garnished hereunder which is not affected by such defense or set-off shall be remitted to the Commissioner as above provided in cases where the garnishee has no defense or set-off, and with like effect. If the Commissioner shall not admit the defense or set-off, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within ten days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.

If judgment is entered in favor of the Commissioner of Revenue by default or after hearing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or set-off of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than ten per cent of any taxpayer's salary or wages be required to be paid hereunder in any one month. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the Commissioner of Revenue or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sole remedies to question his liability for said taxes, interest, and penalties shall be those provided in this subchapter, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the Commissioner, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by law in cases of attachment and garnishment. In case such

third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the Commissioner at any time within twelve months after said intangible is paid to him and if the Commissioner finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by § 105-407, and if such payment is denied, said party may appeal from the determination of the Commissioner under the provisions of G. S. 105-241.4; provided, that in taking an appeal to the superior court, said party may appeal either to the Superior Court of Wake County or to the superior court of the county wherein he resides or does business. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the Commissioner is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied.

This subsection shall be applicable with respect to the wages, salary or other compensation of officials and employees of this State and its agencies and instrumentalities, officials and employees of political subdivisions of this State and their agencies and instrumentalities, and also officials and employees of the United States and its agencies and instrumentalities insofar as the same is permitted by the Constitution and laws of the United States. In the case of State or federal employees, the notice shall be served upon such employee and upon the head or chief officer of the department, agency, instrumentality or institution by which the taxpayer is employed. In case the taxpayer is an employee of a political subdivision of the State, the notice shall be served upon such employee and upon the chief fiscal officer, or any officer or person charged with making up the payrolls, or disbursing funds, of the political subdivision by which the taxpayer is employed. Such head or chief officer or fiscal officer or other person as specified above shall thereafter, subject to the limitations herein provided, make deductions from the salary or wages due or to become due the taxpayer and remit same to the Commissioner until the tax, penalty, interest and costs allowed by law are fully paid. Such deductions and remittances shall, pro tanto, constitute a satisfaction of the salary or wages due the taxpayer.

3. In addition to the remedy herein provided, the Commissioner of Revenue is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and index the same on the cross index of judgments, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court (said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon the execution thereon no homestead or personal property exemption shall be allowed).

Except as provided in subsection (e) of G. S. 105-241.2, no sale of real or personal property shall be made under any execution issued on a certificate docketed pursuant to the provisions of this subsection before the administrative action of the Commissioner of Revenue or the Tax Review Board is completed when a hearing has been requested of the Commissioner or a petition for review has been filed with the Tax Review Board, nor shall such sale be made before

the assessment on which the certificate is based becomes final when there is no request for a hearing before the Commissioner or petition for review by the Tax Review Board. Neither the title to real estate nor to personal property sold under execution issued upon a certificate docketed under this subsection shall be drawn in question upon the ground that the administrative action contemplated by this paragraph was not completed prior to the sale of such property under execution. Nothing in this paragraph shall prevent the sheriff to whom an execution is issued from levying upon either real or personal property pending an administrative determination of tax liability and, in the case of personal property, the sheriff may hold such property in his custody or may restore the execution defendant to the possession thereof upon the giving of a sufficient forthcoming bond. Upon a final administrative determination of the tax liability being had, if the assessment or any part thereof is sustained, the sheriff shall, upon request of the Commissioner of Revenue, proceed to advertise and sell the property under the original execution notwithstanding the original return date of the execution may have expired.

A certificate or judgment in favor of the State or the Commissioner of Revenue for taxes payable to the Department of Revenue, whether docketed before or after the effective date of this paragraph, shall be valid and enforceable for a period of ten years from the date of docketing. When any such certificate or judgment, whether docketed before or after the effective date of this paragraph, remains unsatisfied for ten years from the date of its docketing, the same shall be unenforceable and the tax represented thereby shall abate. Upon the expiration of said ten-year period, the Commissioner of Revenue or his duly authorized deputy shall cancel of record said certificate or judgment. Any such certificate or judgment now on record which has been docketed for more than ten years shall, upon the request of any interested party, be canceled of record by the Commissioner of Revenue or his duly authorized deputy.

(1951, c. 643, s. 9; 1955, c. 1285; c. 1350, s. 23; 1957, c. 1340, s. 10.)

Editor's Note.—

The 1951 amendment inserted the second paragraph of subsection 3 as it appeared prior to the 1955 amendment.

The first 1955 amendment added the last paragraph of subsection 2 and deleted from the end of the next to last paragraph the provision that no salary or wage at the rate of less than \$200 per month shall be attached or garnished under the provisions of this section.

The second 1955 amendment, effective July 1, 1955, changed the provisions as to appeal in the next to last paragraph of subsection 2, and rewrote the first sentence of the second paragraph of subsection 3.

The 1957 amendment substituted "subsection (e)" for "subsection (3)" in line one of the second paragraph of subsection 3.

As subsections 1 and 4 were not changed by the amendments they are not set out.

Federal Tax Lien Entitled to Priority Where Taxpayer Insolvent.—A tax lien filed by the State of North Carolina under subsection 3 of this section is no more than a general lien, and thus, under 31 U. S. C. A. § 191, where taxpayer was insolvent within the meaning of that statute, the federal government's lien for un-

paid income tax was entitled to priority though State lien for unpaid taxes was filed prior to date of federal tax lien. *United States v. Williams*, 139 F. Supp. 94 (1956).

Remedies of Taxpayer.—Where the Commissioner of Revenue assesses additional income tax against a taxpayer in accordance with provisions of § 105-160, and has the certificate filed in the county in which the taxpayer has property for the purpose of creating a lien under subsection 3 of this section, the taxpayer may not move in such county to vacate and set aside the certificate on the ground of irregularity or invalidity, no execution having been issued thereon nor any effort made to enforce the lien, but the taxpayer is remitted to the statutory remedies given him to contest the assessment or attack its validity. *Gil v. Smith*, 233 N. C. 50, 62 S. E. (2d) 544 (1950).

Execution on Judgment under Subsection (3) Must Be Issued by Clerk.—Where the Commissioner of Revenue has the clerk of a superior court to docket his certificate setting forth the tax due by a resident of the county pursuant to subsection (3) of this section, execution on such judgment directed to the sheriff of the

county must be issued by the clerk of the superior court of the county, or in his name by a deputy or assistant clerk, and it cannot be issued by the Commissioner of

Revenue. A sale under execution issued by the Commissioner is a nullity. *Daniels v. Yelverton*, 239 N. C. 54, 79 S. E. (2d) 311 (1953).

§ 105-249. **Free privilege licenses for blind people.**—(1) Notwithstanding any other provisions of law, any blind person, of the age of twenty-one years or more, desiring to operate as sole proprietor a legitimate business, trade, employment or profession of any kind to provide a livelihood for himself and dependents, if any, shall be exempt from procuring any license, and from liability for paying any license tax or fee, required or levied by the State, or any department, licensing board, or commission thereof, or by any county or municipality in the State, for or in connection with the privilege of engaging in or carrying on such business, trade, employment or profession.

(2) The term "blind persons", as used herein, is defined to mean any person who is totally blind or whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or where the widest diameter of visual field subtends an angle no greater than 20 degrees.

(3) The provisions of this section shall not extend to any such sole proprietor who shall permit more than one person other than himself to work regularly in connection with such business, trade, employment or profession for remuneration or recompense of any kind whatsoever, unless such other person in excess of one so remunerated shall be a blind person as defined in subsection (2), above.

(4) Every blind person operating said business, trade, employment or profession under the provisions of this section shall be required to keep at his place of business the statement of a qualified physician or optometrist that he is totally blind or that his central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or that the widest diameter of the visual field does not subtend an angle greater than 20 degrees.

(5) This section shall not apply to N. C. sales tax or to licenses, taxes, and fees required or levied in connection with the manufacture, processing, handling or selling of intoxicating beverages, and shall not apply to any license issued only upon satisfactory completion of a qualification examination conducted by the State or any board or commission thereof.

(6) Any person violating the provisions of subsection (4) of this section shall be guilty of a misdemeanor and fined not to exceed twenty-five dollars (\$25.00) for each offense. (1933, c. 53; 1935, c. 162; 1939, c. 306; 1943, c. 122; 1953, c. 1039, s. 1.)

Editor's Note.—

The 1953 amendment rewrote this section. Section 2 of the amendatory act provides that it shall not apply to licenses re-

quired, nor to taxes and fees collectible, on or before April 27, 1953.

For comment on 1953 amendment, see 31 N. C. Law Rev. 434.

§ 105-250.1. **Distributors of coin-operated machines required to make semi-annual reports.**—Every person, firm or corporation who or which owns and places on location other than on his or its own premises, under any lease or rental agreement, loan or otherwise, or which sells coin-operated machines or vending machines of any type whatsoever upon which a tax is levied under §§ 105-65 and 105-65.1 of the General Statutes (or upon which a tax shall hereafter be levied), hereinafter referred to as a distributor, shall file a semi-annual informational report with the Commissioner of Revenue, in duplicate, as of the first day of June and December of each year, setting out the following information:

1. The name and address of the distributor making the report.
2. A description of the principal business of such distributor.
3. A list giving the location of each machine placed or remaining on location under any lease or rental agreement, loan or other arrangement whatsoever, other than by sale, together with the type of each such machine and its serial or other identifying number.

4. A list giving the location of each machine theretofore sold by the distributor, (whether such sale was for cash, on open account, or under a conditional sale or other title retention contract), together with the type of each such machine and its serial or other identifying number. Provided, that machines sold by the distributor but known by him to be no longer in service need not be reported.

5. A list giving the location of each machine, other than those described in Items 3 and 4 above, for the sale or use by, for or in which the distributor sells, leases, services or in any manner furnishes any goods, wares, merchandise, records, equipment, accessories, supplies, parts or any services whatsoever, together with the type of each such machine and its serial or other identifying number.

Provided, that the report required to be made as of June 1, 1949, (or the first report made by any distributor) shall contain a complete and true list of all of the machines described in Items 3, 4 and 5 above, together with the information required by said items, but the semi-annual reports required to be made as of the first day of June and December thereafter need show only those machines placed on location or sold by the distributor or for which the distributor has begun furnishing supplies, equipment and other services since the date as of which the next preceding semi-annual report was made.

As used herein, "location" shall include the name and address of the owner or operator of the place of business where the machine is located, or the address of the premises on which the machine is located and the name of the person principally responsible for the operation of the machine.

Each semi-annual report required by this section shall be made to the license tax division of the Department of Revenue not later than twenty days after the date as of which each report is required to be made.

The Commissioner of Revenue is hereby authorized and empowered to prescribe forms to be used in making the reports required by this section.

Any distributor who shall fail to comply with the provisions of this section and who shall fail, without showing good cause therefor, to make timely, full and accurate reports shall be liable to a penalty equal to the amount of the tax on all the machines described in Items 3 and 4, whether or not the distributor would otherwise be liable for the tax on such machines: Provided, that this shall not be construed as relieving the owner and/or operator of such machines of liability for any tax which may be due thereon. Provided further, if any person, firm or corporation required to make semi-annual informational reports under this section shall fail to do so within the time herein specified, he or it shall be guilty of a misdemeanor and upon conviction, shall be fined or imprisoned in the discretion of the court, and in addition to such fine or imprisonment shall be required to pay the taxes and penalties herein set out. (1949, c. 392, s. 6; 1951, c. 643, s. 9.)

Editor's Note.—The 1951 amendment, effective April 9, 1951, changed the reports from quarterly to semi-annually and added the proviso at the end of the section.

The purpose of this section apparently is to enable the Commissioner of Revenue to be advised as to the number of machines placed on location by a distributor

on whom would be imposed a tax for each dispensing machine as otherwise there would be no necessity for such a report from one who pays a single annual occupation license tax. *Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N. C. 307, 59 S. E. (2d) 819 (1950).

§ 105-253. Personal liability of officers, trustees, or receivers. — Any officer, trustee, or receiver of any corporation required to file report with the Commissioner of Revenue, having in his custody funds of the corporation, who allows said funds to be paid out or distributed to the stockholders of said corporation without having satisfied the Commissioner of Revenue for any State taxes which are due and have accrued, shall be personally responsible for the payment of said tax, and in addition thereto shall be subject to a penalty of not more than the amount of the tax, nor less than twenty-five per cent (25%) of such tax found to be due or accrued.

The Secretary of State shall withhold the issuance of any certificate of dis-

solution to, 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 any such corporation has met the requirements with respect to reports and taxes required by this subchapter. (1939, c. 158, s. 923; 1941, c. 50, s. 10; 1955, c. 1350, s. 23.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, deleted from the fourth line of the section the words "State Board of Assessment or" formerly appearing before "Commissioner of Revenue."

§ 105-255. Commissioner of Revenue to keep records.

As to photographic reproductions of records of department of revenue, see § 8-45.3.

§ 105-256. **Preparation and publication of statistics.**—The Commissioner of Revenue shall biennially, or more frequently if he so desires, prepare and publish reasonably available statistics dealing with the operation of this subchapter and subchapter V, including amounts collected, classifications of taxpayers, income and exemptions, and such other facts as are deemed pertinent and valuable. (1939, c. 158, s. 926; 1955, c. 1350, s. 8.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote this section.

§ 105-257. **Report to General Assembly on tax system.**—The Commissioner of Revenue shall biennially make report to the General Assembly, making such recommendations as he may consider useful in improving the tax laws and systems of this State. (1933, c. 88, s. 2; 1955, c. 1350, s. 9.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote this section.

§ 105-258. **Powers of Commissioner of Revenue; who may sign and verify pleadings, legal documents, etc.**—The Commissioner of Revenue, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of the tax due by any taxpayer under this subchapter, shall have the power to examine or cause to be examined, by any agent or representative designated by him for that purpose, any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the taxpayer or of any other person having knowledge in the premises, and may take testimony and require proof material for his information, and may administer oaths to such person or persons.

In any action, proceeding, or matter of any kind, to which the Commissioner of Revenue is a party or in which he may have an interest, all pleadings, legal notices, proofs of claim, warrants for collection, certificates of tax liability, executions, and other legal documents may be signed and verified on behalf of the Commissioner by the assistant commissioner or by any director or assistant director of any division of the Department of Revenue or by any other agent or employee of the Department so authorized by the Commissioner of Revenue. (1939, c. 158, s. 927; 1943, c. 400, s. 9; 1955, c. 435.)

Editor's Note.—The 1955 amendment changed the second paragraph by extending to others than the assistant commissioner the authority to sign and verify legal instruments on behalf of the Commissioner.

§ 105-259. Secrecy required of officials — penalty for violation.

Nothing in this section or any other law shall prevent the exchange of information between the Department of Revenue and the Department of Motor Vehicles when such information is needed by either or both of said departments for the pur-

pose of properly enforcing the laws with the administration of which either or both of said departments is charged. (1939, c. 158, s. 928; 1951, c. 190, s. 2.)

Editor's Note.—The 1951 amendment changed by the amendment it is not set added the above sentence at the end of this section. As the rest of the section was not out.

§ 105-262. Rules and regulations. — The Commissioner of Revenue shall, from time to time, initiate and prepare such regulations, not inconsistent with law, as may be useful and necessary to implement the provisions of all the articles of subchapter I (except article 8B) and article 36 of subchapter V, such regulations to become effective when approved by the Tax Review Board. All regulations and amendments thereto shall be published and made available by the Commissioner of Revenue.

The Commissioner of Revenue may, from time to time, make and prescribe such administrative rules, not inconsistent with law and the regulations approved by the Tax Review Board, as may be useful for the administration of his department and the discharge of his responsibilities.

References to rules and regulations of the Commissioner of Revenue in this chapter and in any subsequent amendments or additions thereto (unless expressly provided to the contrary therein) shall be construed to mean those rules and regulations promulgated under the provisions of this section. (1939, c. 158, s. 931; 1955, c. 1350, s. 2.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote this section.

§ 105-264. Construction of the subchapter; population.—It shall be the duty of the Commissioner of Revenue to construe all sections of this subchapter (except article 8B) and all sections of article 36 of subchapter V; provided, such construction shall not be inconsistent with applicable regulations duly promulgated under the provisions of G. S. 105-262; provided further, nothing in this section shall be construed to prohibit the Commissioner of Revenue from initiating and proposing regulations, as provided in G. S. 105-262, modifying, changing, altering or repealing existing regulations. Such decisions by the Commissioner of Revenue shall be prima facie correct, and a protection to the officers and taxpayers affected thereby. Where the license tax is graduated in this subchapter according to the population, the population shall be the number of inhabitants as determined by the last census of the United States government: Provided, that if any city or town in this State has extended its limits since the last census period, and thereafter has taken a census of its population in these increased limits by an official enumeration, either through the aid of the United States government or otherwise, the population thus ascertained shall be that upon which the license tax is to be graduated.

Whenever the Commissioner of Revenue shall construe any provisions of the revenue laws administered by him and shall issue or publish to taxpayers in writing any regulation or ruling so construing the effect or operation of any such laws, such ruling or regulation shall be a protection to the officers and taxpayers affected thereby and taxpayers shall be entitled to rely upon such regulation or ruling. In the event the Commissioner of Revenue shall change, modify, repeal, abrogate, or alter any such regulation or ruling any taxpayer who has relied upon the construction or interpretation contained in the Commissioner's previous ruling or regulation shall not be liable for any additional assessment on account of any tax not paid by reason of reliance upon such ruling or regulation and which might have accrued prior to the date of the change, modification, repeal, abrogation, or alteration by the Commissioner, and during the effective period of such prior ruling or regulation. Provided, that nothing herein contained shall prevent any such change in construction or interpretation of the provisions of this chapter by the Commissioner of Revenue from being effective from and after

the date of its issuance or promulgation, or the assessment of any tax thereunder. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote the first sentence.

The 1957 amendment added the second paragraph.

Authority of Commissioner to Construe.—

In accord with original. See Dayton

Rubber Co. v. Shaw, 244 N. C. 170, 92 S. E. (2d) 799 (1956).

The construction given a taxing statute by the Commissioner of Revenue will be given consideration by the courts though not controlling. Charlotte Coca-Cola Bottling Co. v. Shaw, 232 N. C. 307, 59 S. E. (2d) 819 (1950).

§ 105-266. **Overpayment of taxes to be refunded with interest.**—If the Commissioner of Revenue discovers from the examination of any return, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interest and costs if any), such overpayment if the amount of three dollars (\$3.00) or more, shall be refunded to the taxpayer within sixty (60) days after it is ascertained together with interest thereon at the rate of four per cent (4%) per annum; provided, that interest on any such refund shall be computed from a date ninety (90) days after the date the tax was originally paid by the taxpayer. If said overpayment is less than three dollars (\$3.00) said overpayment shall be refunded as aforesaid but only upon receipt by the Commissioner of Revenue of a written demand for such refund from the taxpayer. Provided, however, that no overpayment shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three (3) years from the date set by the statute for the filing of the return or within six (6) months of the payment of the tax alleged to be an overpayment, whichever date is the later. The provisions of this paragraph shall not apply to interest required under G. S. 105-267. (1939, c. 158, s. 937; 1941, c. 50, s. 10; 1947, c. 501, s. 9; 1949, c. 392, s. 6; 1951, c. 643, s. 9; 1957, c. 1340, s. 14.)

Editor's Note.—

The 1957 amendment rewrote this section as changed by the 1951 amendment.

§ 105-266.1. **Refunds of overpayment of taxes.**—(a) Any taxpayer may apply to the Commissioner of Revenue for refund of tax or additional tax paid by him at any time within three years after the date set by the statute for the filing of the return or application for a license or within six months from the date of payment of such tax or additional tax, whichever is later. The Commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly. The Commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due.

(b) The provisions of G. S. 105-241.1, 105-241.2, 105-241.3 and 105-241.4 with respect to review and appeal shall apply to the tax for which refund is demanded under this section.

(c) Within ninety days after notification of the Commissioner's decision with respect to a demand for refund of any tax or additional tax under this section any taxpayer aggrieved thereby, in lieu of petitioning for administrative review by the Tax Review Board under G. S. 105-241.1, may bring a civil action against the Commissioner of Revenue for recovery of the alleged overpayment in the Superior Court of Wake County, or in the superior court of the county in which the taxpayer resides, if the alleged overpayment exceeds \$200.00, and if \$200.00 or less, in any State court of competent jurisdiction in Wake County. If upon trial it shall be determined that there has been any overpayment of tax or additional tax, judgment shall be rendered therefor, with interest, and the same shall be refunded by the State.

(d) Either party may appeal to the Supreme Court from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that the Commissioner, if he should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal.

(e) Nothing in this section shall be construed to conflict with or supersede the provisions of G. S. 105-241.2, and, with respect to tax paid to the Commissioner of Revenue, the rights granted by this section are in addition to the rights provided by G. S. 105-267. (1957, c. 1340, s. 10.)

§ 105-267. Taxes to be paid; suits for recovery of taxes.—No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within thirty days after payment, the taxpayer may demand a refund of the tax paid in writing from the Commissioner of Revenue of the State, if a State tax, or if a county, city or town tax, from the treasurer thereof for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue the Commissioner of Revenue or the county, city or town, as the case may be, in the courts of the State for the amount so demanded. Such suit, if against the State Commissioner of Revenue, must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides, if the sum demanded is upwards of two hundred dollars (\$200.00), and if for two hundred dollars (\$200.00) or less, before any State court of competent jurisdiction in Wake County. If for a county, city or town tax, suit must be brought in a State court of competent jurisdiction in the county where the tax is collectible, and the defendant official has his official residence. If upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of State taxes for which judgment shall be rendered in such action shall be refunded by the State: Provided, nothing in this section shall be construed to conflict with or supersede the provisions of G. S. 105-241.2. (1939, c. 158, s. 936; 1955, c. 1350, s. 15; 1957, c. 1340, s. 10.)

Editor's Note.—The 1955 amendment added the proviso at the end of this section.

The 1957 amendment rewrote the second and third sentences.

Strict Compliance Necessary. — Strict compliance with the provisions of this section is necessary. *Victory Cab Co. v. Charlotte*, 234 N. C. 572, 68 S. E. (2d) 433 (1951).

Where payments were not made under protest, nor the mandatory provisions of this section otherwise complied with, the taxpayer is not entitled to recover for the excess fees paid. *Victory Cab Co. v. Charlotte*, 234 N. C. 572, 68 S. E. (2d) 433 (1951).

This section provides the sole remedy of a taxpayer to determine his liability for a sales tax; he may not maintain an action under the Declaratory Judgment Act to determine his liability therefor, since the

State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act to adjudicate his tax liability under the sales tax statute. *Buchan v. Shaw*, 238 N. C. 522, 78 S. E. (2d) 317 (1953).

Where the plaintiffs complied with the provisions of this section in respect to the fees paid for a particular year, they are entitled to recover back the excess portion of the fees paid for that year. *Victory Cab Co. v. Charlotte*, 234 N. C. 572, 68 S. E. (2d) 433 (1951).

Where the Commissioner of Revenue assesses additional income tax in accordance with § 105-160 and has the certificate filed in the county in which the taxpayer has property for the purpose of creating a lien under § 105-242(3) the taxpayer may not move in such county to vacate and set aside the certificate on the ground of irregularity or invalidity, no execution hav-

ing been issued thereon nor any effort made to enforce the lien, but the taxpayer is remitted to the statutory remedies given him to contest the assessment or attack its validity. *Gill v. Smith*, 233 N. C. 50, 62 S. E. (2d) 544 (1950).

Commissioners who were directed by a consent judgment to sell land and pay the taxes lawfully due thereon and distribute

the remaining proceeds as provided in the judgment could not tender only the taxes which were in fact lawfully due, but were compelled by this section to pay the entire amount demanded by the county, and then sue for the recovery of so much of the tax paid as was not lawfully due. *Rand v. Wilson County*, 243 N. C. 43, 89 S. E. (2d) 779 (1955).

§ 105-269.1. Local authorities authorized to furnish office space.—Boards of county commissioners and governing boards of cities and towns are hereby fully authorized and empowered to furnish adequate and suitable office space for field representatives of the Department of Revenue upon request of the Commissioner of Revenue, and are hereby authorized and empowered to make necessary expenditures therefor. (1951, c. 643, s. 9.)

§ 105-269.2. Tax Review Board.—The Director of the Department of Tax Research, ex officio, the State Treasurer, ex officio, and the chairman of the Utilities Commission, ex officio, are hereby constituted the Tax Review Board. Provided, that for the purposes stated in G. S. 105-122 and 105-134, and for those purposes only, the Commissioner of Revenue, ex officio, shall also be a member of said Board. The State Treasurer, ex officio, shall be chairman of the Board.

The chairman or any two members, upon five days' notice, may call a meeting of the Board; provided, any member of the Board may waive notice of a meeting and the presence of a member of the Board at any meeting shall constitute a waiver of the notice of said meeting. A majority of the members of the Board shall constitute a quorum, and any act or decision of a majority of the members shall constitute an act or decision of the Board, except for the purposes and under the conditions of the provisions of G. S. 105-122 and 105-134.

The Tax Review Board may employ a secretary and such clerical assistance as it deems necessary for the proper performance of its duties. All expenses of the Board shall be paid from sums appropriated from the contingency and emergency fund to the use of said Board. If the full time of such secretary and clerical staff should not be needed in connection with the duties of such Board, such secretary and staff can be assigned by the Board to other duties related to the tax program of the State.

The regular sessions of the Tax Review Board shall be held in the city of Raleigh at the offices provided for the Board by the Superintendent of Public Buildings and Grounds. The Board may in its discretion, hold other meetings at any place in the State. (1953, c. 1302, s. 7; 1955, c. 1350, s. 1.)

Editor's Note.—The 1955 amendment. For brief comment on this section, see effective July 1, 1955, rewrote this section. 31 N. C. Law Rev. 441.

SUBCHAPTER II. ASSESSMENT, LISTING AND COLLECTION OF TAXES.

ARTICLE 11.

Short Title and Definitions.

§ 105-272. Definitions.

Leasehold Estate.—A lease is a chattel real, and as such is a species of intangible personal property. However the value of a leasehold estate is subject to ad valorem

tax and not to the State intangible tax. *Bragg Investment Co. v. Cumberland County*, 245 N. C. 492, 96 S. E. (2d) 341 (1957).

ARTICLE 12.

State Board of Assessment.

§ 105-275. **Duties of the Board.**—The State Board of Assessment shall exercise general and specific supervision of the systems of valuation and taxation throughout the State, including counties and municipalities, and in addition it shall be and constitute a State Board of Equalization and Review of valuation and taxation in this State. It shall be the duty of said Board:

(1) To confer with and advise boards of county commissioners, tax supervisors, assessing officers, list takers, and all others engaged in the valuation and assessment of property, in the preparation and keeping of suitable records, and in the levying and collection of taxes and revenues, as to their duties under this subchapter or any other act passed with respect to valuation of property, assessing, levying or collection of revenue for counties, municipalities and other subdivisions of the State, to insure that proper proceedings shall be brought to enforce the statutes pertaining to taxation and for the collection of penalties and liabilities imposed by law upon public officers, officers of corporations, and individuals failing, refusing or neglecting to comply with this subchapter; and to call upon the Attorney General or any prosecuting attorney in the State to assist in the execution of the powers herein conferred.

(2) To prepare a pamphlet or booklet for the instruction of the boards of county commissioners, tax supervisors, assessing officers, list takers, and all others engaged in the valuation of property, preparing and keeping records, and in the levying and collecting of taxes and revenue, and have the same ready for distribution at least thirty (30) days prior to the date fixed for listing taxes. The said pamphlet or booklet shall, in as plain terms as possible, explain the proper meaning of this subchapter and the revenue laws of this State; shall call particular attention to any points in the law or in the administration of the laws which may be or which have been overlooked or neglected; shall advise as to the practical working of the revenue laws and the Machinery Act, and shall explain and interpret any points that seem to be intricate and upon which county or State officers may differ.

(3) To hear and to adjudicate appeals from boards of county commissioners and county boards of equalization and review as to property liable for taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, to investigate the same, and if error, inequality, or fraud is found to exist, to take such proceedings and to make such orders as to correct the same. In case it shall be made to appear to the State Board of Assessment that any tax list or assessment roll in any county in this State is grossly irregular, or any property is unlawfully or unequally assessed as between individuals, between sections of a county, or between counties, the said Board shall correct such irregularities, inequalities and lack of uniformity, and shall equalize and make uniform the valuation thereof upon complaint by the board of county commissioners under rules and regulations prescribed by it, not inconsistent with this subchapter: Provided, that no appeals shall be considered or fixed values changed unless notice of same is filed within sixty (60) days after the final values are fixed and determined by the board of county commissioners or the board of equalization and review, as hereinafter provided: Provided, further, that each taxpayer or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the State Board of Assessment.

(4) To report to the General Assembly at each regular session, or at such other times as it may direct, the proceedings of the Board under subchapters II and III and such other information and recommendations concerning the public revenues as required by the General Assembly or that may be of public interest.

Such reports, in the interest of up-to-date information, need not be printed, but shall be made available in a reasonably durable form.

(5) To discharge such other duties as may be prescribed by law, and take such action, do such things, and prescribe such rules and regulations as may be needful and proper to enforce the provisions of this subchapter and the Revenue Act.

(6) To prepare for the legislative committee of succeeding general assemblies such suggestions of revision of the revenue laws, including the Machinery Act, as it may find by experience, investigation, and study to be expedient and wise.

(7) To report to the Governor, on or before the first day of January of each year, the proceedings of said Board during the preceding year, with such recommendations as it desires to submit with respect to any matters touching taxation and revenue.

(8) To keep full, correct and accurate records of its official proceedings.

(9) To properly administer the duties prescribed by Schedule H, §§ 105-198 to 105-217, with respect to division and certification of taxes collected thereunder; the State Board of Assessment shall hear and pass upon any matters relative thereto.

(10) To perform the duties imposed upon it with respect to the classification and assessment of property. (1939, c. 310, s. 202; 1955, c. 1350, s. 10.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, deleted former subsections (4), (5) and (6) and renumbered the remaining subsections in proper numerical order. It also rewrote former subsection (7) now subsection (4).

§ 105-276. Powers of the Board.

(6) The Board shall make available personally to the tax supervisors or county board of commissioners any information contained in any report to said State Board, or in any report to the Department of Revenue or other State department to which said State Board may have access, or any other information which said State Board may have in its possession which may assist said supervisors or commissioners in securing an adequate listing of property for taxation or in assessing taxable property. Provided, that the State Board of Assessment may, upon written application of any county tax supervisor or person performing the function of county tax supervisor and approval by the chairman of the board of county commissioners, mail to such county tax supervisor an abstract of information contained in any of such reports relevant to the discovery or assessment of any taxable property of any taxpayers of the county listed in such application.

Except as herein specified, and except to the Governor or his authorized agent or solicitor or authorized agent of the solicitor of a district in which such information would affect the listing or valuation of property for taxes, the State Board shall not divulge or make public the reports made to it or to other State departments. Provided, this shall not interfere with the publication of assessments and decisions made by said Board or with publication of statistics by said Board; nor shall it prevent presentation of such information in any administrative or judicial proceedings involving assessments or decisions of said Board.

Information transmitted or made available to local tax authorities under this section shall not be divulged or published by such authorities, and shall be used only for the purposes of securing adequate tax lists, assessing taxable property and presentation in administrative or judicial proceedings involving such lists or assessments.

(1951, c. 798.)

Editor's Note.—

The 1951 amendment, effective July 1, 1951, added the proviso to the first para-

graph of subsection (6). As only this subsection was affected by the amendment the rest of the section is not set out.

ARTICLE 13.

*Quadrennial and Annual Assessment.***§ 105-278. Listing and assessing in quadrennial years.**

Provided, further, that the boards of commissioners of the various counties of the State may, in their discretion, defer or postpone revaluation and reassessment of real property for the years 1951 and 1952. Provided, further, that the boards of commissioners of the various counties of the State may, in their discretion, defer or postpone revaluation and reassessments of real property for the years 1953 and 1954. Provided, further, that the boards of commissioners of the various counties of the State may, in their discretion, defer or postpone revaluation and reassessments of real property for the years 1955 and 1956. Provided, further, that the boards of commissioners of the various counties of the State may, in their discretion, defer or postpone revaluation and reassessments of real property for the years 1957 and 1958. Whenever revaluation is had, same may be by horizontal increase or reduction or by actual appraisal thereof, or both. (1939, c. 310, s. 300; 1941, c. 282, ss. 1, 1½; 1943, c. 634, s. 1; 1945, c. 5; 1947, c. 50; 1949, c. 109; 1951, c. 847; 1953, c. 395; 1955, c. 1273; 1957, c. 1453, s. 1.)

Local Modification.—

Alamance: 1953, c. 188, and 1957, c. 533; Bertie: 1953, c. 1026, and 1955, c. 326; Burke: 1957, c. 781; Camden: 1957, c. 354; Caswell: 1957, c. 890; Catawba: 1957, c. 156; Dare: 1957, c. 465; Davidson: 1953, c. 598; Franklin: 1957, c. 966; Greene: 1953, c. 330, and 1953, c. 395; Halifax: 1953, c. 359, and 1957, c. 669; Hertford: 1957, c. 528; Iredell: 1957, c. 838; Johnston: 1957, c. 462; Lee: 1953, c. 743, and 1957, c. 118, 272; Mecklenburg: 1957, c. 711; Mitchell: 1953, c. 86, and 1957, c. 650; Montgomery: 1957, c. 622; Nash: 1957, c. 733; Onslow: 1953, c. 623; Pasquotank: 1953, c. 624, and 1957, c. 1164; Pender: 1957, c. 536; Randolph: 1951, c. 297, 1953, c. 892, 1955, c.

719, and 1957, c. 853; Rockingham: 1957, c. 670; Rowan: 1953, c. 186, and 1957, c. 409; Scotland: 1951, c. 192; Stokes: 1957, c. 270; Surry: 1957, c. 52; Union: 1957, c. 195; Warren: 1957, c. 1321; Wayne: 1957, c. 381.

Editor's Note.—

The 1951, 1953, 1955 and 1957 amendments, respectively, added the provisos shown above, and each amendment re-enacted the last sentence. As the rest of the section was not changed it is not set out.

The 1957 amendatory act further provided that it should not apply to Bertie and Wake counties, nor repeal any local acts.

§ 105-279. Listing and assessing in years other than quadrennial years.—In the year one thousand nine hundred thirty-nine and in other than quadrennial years all property, real and personal, subject to taxation, shall be listed for ad valorem tax purposes. Property not subject to reassessment in such years shall be listed at the value at which it was assessed at the last quadrennial assessment. In all such years the following property shall be assessed or reassessed:

(1) All personal property (which for purposes of taxation shall include all personal property whatsoever, tangible or intangible, except personal property expressly exempted by law).

(2) All machinery, service station equipment, merchandise and trade fixtures, barber shop equipment, meat market equipment, restaurant and cafe fixtures, drugstore equipment and similar property not permanently affixed to the real estate.

(3) All real property (which for purposes of taxation shall include all lands within the State and all buildings and fixtures thereon and appurtenances there-to) which:

(a) Was not assessed at the last quadrennial assessment.

(b) Has increased in value to the extent of more than one hundred dollars (\$100.00) by virtue of improvements or appurtenances (other than those listed in G. S. 105-294) added since the last assessment of such property.

(c) Has decreased in value to the extent of more than one hundred dollars (\$100.00) by virtue of improvements or appurtenances (other than those listed in G. S. 105-294) damaged, destroyed, or removed since the last assessment of such property.

(d) Has increased or decreased in value to the extent of more than one hundred dollars (\$100.00) by virtue of circumstances other than general economic increases or decreases since the last assessment of such property. In each such case the facts in connection with the increase or decrease in value of the specific tract, parcel, or lot shall be found by the Board of Equalization and entered upon the proceedings of said Board.

(e) Has been subdivided into lots located on streets already laid out and open for travel, and sold or offered for sale as lots, since the date of the last assessment of such property. Provided, that where lands have been subdivided into lots, and more than five acres of any such subdivision remain unsold by the owner thereof, the unsold portion may be listed as land acreage in the discretion of the tax supervisor. The provisions of this subsection shall apply to all cases of subdivision into lots, regardless of whether the land is situated within or without an incorporated municipality.

(f) Was last assessed at an improper figure as the result of a clerical error.

(g) Was last assessed at an improper figure as the result of an error in the listing of the number of acres in the tract or parcel or in the listing of the dimensions of the lot. In each such case the facts in connection with the error shall be found by the Board of Equalization and entered upon the proceedings of said board.

(h) Was last assessed at a figure which (when compared with the assessment placed upon similar property in the county) was manifestly unjust at the time so assessed: Provided, that the power to reassess under this subdivision shall be exercised only by the Board of Equalization and Review, subject to appeal to the State Board of Assessment; provided, further, that no reassessment under the powers granted by this section shall be retroactive beyond the current year. (1939, c. 310, s. 301; 1955, c. 901.)

Local Modification.—Guilford, as to subsection (2): 1953, c. 345.

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote subsection (2).

tion (3).
Quoted, as to subsection (1), in *Bragg Investment Co. v. Cumberland County*, 245 N. C. 492, 96 S. E. (2d) 341 (1957).

§ 105-280. Date as of which assessment is to be made.

Cited in *Bragg Investment Co. v. Cumberland County*, 245 N. C. 492, 96 S. E. (2d) 341 (1957).

§ 105-281. Property subject to taxation.

All property privately owned within this State is subject to taxation unless exempt by strict construction of pertinent statute. *Bragg Investment Co. v. Cumberland County*, 245 N. C. 492, 96 S. E. (2d) 341 (1957).

Structures and improvements, together with stoves and refrigerators, placed by lessee on lands within a military reserva-

tion leased from the federal government, are subject to taxation by the county in which the property is situate, the improvements as realty, and the stoves and refrigerators as tangible personal property. *Bragg Investment Co. v. Cumberland County*, 245 N. C. 492, 96 S. E. (2d) 341 (1957).

ARTICLE 14.

Personnel for County Tax Listing and Assessing.

§ 105-283. Appointment and qualifications of tax supervisors.—At or before the regular meeting on the first Monday in December, 1953, the board of county commissioners of each county shall appoint a county tax supervisor to

serve for one year. At or before the regular meeting on the first Monday in December, 1954, the board of county commissioners of each county shall appoint a county tax supervisor to serve until the first Monday in July, 1955. At the regular meeting of each board of county commissioners on the first Monday in July, 1955, and biennially thereafter, each board of commissioners shall appoint a county tax supervisor to serve for two years. All such appointments shall be subject to the provisions of G. S. 105-284 concerning holding over until a successor has been appointed and has qualified and concerning removal for cause.

In appointing a county tax supervisor, each board of county commissioners shall select some person who shall, for one year immediately preceding the appointment, have been a resident of the county, and whose experience in the appraisal and valuation of real and personal property is satisfactory to the said board.

In lieu of appointing a county tax supervisor, the board of commissioners may impose the duties and responsibilities of that position as outlined in this chapter upon the county accountant, auditor, all time chairman of the board of county commissioners, or other similar county official. (1939, c. 310, s. 400; 1953, c. 970, s. 1.)

Editor's Note. — The 1953 amendment rewrote this section.

§ 105-284. Term of office and compensation of tax supervisors.— Subject to the provisions of G. S. 105-283 concerning the appointments of tax supervisors to be made on the first Monday in December, 1953, and on the first Monday in December, 1954, the tax supervisor shall serve for two years, and until his successor is appointed and has qualified. The board of county commissioners may remove the tax supervisor at any time for cause. Any vacancy shall be filled by the board of county commissioners by appointment of a tax supervisor to serve for the period of the unexpired term of the vacating supervisor.

The compensation of the county tax supervisor shall be fixed by the board of county commissioners, and he shall be allowed such expenses as the commissioners may approve. (1939, c. 310, s. 401; 1953, c. 970, s. 2.)

Editor's Note. — The 1953 amendment rewrote this section.

§ 105-286. Powers and duties of tax supervisor.

(3) He shall, at any time following the appointment of list takers and assessors as prescribed by G. S. 105-287, but not later than the week preceding the date as of which property is to be assessed, convene the list takers and assessors for general instruction in methods of securing a complete list of all property in the county, and of assessing, in accordance with law, all property which is to be assessed during the approaching listing period.

(1957, c. 202.)

Editor's Note.— The 1957 amendment section was changed the rest of the section rewrote subsection (3). As only this subsection is not set out.

§ 105-287. Appointment, qualifications, and number of list takers and assessors.— Subject to the approval of the county commissioners, the supervisor, on or before the second Monday preceding the date as of which property is to be assessed, shall appoint some competent person to act as list taker and assessor in each township. With the approval of the commissioners the supervisor may appoint more than one such person for any township. If more than one list taker is appointed for a township, the supervisor, with the approval of the county commissioners, shall have power to allocate responsibility for tax listing and assessment between or among the list takers for that township as he deems most effective. In quadrennial years three such persons shall be appointed in each township, and more than three may be appointed in townships in which is located an incorporated town or part of an incorporated town; and in such

years, at the time of their appointment, such appointees shall have been residents of the county for at least twelve months: Provided, that in any county adopting the horizontal method of revaluations in one thousand nine hundred forty-one, and quadrennially thereafter, the commissioners may appoint less than three list takers and assessors per township: Provided, further, that in quadrennial years the board of county commissioners may appoint one list taker and assessor in each township if in addition thereto at least two county-wide list takers and assessors are appointed; or said board may appoint not more than three qualified assessors to assess all real estate in the county. In every year the persons appointed shall be persons of character and integrity, and shall have such experience in the valuation of types of property commonly owned in the county as shall satisfy the supervisor and the commissioners. (1939, c. 310, s. 404; 1953, c. 970, s. 3; 1955, c. 1012, s. 1.)

Editor's Note. — The 1953 amendment substituted "residents" for "resident free-holders" in the fourth sentence.

1955, inserted the present second and third sentences in lieu of the former second sentence.

The 1955 amendment, effective July 1,

§ 105-290. Powers and duties of list takers and assessors.

(4) Each list taker and assessor shall have power to subpoena any person for examination under oath whenever he has reasonable grounds for belief that such person has knowledge which is pertinent to the discovery or valuation of property subject to taxation in his township or which is necessary for compliance with the requirements, hereinafter set forth, as to what the tax list shall contain. The subpoena shall be signed by the chairman of the county board of equalization and served by an officer qualified to serve subpoenas.

(1953, c. 970, s. 4.)

Editor's Note. — The 1953 amendment added the second sentence of subsection (4). As the rest of the section was not

affected by the amendment only this subsection is set out.

§ 105-292. Assistant tax supervisors and clerical assistants.—The board of county commissioners may, in their discretion, upon the recommendation of the tax supervisor, appoint one or more assistant tax supervisors and employ such clerical assistants to the tax supervisor as they deem proper. The board of county commissioners may delegate to assistant tax supervisors appointed under this section responsibility for real property appraisal, the listing and appraisal of business property, or such other duties as they deem advisable. Clerical assistants shall perform such duties as may be assigned them by the tax supervisor. Assistant tax supervisors and clerical assistants shall be appointed or employed and compensated for such terms as the county commissioners deem proper.

The provisions of this section shall not apply to the following counties: Alleghany, Ashe, Avery, Buncombe, Caldwell, Catawba, Cherokee, Duplin, Franklin, Granville, Halifax, Hoke, McDowell, Martin, Perquimans, Randolph, Transylvania, and Watauga. (1939, c. 310, s. 409; 1955, c. 866.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote this section

and added the provisions relating to assistant tax supervisors.

ARTICLE 15.

Classification, Valuation and Taxation of Property.

§ 105-294. Taxes to be on uniform ad valorem basis as to class.—All property, real and personal, shall as far as practicable, be valued at its true value in money, and taxes levied by all counties, municipalities and other local taxing authorities shall be levied uniformly on valuations so determined. The intent and purpose of this subchapter is to have all property and subjects of taxation assessed at their true and actual value in money, in such manner as such

property and subjects are usually sold, but not by forced sale thereof, and the words "market value," "true value," or "cash value," whenever used in the tax laws of this State, shall be held to mean for what property and subjects can be transmuted into cash when sold in such manner as such property and subjects are usually sold: Provided, nothing in this section shall be construed as conflicting with or modifying the provisions of Schedule H, §§ 105-198 to 105-217, or the provisions of this subchapter classifying other property.

It is hereby declared to be the policy of this State so to use its system of real estate taxation as to encourage the conservation of natural resources and the beautification of homes and roadsides, and all tax assessors are hereby instructed that in assessing real estate under the provisions of G. S. 105-279 they shall make no increase in the tax valuation of real estate as a result of the owner's enterprise in adopting any one or more of the following progressive policies:

1. Planting and care of lawns, shade trees, shrubs and flowers for noncommercial purposes.

2. Repainting buildings.

3. Terracing or other methods of soil conservation, to the extent that they preserve values already existing.

4. Protection of forests against fire.

5. Planting of forest trees on vacant land for reforestration purposes (for ten years after such planting).

It is hereby declared to be the policy of this State to use its system of real estate taxation in such manner as to encourage the conservation of natural resources and the abatement and prevention of water pollution, and all tax assessors are hereby instructed that in assessing real estate under the provisions of G. S. 105-279 they shall make no increase in the tax valuation of real estate as the result of the owner's enterprise in installing or constructing waste disposal or water pollution abatement plants, including waste lagoons, or equipment, upon the condition that a certificate is furnished to the tax supervisor of the county, wherein such property is located, by the State Stream Sanitation Committee, certifying that said Committee has found as a fact that the waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Committee with respect to such plants or equipment, that such plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the State Stream Sanitation Committee, and that the primary purpose thereof is to reduce water pollution resulting from the discharge of sewage and waste and not merely incidental to other purposes and functions. (1939, c. 310, s. 500; 1953, c. 970, s. 5; 1955, c. 1100, s. 2.)

Editor's Note. — The 1953 amendment therein. The 1955 amendment added the last paragraph preceding the numbered listing paragraph.

§ 105-294.2. Peanuts; year following year in which grown.—Peanuts shall be taxed uniformly as a class in the year following the year in which such peanuts are grown at not less than twenty per cent (20%) nor more than sixty per cent (60%) of the rate levied for all purposes upon real estate and other tangible personal property by or for said county and the city, town, or special district, if any, in which such peanuts are listed for taxation. The amount of the percent of the tax rate to be applicable to such peanuts as herein provided shall be fixed each year for the succeeding year by the county board of commissioners not later than the time of the first September meeting of said board. (1955, c. 697, s. 1.)

Editor's Note.—Section 3 of the act inserting this section provides that it shall apply with respect to all ad valorem taxes on peanuts, as specified above, becoming due after April 27, 1955.

ARTICLE 16.

*Exemptions and Deductions.***§ 105-296. Real property exempt.**

(1) Real property owned by the United States or this State, and real property owned by the State for the benefit of any general or special fund of the State, and real property lawfully owned and held by counties, cities, townships, rural fire protection districts, or school districts, used wholly and exclusively for public or school purposes. The repeal of the exemption of real property indirectly owned by federal, State, or local governments shall be effective for the tax year 1943, and such property indirectly owned shall be placed upon the tax books for 1943 and subject to the tax rates levied on real estate in the year 1943.

(11) Real property, or so much thereof, which is used exclusively for waste disposal or water pollution abatement plants, including waste lagoons, designed to abate, reduce, or prevent pollution of water. This exemption is allowed only upon the condition that a certificate is furnished to the tax supervisor of the county, wherein such property is located, by the State Stream Sanitation Committee, certifying that said Committee has found as a fact that the waste treatment plant, including waste lagoons, or pollution abatement equipment above described has been constructed or installed thereon and that such plant or equipment complies with the requirements of said Committee with respect to such plants or equipment, that such plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the State Stream Sanitation Committee, and that the primary purpose thereof is to reduce water pollution resulting from the discharge of sewage and waste and not merely incidental to other purposes and functions. The exemption herein provided for shall be applicable only with respect to taxes levied in 1955 and subsequent years. (1939, c. 310, s. 600; 1941, c. 125, ss. 1, 2; 1943, c. 634, s. 2; 1945, c. 995, s. 2; 1955, c. 230, s. 1; c. 1100, s. 2.)

Local Modification.—Pitt: 1955, c. 113.
Editor's Note.—

The first 1955 amendment, effective July 1, 1955, inserted "rural fire protection districts" in the first sentence of subsection (1). The second 1955 amendment added subsection (11). As the rest of the section was not changed by the amendments, only subsections (1) and (11) are set out.

The property of a cemetery association is exempt from ad valorem taxes by virtue of subsection 2. Raleigh Cemetery Ass'n

v. Raleigh, 235 N. C. 509, 70 S. E. (2d) 506 (1952).

But this section does not authorize the exemption of such property from a local improvement assessment made pursuant to and in conformity with the law authorizing such assessment. No land in a municipality is exempt from assessment for local improvements. Raleigh Cemetery Ass'n v. Raleigh, 235 N. C. 509, 70 S. E. (2d) 506 (1952). See § 160-85(4). See also annotations under Art. V, § 5, N. C. Const.

§ 105-296.1. Timberland owned by State.—Any State department or agency owning timberland or leasing, controlling or administering timberland owned by the State, shall pay to each county in which said timberland is situated an amount equal to ten per cent (10%) of proceeds of the gross sales of trees, timber, pulpwood, and any forest products from said timberland, and said funds shall, when received, be placed in the account of the county general fund. Where the said timberland consists of a tract situated in more than one county and the timber, trees, pulpwood, or forest products are sold, or cut, removed and sold from the entire tract, then the percentage of gross sales as herein prescribed shall be divided and paid to said county boards on the basis of the acreage located in the respective counties: Provided, this section shall not apply to the proceeds of sale of trees, timber, pulpwood, or forest products paid to or received by the State Board of Education, or any other State educational institution, or the North Carolina Department of Agriculture from its research stations and experimental

farm lands; provided, further, that where State forests are held, leased, or administered by the Prison Department, or as held, leased or administered by the Department of Conservation and Development as provided by G. S. 113-34, said departments, instead of payment as above prescribed, may elect permanently to subject such State forests to county taxes assessed on the same basis as are private lands, and pay said taxes from the proceeds of revenue received and collected by said departments to the board of county commissioners of the county in which said forest is situated, but all fire towers, buildings and all other permanent improvements shall be exempt from assessment. Provided that the provisions of this section shall not apply to lands under the control of The Hospitals Board of Control. (1957, c. 988, s. 1.)

Editor's Note.—The act inserting this section is effective as of January 1, 1958.

§ 105-297. Personal property exempt.

(1) Personal property, directly or indirectly owned by this State and by the United States, and that lawfully owned and held by the counties, cities, towns, rural fire protection districts, and school districts of the State, used wholly and exclusively for county, city, town, fire protection district, or public school purposes.

(15) All cotton while subject to transit privileges under Interstate Commerce Commission Tariffs.

(16) Sewage and waste treatment facilities, and water pollution abatement equipment designed to abate, reduce, or eliminate water pollution. This exemption shall be allowed only upon the condition that a certificate is furnished to the tax supervisor of the county, wherein such property is located, by the State Stream Sanitation Committee, certifying that said Committee has found as a fact that the waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Committee with respect to such plants or equipment, that such plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval or other document of approval issued by the State Stream Sanitation Committee, and that the primary purpose thereof is to reduce water pollution resulting from the discharge of sewage and waste and not merely incidental to other purposes and functions. The exemption herein provided for shall be applicable only with respect to taxes levied in 1955 and subsequent years.

(17) All cotton, tobacco and other farm products, and all goods, wares and merchandise, held for shipment to any foreign country, or held or stored after being imported from a foreign country awaiting further shipment, in the seaport terminals at Morehead City or Wilmington, or within ten (10) miles of such ports or terminals, shall be exempt from taxation. Provided that the provisions of this subsection shall not apply to any products, goods, or merchandise which are stored for more than twelve months. (1939, c. 310, s. 601; 1941, c. 125, ss. 3, 4; c. 221, s. 2; 1945, c. 995, s. 3; 1949, cc. 132, 1268; 1955, c. 230, s. 2; c. 1069, s. 1; c. 1100, s. 2; c. 1356.)

Local Modification.—Harnett: 1957, c. 1139; Pitt: 1955, c. 709; Wake: 1955, c. 192.

Editor's Note.—

The first 1955 amendment, effective July 1, 1955, rewrote subsection (1) so as to exempt property of rural fire protection

districts. The second 1955 amendment added subsection (15). The third 1955 amendment added subsection (16), and the fourth 1955 amendment added subsection (17). As the rest of the section was not changed, only subsections (1) and (15) to (17) are set out.

ARTICLE 18.

Personal Property—Where and in Whose Name Listed.

§ 105-302. **Place for listing tangible personal property.** — (1) Except as otherwise provided in this section, all tangible personal property and polls shall be listed in the township in which the owner thereof has his residence. For purposes of this section the residence of a person who has two or more places in which he occasionally dwells shall be the place at which he resided for the longest period of time during the year preceding the date as of which property is assessed; provided, that household and kitchen furniture and other tangible personal property kept or used in connection with any temporary or seasonal residence, either owned or leased by the owner of such personal property, shall be listed in the township in which such temporary or seasonal residence is located, and all such property kept or used in connection with any rental real estate shall be listed in the township where such rental real estate is located. The residence of a corporation, partnership or unincorporated association, domestic or foreign, shall be the place of its principal office in this State, and if a corporation, partnership or unincorporated association has no principal office in this State, its tangible personal property may be listed at any place at which said property is situated provided said property has a taxable situs within the State.

(4) Subject to the provisions of subsection (2) of this section, tangible personal property shall be listed in the township in which such property is situated, rather than in the township in which the owner resides, if the owner or person having control thereof hires or occupies a store, mill, dockyard, piling ground, place for the sale of property, shop, office, mine, farm, place for storage, manufactory or warehouse therein for use in connection with such property. Property stored in public warehouses and merchandise in the possession of a consignee or broker shall be regarded as falling within the provisions of this subsection. When tangible personal property, which may be used by the public generally or which is used to sell or vend merchandise to the public, is placed at or on a location outside of the township in which the owner or lessor has his residence, such tangible personal property shall be listed for taxation in the township where located.

(1951, c. 1102, s. 1; 1955, c. 1012, ss. 2, 3.)

Local Modification.—Caswell: 1951, c. 728; Orange: 1951, c. 728; Person: 1951, c. 728.

Editor's Note.—

The 1951 amendment inserted the proviso at the end of the second sentence of

subsection (1). The 1955 amendment, effective July 1, 1955, made changes in subsections (1) and (4). As only these two subsections were changed, the rest of the section is not set out.

ARTICLE 19.

What the Tax List Shall Contain and Miscellaneous Matters Affecting Listing.§ 105-306. **What the tax list shall contain.**

(8) The amount and value of all machinery and fixtures.

(9) A special description of any improvements, having a value in excess of one hundred dollars (\$100.00), which have been begun, erected, damaged or destroyed since the time of the last assessment of such property.

(10) A list of horses, mules, cattle, hogs, sheep, goats, and other livestock, poultry, fowls, and dogs, with the number and value of each class shown separately.

(11) The number of open female dogs and the number of other dogs.

(12) The amount and value of farm machinery, farm utensils, farm tractors, tractor-operated machinery, dairy equipment, sawmills, power mowers, garden tractors, portable irrigation equipment, wagons, and other vehicles.

(13) The amount and value of household and kitchen furniture, libraries,

scientific instruments, tools of mechanics, wearing apparel, and provisions of all kinds.

(14) The amount and value of merchandise, manufactured goods, or goods in the process of manufacture. This subdivision is intended to include all tangible personal property whatever held for the purpose of sale or exchange or held for use in the business of the taxpayer.

(15) The amount and value of all office furniture, fixtures and equipment.

(16) The number and value of all motor vehicles, tractors, trailers, bicycles, flying machines, pleasure boats of any and all kinds, and their appliances.

(17) The number and value of all seines, nets, fishing tackle, boats, barges, schooners, vessels, and all other floating property.

(18) The number and value of billboards and signboards and the value of other property used in outdoor advertising.

(19) The number and value of radios, phonographs, television sets, musical instruments, and home electrical, gas, and mechanical appliances.

(20) The value of plated or silverware, clocks, watches, firearms and jewelry.

(21) The amount and value of all cotton, tobacco or other farm products owned by the original producer, or held by the original producer in any public warehouse and represented by warehouse receipts, or held by the original producer for any co-operative marketing or grower's association, together with a statement of the amount of any advance against said products: Provided, the same need not be listed if grown in the preceding year, and shall not be subject to taxation for the year following the year in which grown, but shall be listed and taxed for any year thereafter.

(22) The amount and value of all other cotton, tobacco or other farm products.

(23) The amount and value of all fertilizer and fertilizer materials.

(24) The value and a description of all other property whatever, not especially exempted by law.

(25) An itemized list of any type of personal property when such itemization is required by the list taker or supervisor.

(26) The oath of the taxpayer hereinafter set forth. (1939, c. 310, s. 900; 1941, c. 221, s. 1; 1953, c. 970, s. 6; 1955, c. 34.)

Local Modification.—Forsyth: 1951, c. 351. (7) was not affected by the amendments that portion is not set out.

Editor's Note.—

The 1953 amendment repealed former subsections (8) and (27), and renumbered the remaining subsections. The 1955 amendment, effective July 1, 1955, made changes in subsections (10), (12) and (19). As the section down through subsection

Cited in *Alexander v. Grove Stone & Sand Co.*, 237 N. C. 251, 74 S. E. (2d) 538 (1953); as to subsections (6), (7), (8) and (24), in *Bragg Investment Co. v. Cumberland County*, 245 N. C. 492, 96 S. E. (2d) 341 (1957).

§ 105-307. Duty to list; penalty for failure.—It shall be the duty of every person, firm or corporation, in whose name any property or poll is to be listed under the terms of this subchapter, to list said property or poll with the proper list taker or the supervisor, within the time allowed by law, on a list setting forth the information required by this subchapter. In addition to all other penalties prescribed by law, any person, firm or corporation whose duty it shall be to list any poll or property, real or personal, who wilfully fails or refuses to list the same within the time allowed by law, or who removes or conceals property for the purpose of evading taxation, shall be guilty of a misdemeanor punishable by a fine not to exceed fifty dollars (\$50.00) or imprisonment not to exceed thirty days; and any person, firm or corporation aiding or abetting the removal or concealment of property for the purpose of evading taxation shall be guilty of a misdemeanor punishable by a fine not to exceed fifty dollars (\$50.00) or im-

prisonment not to exceed thirty days. The failure to list shall be prima facie evidence that such failure was willful. (1939, c. 310, s. 901; 1957, c. 848.)

Editor's Note.—The 1957 amendment rewrote this section.

Cited in *Brown v. Allen*, 244 U. S. 443, 73 S. Ct. 397, 437 (1953).

§ 105-308. Oath of the taxpayer.

Local Modification.—Forsyth: 1951, c. 351.

§ 105-309. Listing by agents.

Local Modification.—Forsyth: 1951, c. 351.

§ 105-310. Listing by mail.

Local Modification.—Forsyth: 1951, c. 351.

§ 105-314.1: Repealed by Session Laws 1953, c. 970, s. 7.

ARTICLE 20.

Special Provisions Affecting Motor Vehicle Owners, Warehousemen, etc.

§ 105-315. Information to be given by motor vehicle owners applying for license tags.—Every motor vehicle owner applying to the State Department of Motor Vehicles for motor vehicle license tags shall specify in the application the county in which each such motor vehicle is subject to ad valorem taxation. If any such vehicle is not subject to ad valorem taxation in any county of this State, such fact, with the reason therefor, shall be stated in the application. No State license tags shall be issued to any applicant until the requirements of this subdivision have been met. The Commissioner of Motor Vehicles shall, upon request from any county, send to the supervisor of such county a list of motor vehicles subject to ad valorem taxation in such county as shown by the Commissioner's records of applications filed during the year preceding the day as of which property is to be assessed, and shall charge the county the actual cost incurred by the Commissioner in the preparation of said list, said amount to be used by the Commissioner as compensation for the preparation of said list. (1939, c. 310, s. 1000; 1941, c. 36, s. 4; 1955, c. 98.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, substituted in the last sentence the words "actual cost incurred by the Commissioner in the preparation of said list" for the words "sum of thirty cents per hundred names for the same."

§ 105-316. Warehouses and co-operative growers' or marketing associations to furnish lists.—(1) Every warehouse company or corporation and every growers' or marketing association receiving for storage cotton, tobacco or other products, commodities or property, and issuing warehouse receipts for same, shall, on the day as of which property is assessed, furnish to the supervisor of the county in which such property is stored a full and complete list of all persons, corporations, partnerships, firms or associations for whom such property is stored, except in cases in which farm produce is stored for its original producer who is a resident of another county in this State, together with the amount of such property stored for each owner and the amount advanced against such property by the warehouse or association. In all cases in which farm produce is stored for its original producer, who is a resident of another county in this State, the names of such producers shall be sent to the supervisors of the respective counties in which such producers reside, together with the amount of such produce stored for them and the amount advanced against such produce by the ware-

house or association. The provisions of this section do not apply to cotton which is exempt from taxation under G. S. 105-297(15).

(1955, c. 1069, s. 2.)

Editor's Note.—The 1955 amendment As subsection (2) was not changed, it is added the last sentence of subsection (1). not set out.

§ 105-317. Reports by consignees and brokers.

The provisions of this section do not apply to cotton which is exempt from taxation under G. S. 105-297(15). (1939, c. 310, s. 1002; 1955, c. 1069, s. 3.)

Editor's Note.—The 1955 amendment this section. As the rest of the section was added the above sentence at the end of not changed it is not set out.

§ 105-318: Repealed by Session Laws 1953, c. 970, s. 8.

§ 105-319: Transferred to § 14-401.7 by Session Laws 1953, c. 970, s. 9.

ARTICLE 21.

Procedure Subsequent to the Close of the Tax Listing Period.

§ 105-323. Making up the tax records.

Local Modification.—Guilford: 1953, c. 690, s. 1.

§ 105-324. Tax receipts and stubs.

Local Modification.—Guilford: 1953, c. 690, s. 2; Mecklenburg, as to paragraph (e): 1955, c. 897; Pitt, as to paragraph (e): 1957, c. 482; city of Charlotte, as to paragraph (e): 1955, c. 897.

§ 105-327. County board of equalization and review.

Local Modification.—Alamance, as to subsection (5): 1957, c. 450; Beaufort, as to subsection (5): 1957, c. 28; Cabarrus, Edgecombe, Guilford, Lee, as to subsection (5): 1957, c. 271; Lincoln, Nash, Person, Warren and Wilkes, as to subsection (7) (d): 1955, c. 1098.

§ 105-331. Discovery and assessment of property not listed during the regular listing period.

Stated in *Rand v. Wilson County*, 243 N. C. 43, 89 S. E. (2d) 779 (1955).

ARTICLE 22.

Assessment Procedure of Cities and Towns.

§ 105-333. Tax lists and assessment powers of cities and towns.

Cited in *Bowie v. West Jefferson*, 231 N. C. 408, 57 S. E. (2d) 369 (1950).

§ 105-334. Cities and towns situated in more than one county.

Local Modification. — Town of Whitakers: 1957, c. 1311. Stated in *Bowie v. West Jefferson*, 231 N. C. 408, 57 S. E. (2d) 369 (1950).

ARTICLE 23.

Reports to the State Board of Assessment and Local Government Commission.

§ 105-336. Clerks of cities and towns to furnish information.

Cited in *Brown v. Allen*, 244 U. S. 443, 73 S. Ct. 397, 437 (1953).

ARTICLE 24.

*Levy of Taxes and Penalties for Failure to Pay Taxes.***§ 105-339. Levy of taxes.**

Cited in *Holt v. May*, 235 N. C. 46, 68 S. E. (2d) 775 (1952); *Brown v. Allen*, 244 U. S. 443, 73 S. Ct. 397, 437 (1953).

§ 105-340. Date as of which lien attaches.—(a) The lien of taxes levied on property and polls listed pursuant to this subchapter shall attach to all real property of the taxpayer in the taxing unit as of the day as of which property is listed, regardless of the time at which liability for the tax may arise or the exact amount thereof be determined. All penalties, interest and costs allowed by law shall automatically be added to the amount of such lien and shall be regarded as attaching at the same time as the lien for the principal amount of the taxes.

(b) Taxes, interest, penalties and costs shall be a lien on personal property from and after levy or attachment and garnishment of such property; provided, however, that the lien of taxes levied on the stock of goods and fixtures of a wholesale or retail merchant, as defined in Schedule E of the Revenue Act, shall attach to such stock of goods and fixtures in the taxing unit as of the day of any removal or transfer or quitting business as set out in subsection (a) (1) and (2) of G. S. 105-385, regardless of the time at which liability for the tax may arise or the exact amount thereof be determined. All penalties, interest, and costs, allowed by law, shall automatically be added to the amount of such lien and shall be regarded as attaching at the same time as the lien for the principal amount of the taxes. (1939, c. 310, s. 1401; 1957, c. 1414, s. 1.)

Editor's Note.—
The 1957 amendment rewrote this section.

Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Cited in *In re Cleveland*, 146 F. Supp.

Applied in *National Surety Corp. v.* 765 (1956).

§ 105-341. Levy of poll tax.

(4) For the purposes of this article members of the armed forces of the United States who are on active duty elsewhere than in the counties of their residence on January 1st of 1957 and on the 1st day of January in each year thereafter shall not be subject to the tax levied in subsection (1) of G. S. 105-341. (1939, c. 310, s. 1402; 1943, c. 3; 1957, c. 842.)

Editor's Note.—
The 1957 amendment rewrote subsection (4). As only this subsection was changed the rest of the section is not set

out.

Cited in *Brown v. Allen*, 244 U. S. 443, 73 S. Ct. 397, 437 (1953).

§ 105-342. What veterans exempt from poll tax; World War veterans.—Any honorably discharged veteran of any of the wars of the United States, now a resident of, and subject to capitation or poll tax in this State, and who received injuries in the line of duty in the military service, whether compensable or not, and all such honorably discharged veterans that have been, or are now, receiving compensation from the federal government for disability of service connected origin, shall be conclusively considered and presumed as having physical infirmities sufficient to warrant exemption from the payment of the capitation or poll tax under article five, section one, of the Constitution of North Carolina: Provided, however, that with respect to veterans of the World War, this section and § 105-343 shall apply only to those who served not less than ninety days during the period between April sixth, one thousand nine hundred seventeen, and November eleventh, one thousand nine hundred eighteen, or to those of such veterans who served with the United States forces in Russia during the period between April sixth, one thousand nine hundred seventeen, and April

first, one thousand nine hundred twenty: Provided further, that the provisions of this section shall also be applicable to veterans of World War II and to veterans of the Korean conflict similarly injured or similarly having physical infirmities, and the term "veterans of the Korean conflict," as used in this section, means those persons serving in the armed forces of the United States at any time during the period beginning June 27, 1950, and ending on July 27, 1953. (1931, c. 193, s. 1; 1955, c. 1269.)

Editor's Note.—The 1955 amendment added the last proviso.

§ 105-345. Penalties and discounts for nonpayment of taxes.

Local Modification.—

Anson: 1957, c. 134; Burke: 1953, c. 182; Catawba, as to subsection (6): 1953, c. 434; Cleveland: 1951, c. 568; Davidson: 1951, c. 610; Forsyth: 1953, c. 229; Harnett: 1957, c. 903; Mecklenburg: 1949, c. 999; 1953, c. 184; 1955, c. 378; Pitt: 1957, c. 531; Robeson: 1953, c. 85; Union: 1951, c. 822; Washington: 1953, c. 681, and 1957, c. 574; city of Charlotte: 1953, c. 378; city of Concord: 1951, c. 289; city of Kings Mountain: 1951, c. 68; city of Shelby: 1951, c. 568; city of Winston-Salem: 1953, c. 229; town of Davidson: 1953, c. 184;

1955, c. 378; towns of Huntersville and Matthews: 1955 c. 378; town of Pilot Mountain: 1955, c. 441.

Editor's Note.—

Delete subsection (8) in recompiled volume.

Session Laws 1953, c. 109, which made this section applicable to Avery County, provided: "The board of county commissioners of Avery County and the governing bodies of the municipalities therein shall not refund any penalties or interest heretofore collected with respect to the late payment of ad valorem property taxes."

ARTICLE 25.

Banks, Banking Associations, Trust Companies and Building and Loan Associations.

§ 105-349.1. Obtaining record of corporation.—The Commissioner of Revenue shall have power to require the Secretary of State, and it shall be the duty of the Secretary of State, to furnish monthly to the Commissioner a list of all domestic corporations incorporated or whose charters have been amended or which have been dissolved during the preceding month, and a list of all foreign corporations which have been domesticated, or whose charters have been amended, or which have been dissolved, or whose domestication has been withdrawn during the preceding month, both such lists to be in such detail as may be prescribed by the Commissioner. (1955, c. 1350, s. 11.)

Editor's Note.—The act inserting this section became effective July 1, 1955.

ARTICLE 27.

Collection and Foreclosure of Taxes.

§ 105-374.1. Deputy tax collectors.—The governing bodies of municipalities and the boards of commissioners of the several counties are hereby authorized to appoint, in their discretion, one or more deputy tax collectors to serve at the will of the appointing board and for such compensation and to give such bond as may be fixed by such board. Deputy tax collectors shall have authority to do and perform, under direction of the tax collector, any act which the tax collector himself might perform unless the scope of authority of the deputy tax collector is specifically limited by the appointing governing board. (1957, c. 537.)

§ 105-376. The tax lien and discharge thereof.

Applied in *National Surety Corp. v. Sharpe*, 236 N. C. 35, 72 S. E. (2d) (1952). Cited in *In re Cleveland*, 146 F. Supp. 765 (1956).

§ 105-385. Remedies against personal property.

(a) Time for.—Every official charged with the duty of collecting current or delinquent taxes, including deputy tax collectors appointed according to law, shall have power and authority to proceed against personal property as described in this section at any time after taxes are due and before the filing of a tax foreclosure complaint or docketing of a judgment for said taxes as provided herein: Provided, however, that between the listing date in any year and the following first Monday in October the collector may, under the conditions described in subdivisions (1) and (2), below, proceed against personal property by levy in order to collect taxes to become due on said first Monday in October following the listing date.

(1) If between the listing date and the first Monday in October there is reasonable ground for believing that the taxpayer is about to remove his property from the taxing unit or transfer it to another person, the collector is authorized and empowered to levy on such property or any other personal property of said taxpayer, in the manner set out in subsection (c), prior to the first Monday in October for the taxes to become due on that date. When collected under this procedure, the amount of taxes not yet determined shall be computed under the provisions of G. S. 105-378 and, with respect to the principal amount of the taxes only, shall be allowed the discount applicable under the provisions of G. S. 105-345 or any valid local act applicable in lieu of said section.

(2) If the personal property subject to taxation is the stock of goods or fixtures of a wholesale or retail merchant, as defined in Schedule E of the Revenue Act, and if the owner thereof shall at any time after the listing date, sell out his business or stock of goods or fixtures, or if he shall quit business, said owner, within thirty days after said transfer or termination of business, shall be required to pay both the unpaid taxes on said property for prior years, if any, and the taxes to become due on said property for the current year on the first Monday in October. Should neither the selling owner nor the purchaser, under the provisions of subsection (g), pay the taxes due, the collector is authorized and empowered to levy on such property or any other personal property of the selling owner or of the purchaser, in the manner set out in subsection (c), prior to the first Monday in October for the taxes to become due on that date: Provided, the levy is made within sixty days after said transfer or termination of business. The collector may levy on such property or any other personal property of the selling owner or of the purchaser at any time for taxes on said stock of goods or fixtures already due at the time of the transfer or termination of business. When collected under this procedure, the amount of taxes not yet determined shall be computed under the provisions of G. S. 105-378 and, with respect to the principal amount of the taxes only, shall be allowed the discount applicable under the provisions of G. S. 105-345 or any valid local act applicable in lieu of said section.

(b) Relation between Remedies against Personal Property and Remedies against Real Property.—The collector may proceed against the personal property of the taxpayer, as herein provided, in his discretion; and he shall proceed against such property:

(1) If directed so to do by the governing body; or

(2) Upon demand by the taxpayer, mortgagee or other person holding a lien upon the real property of the taxpayer: Provided, that said taxpayer, mortgagee or other person making said demand shall furnish the collector with a written memorandum describing such personal property and stating where it can be found.

After the sale of a tax sale certificate, no person shall be allowed to attack the validity of the sale on the ground that the tax should have been procured from personal property; but this shall not be construed as prohibiting proceedings against personal property after said sale.

(c) Levy upon Personal Property.—Subject to the provisions of this article governing the priority of the lien acquired, the following property may be levied upon and sold for failure to pay taxes:

- (1) Any personal property of the taxpayer, regardless of the time at which it was acquired and regardless of the existence or date of creation of mortgages or other liens thereon;
- (2) Any personal property transferred by the taxpayer to relatives of the taxpayer;
- (3) Personal property in the hands of a receiver for the taxpayer and in such cases it shall not be necessary for the collector to apply for an order of the court directing payment or authorizing the levy, but said collector may proceed as if the property were not in the hands of a receiver or in the custody of the law;
- (4) Personal property of a deceased taxpayer: Provided, the levy is made prior to final settlement of the estate;
- (5) Personal property transferred by the taxpayer, after the taxes levied for were due, by any type of transfer other than those hereinbefore mentioned in this subsection and other than by bona fide sale for value: Provided, the levy is made within sixty days after such transfer;
- (6) The stock of goods and fixtures of a wholesale or retail merchant, as defined in Schedule E, of the Revenue Act, in the hands of a purchaser thereof when the taxes on said property remain unpaid thirty days after the date of the sale or transfer: Provided, the levy is made within sixty days after such sale or transfer.

The levy and sale (including both levy and sale fees) shall be governed by the laws regulating levy and sale under execution: Provided, that it shall not be necessary for said levy to be made or said sale to be conducted by the sheriff, and the collector or any duly appointed deputy collector, is hereby given the same authority as the sheriff to make said levy and conduct said sale. Provided, further, that upon authorization of the board of county commissioners or governing body of the municipality, the tax collector may direct an execution against personal property for taxes to the sheriff or any peace officer, including township constables and, in the case of municipal taxes, municipal policemen, and in such event the officer to whom such execution is directed may proceed to levy upon and sell the personal property of the taxpayer in the same manner and with the same powers and authority as normally exercised by sheriffs in levying upon and selling personal property under execution. Levy and sale fees, plus actual advertising costs, shall be added to and collected in the same manner as the taxes. The advertising costs, when collected, shall be used to reimburse the taxing unit, which shall advance the cost of said advertising; and the levy and sale fees, when collected, shall be treated in the same manner as other fees collected by said official.

(d) Attachment and Garnishment.—Subject to the provisions of this article governing the priority of rights acquired, the collector may attach wages or other compensation, rents, bank deposits, the proceeds of property subject to levy and sale, or other property incapable of manual delivery: Provided, the same belongs to the taxpayer or has been transferred to another under circumstances which would permit it to be levied upon if it were tangible, or is due to the taxpayer or may become due to him within the calendar year; and the person owing same or having same in his possession shall become liable for the taxes to the extent of the amount he owes or has in his possession: Provided, that not more than ten per cent of wages or other compensation for personal services shall be liable to attachment and garnishment for failure to pay taxes.

To proceed under this subsection, the collector shall serve or cause to be served upon the taxpayer and the person owing or having in his possession the wages, rents, debts or other things sought to be attached, a notice showing at least:

- (1) The name of the taxpayer;
- (2) The amount of the taxes, penalties and costs (including the fees allowed by this subsection) and year or years for which such taxes were levied;
- (3) The name of the taxing unit or units by which such taxes were levied;
- (4) A brief description of the thing sought to be attached; and
- (5) A statement that the person served has the right to appear, within ten days after service, before some designated justice of the peace or (if the amount is beyond the jurisdiction of a justice of the peace) the superior court in the county in which the taxing unit lies, and show cause why he should not be compelled to pay said taxes, penalties and costs.

Notices concerning two or more taxpayers may be combined if they are to be served upon the same person, but in such case the taxes, penalties and costs charged against each taxpayer must be set forth separately.

A copy of each notice shall be retained by the collector and a copy shall be filed, not later than the first business day following the day of service, with the justice or court before which the notice is returnable, together with a notation of service. Upon entry of judgment, by default or after appearance and hearing, in favor of the taxing unit, the person so served shall become liable for the taxes, penalties and costs: Provided, that payment shall not be required from amounts which are to become due to the taxpayer until they actually become due.

The fee for serving said notice shall be fixed by the governing body of the taxing unit. The justice's fee shall be fixed by the board of county commissioners, but no justice's fees shall be charged except in cases in which judgment is actually entered. Costs in the superior court shall be the same as in other proceedings therein. Fees and costs shall be added to and collected as part of the taxes: Provided, that if judgment is rendered against the taxing unit such costs and fees shall be paid by the taxing unit. All fees collected by officers shall be disposed of in the same manner as other fees collected by such officers.

(e) **Employees of State and Its Subdivisions.**—Tax collectors may proceed against the wages, salary or other compensation of officials and employees of this State and its agencies and instrumentalities and officials and employees of political subdivisions of this State and their agencies and instrumentalities in the manner provided by subsection (d) of this section. In case the taxpayer is an employee of the State, the notice shall be served upon such employee and upon the head or chief officer of the department, agency, instrumentality or institution by which the taxpayer is employed. In case the taxpayer is an employee of a political subdivision of the state, the notice shall be served upon the taxpayer and upon the officer charged with making up the payrolls of the political subdivision by which the taxpayer is employed. If judgment is rendered against the taxpayer, either upon default or after a hearing, a copy of such judgment shall be forwarded by the collector to the officer upon whom the notice of garnishment was served, and such officer shall thereafter, subject to the limitation in amount set out in subsection (d) of this section, make deductions from the salary or wages due or to become due the taxpayer and remit same to the tax collector of the taxing unit which caused the notice to be served, until the tax, penalty, interest and costs allowed by law are fully paid. Such deductions and remittances shall, *pro tanto*, constitute a satisfaction of the salary or wages due the taxpayer.

(f) **Lists of Employees.**—Any person, firm or corporation who shall, after written demand therefor, refuse to give the tax collector or tax supervisor a list

of all employees of such person, firm or corporation who may be liable for taxes, shall be guilty of a misdemeanor.

(g) **Personal Liability of Purchasers of Stocks of Goods or Fixtures.**—If any wholesale or retail merchant, as defined in Schedule E of the Revenue Act, shall sell out his business or stock of goods or fixtures or shall quit business, he shall be required to notify the tax supervisor of that fact within thirty days after the date he sells out his business or stock of goods or fixtures, or quits business. The successor in business of said wholesale or retail merchant shall be required to withhold sufficient of the purchase money to cover the amount of taxes made a lien upon such stock of goods or fixtures under the provisions of G. S. 105-340 (b) until such time as the former owner or seller shall produce a receipt from the tax collector showing that the taxes have been paid, or a certificate that no taxes are due. If the transfer or termination of business occurs before taxes for the current year have been determined, the amount of taxes due and included in said lien shall be computed under the provisions of G. S. 105-378 and, with respect to the principal amount of the taxes only, shall be allowed the discount applicable under the provisions of G. S. 105-345 or any valid local act applicable in lieu of said section. If the purchaser of a business or stock of goods or fixtures shall fail to withhold purchase money as provided above, and the tax shall be unpaid after the thirty-day period allowed, he shall be personally liable for the payment of the taxes on such property; provided, nothing herein shall be construed as limiting the tax collector's remedies set out in subsections (a) through (f) of this section. (1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4.)

Local Modification.—Session Laws 1951, c. 128, provides that this section as modified therein "shall apply to Anson county and to Wake county and the municipalities therein."

Editor's Note.—The 1951 amendment rewrote subsection (e).

The first 1955 amendment, effective July 1, 1955, rewrote the last paragraph of sub-

section (d). And the second 1955 amendment, effective the same date made changes in the second paragraph of subsection (c).

The 1957 amendment rewrote subsection (a), added subdivision (6) to the first paragraph of subsection (c) and added subsection (g).

§ 105-386. **Collection of taxes outside the taxing unit.**—If a taxpayer has no property in the taxing unit to which the taxes are due, but does have property in some other unit, or if the taxpayer has removed from the taxing unit in which the taxes are due and has left no property there and is known to be in some other unit in this State, it shall be the duty of the collector to send a copy of the tax receipt, with a certificate stating that such taxes are unpaid, to the collector of the unit in which such property is located or in which such taxpayer is known to be. Such receipt and certificate shall have the force and effect of a tax list of his own unit in the hands of the collector receiving it, and it shall be the duty of such collector to proceed immediately to collect such taxes by any means by which he could lawfully collect taxes of his own unit. The collector receiving such receipt and certificate shall report, within thirty days after such receipt, to the collector who sent the same, either that he has collected the same or is unable to collect the same by any lawful means or that he has begun proceedings for the collection of same. In acting on such receipt and certificate the receiving collector shall, in addition to collecting the amount of taxes certified as due, also collect a fee equal to ten per centum (10%) of the amount of taxes actually collected. All collections made under this section shall be remitted to the unit levying the tax within five days after such collection, but the collector making collection shall retain the prescribed collection fee for his personal use. All reports under this section, reporting that the tax is uncollectible, shall be under oath and shall state that the collector has used due diligence and is unable to collect said taxes by levy, garnishment or otherwise. Upon failure to make such sworn report the

collector receiving such receipt and certificate shall be liable on his bond for such taxes.

(1955, c. 909.)

Editor's Note.—The 1955 amendment, paragraph. As the second paragraph was effective July 1, 1955, rewrote the first paragraph. As the second paragraph was not changed it is not set out.

§ 105-387. Sales of tax liens on real property for failure to pay taxes.

(b) **Date of Sale; Effect of Delay.**—The county and district sale shall be held on the first Monday, and the city sale on the second Monday, in May or in any of the four succeeding months. Failure to hold said sale within the time prescribed shall not affect the validity of the taxes or the tax liens, nor shall it affect the validity of the sale when thereafter held. All sales held shall begin, in the case of county and district taxes, on the first Monday of the month and, in the case of city taxes, on the second Monday in the month: Provided, that where county and city taxes are collected by the same collector, the sale may be held on either of said Mondays; provided further, any sale herein provided for may be held on the Tuesday following the Monday herein provided for when said Monday is a legal holiday.

No sale shall be delayed or restrained by order of any court of this State.

(1955, c. 993.)

Editor's Note.—The 1955 amendment added the last proviso to the first paragraph of subsection (b). As the rest of the section was not changed only subsection (b) is set out.

Cited in *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717 (1950); *Boone v. Sparrow*, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

§ 105-388. Certificates of sale.

Tax Lien Certificates Held Insufficient to Make Out Prima Facie Case in Action to Foreclose Lien.—Where, in a county's action to foreclose tax lien certificates, the introduction in evidence by the county of the tax lien certificates for the years in question with tax certificates attached on one hundred fifty acres of land outstanding in the name of a certain person, but without evidence that the hundred and fifty acre tract listed in the name of such

person and referred to in the tax lien certificates was the same land as that described in the deed executed to defendants by another, it was held insufficient to make out a prima facie case to sell the land of the defendants. *Hyde County v. Bridgman*, 238 N. C. 247, 77 S. E. (2d) 628 (1953).

Cited in *Boone v. Sparrow*, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

§ 105-391. Foreclosure of tax liens by action in nature of action to foreclose a mortgage.

(e) **Parties; Summons.**—The listing taxpayer and spouse, if any, the current owner, all other taxing units having tax liens, all other lien-holders of record, and all persons who would be entitled to be made parties to a court action (in which no deficiency judgment is sought) to foreclose a mortgage on such property, shall be made parties and served with summons in the manner provided by § 1-89: Provided, that service by publication may be begun at any time within two years after the issuance of the original summons and that time within which to serve summons may be extended as provided by § 1-95.

The fact that the listing taxpayer or any other defendant is a minor, is incompetent or is under any other disability shall not prevent or delay the collector's sale or the foreclosure of the tax lien; and all such defendants shall be made defendants and served with summons in the same manner as in other civil actions.

Persons who have disappeared or cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons may be served by publication; and such person, their heirs and assignees may be

designated by general description or by fictitious names in such action. It is hereby declared that service of summons by publication against such persons, in the manner provided by law, shall be as valid in all respects as such service against known persons who are nonresidents of this State.

(k) **Costs.**—Subject to the provisions of this subsection, costs may be taxed in any action brought under this section in the same manner as in other civil actions. Upon collection of said costs, either upon redemption or upon payment of the purchase price at foreclosure sale, the fees allowed officers shall be paid to those entitled to receive the same: Provided, that no process tax for the use of the State shall be levied or collected in tax foreclosure actions, and, where the plaintiff is a taxing unit, no prosecution bond shall be required in such actions.

The word "costs" as used in this section shall be construed to include one reasonable attorney's fee for the plaintiff in such amount as the court shall, in its discretion, determine and allow: Provided, that the governing body of any taxing unit may, in its discretion, pay a smaller or greater sum to its attorney as a suit fee, and said governing body may, in its discretion, allow a reasonable commission to its attorney on delinquent taxes collected by him after said taxes have been placed in his hands; or said governing body may arrange with its attorney for the handling of tax suits on a salary basis or make such other reasonable agreement with its attorney or attorneys as said governing body may approve; and any arrangement made may provide that attorneys' fees collected as costs be collected for the use of the taxing unit; and provided further, that when any taxing unit is made a party defendant in a tax foreclosure action and files answer therein, there may be included in the costs an attorney's fee for said defendant in such amount as the court shall, in its discretion, determine and allow.

In any action in which real property is actually sold after judgment, costs shall include a commissioner's fee to be fixed by the court, not exceeding five per centum of the purchase price; and in case of redemption between the date of sale and judgment of confirmation, said fee shall be added to the amount otherwise necessary for redemption. In case more than one sale is made of the same property in any action, the commissioner's fee may be based on the highest amount bid, but said commissioner shall not be allowed a separate fee for each such sale. The governing body of any plaintiff unit may request the court to appoint as commissioner a salaried official, attorney or employee of the unit and, if such appointment is made, may require that such commissioner's fees, when collected, be paid to plaintiff unit for use as it may direct.

(n) **Advertisement of Sale.**—The sale shall be advertised, and all necessary resales shall be advertised, in the manner provided by Article 29A of Chapter 1 or by such statute as may be enacted in substitution therefor.

(q) **Exceptions and Increased Bids.**—At any time within ten days after the filing of said report of sale any person having an interest in the property may file exceptions to said report, and at any time within said period an increased bid may be filed in the amount specified by and subject to the provisions (other than provisions in conflict herewith) of Article 29A of Chapter 1, or to the provisions (other than provisions in conflict herewith) of any law enacted in substitution for said section.

(v) **Resale of Property Purchased by Taxing Units.**—Property purchased at tax foreclosure sale by a taxing unit may be resold at any time for such price as the governing body may approve. Such resales shall be conducted in the manner provided by law for sales of other property of the various taxing units: Provided, that a city or county may, in the discretion of its governing body, resell such property to former owner or other person formerly having an interest in said property, at private sale, for an amount not less than its interest therein, if it holds said property as sole owner, or for an amount not less than the total interests of all taxing units (other than assessments due the city holding title), if it holds said property for the benefit of all such units. (1939, c. 310, s. 1719; 1945, c. 635;

1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908.)

Local Modification.—Martin, as to subsection (k): 1955, c. 792.

Editor's Note.—

The first 1951 amendment inserted the words "or county" near the beginning of the proviso in subsection (v). The second 1951 amendment substituted "Article 29A of Chapter 7" for "§§ 1-327, 1-328" in line two of subsection (n) and for "§ 45-28" in line five of subsection (q).

The 1953 amendment, effective July 1, 1953, inserted in the first paragraph of subsection (e) the words "time within which to serve summons may be extended" in lieu of the words "alias and pluries summonses may be issued."

The 1955 amendment, effective July 1, 1955, rewrote the first two paragraphs of subsection (k).

As only subsections (e), (k), (n), (q) and (v) were affected by the amendments the rest of the section is not set out.

For brief comment on the 1951 amendments, see 29 N. C. Law Rev. 376.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 389.

A suit for the foreclosure of tax liens is a civil action, and not a special proceeding. This is made plain by the specific declaration of this section that "the foreclosure action shall be an action in superior court, in the county in which the land is situated, in the nature of an action to foreclose a mortgage." *Chappell v. Stallings*, 237 N. C. 213, 74 S. E. (2d) 624 (1953).

There are two distinct alternate methods provided by statute for the foreclosure of a tax sale certificate or the lien evidenced thereby: 1. After the land has been sold by the sheriff and a certificate of sale has been issued, the purchaser may institute an action to foreclose the lien evidenced by the certificate. This section provides the regulations and procedure respecting an action instituted pursuant to this method. 2. Under § 105-392 the taxing unit may file in the office of the clerk of the superior court a sheriff's certificate of sale of land to satisfy taxes. Thereupon, the clerk must docket the certificate upon his judgment docket. It then has the full force and effect of a judgment, and execution may issue thereon against the property of the tax debtor. *Boone v. Sparrow*, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

Tax Sale of Land Owned by Minors.—A judgment decreeing foreclosure and ordering sale of land for taxes was not void on the ground that three of the defendants were minors where the court upon learn-

ing of such fact appointed a guardian ad litem for the minors who filed an answer prior to the date of the tax sale. *Franklin County v. Jones*, 245 N. C. 272, 95 S. E. (2d) 863 (1957).

Continuance of Sale.—A continuance of a sale for a six-day period instead of from day to day of six-day period did not render the tax sale void. *Franklin County v. Jones*, 245 N. C. 272, 95 S. E. (2d) 863 (1957).

Inadequacy of Purchase Price.—A tax sale confirmed by the court was not rendered void by a finding five years later that the purchase price was unjust and inadequate. *Franklin County v. Jones*, 245 N. C. 272, 95 S. E. (2d) 863 (1957).

Effect of Failure of Owners to List Property for Taxes.—The jurisdiction of the superior court to determine the liability of the land for taxes was not defeated by a finding that the owners—defendants in the action—had not listed the property for taxes. *Franklin County v. Jones*, 245 N. C. 272, 95 S. E. (2d) 863 (1957).

The owner's right of redemption is recognized in express terms three times in this section. The owner has the right to redeem his land from the lien of unpaid taxes by paying the taxes with accrued interest, penalties and costs, and the court costs at any time before the entry of a valid judgment in a tax foreclosure action confirming the judicial sale of the land for the satisfaction of the lien. *Chappell v. Stallings*, 237 N. C. 213, 74 S. E. (2d) 624 (1953).

Service of process by publication is in derogation of the common law and every statutory prerequisite must be observed. *Board of Com'rs v. Bumpass*, 233 N. C. 190, 63 S. E. (2d) 144 (1951).

The provision of this section permitting persons who have disappeared, who cannot be located, or whose names and whereabouts are unknown, to be served by publication under a fictitious name or by designation as heirs and assigns, is protective in nature and may not be used as a subterfuge to excuse failure to serve process on those whose names can be discovered by the exercise of due diligence. *Wilmington v. Merrick*, 231 N. C. 297, 56 S. E. (2d) 643 (1949).

When Exceptions to Be Filed under Subsections (p), (q) and (r).—It is manifest that subsections (p), (q) and (r) require a person having an interest in the property involved in a tax foreclosure action file exceptions to the report of a par-

ticular sale and to appeal from an adverse ruling on such exceptions when, and only when, his exceptions challenge the validity of the steps taken by the commissioner in conducting the particular sale, or the fairness of the particular sale in respect to price or other factors to the parties concerned. *Chappell v. Stallings*, 237 N. C. 213, 74 S. E. (2d) 624 (1953).

Subsections (p), (q) and (r) do not apply to objections which are addressed to the validity of the judgment of sale itself. In consequence, a person having an interest in the property involved in a tax fore-

closure action does not lose the benefit of an aptly taken objection to the validity of the judgment of sale by failing to file exceptions to the report of a particular sale made under it, or by failing to take a specific appeal from an order confirming such particular sale. A proper legal objection to the validity of a judgment of sale in and of itself puts in issue the validity of all proceedings under it. *Chappell v. Stallings*, 237 N. C. 213, 74 S. E. (2d) 624 (1953).

Cited in *Quevedo v. Deans*, 234 N. C. 618, 68 S. E. (2d) 275 (1951).

§ 105-391.1. Validation of sales and resales held pursuant to § 105-391.—All sales or resales heretofore held pursuant to G. S. 105-391 where the advertisement was in accordance with G. S. 1-327 and 1-328, as provided by such sections prior to their repeal, are validated to the same extent as if such advertisement were in accordance with Article 29A of Chapter 1 of the General Statutes, and all such sales, where the provisions of G. S. 45-28 as to resales, as provided by such section prior to its repeal, were followed, are validated to the same extent as if the resale procedure provided for in Article 29A of Chapter 1 of the General Statutes had been followed. (1951, c. 1036, s. 2.)

Editor's Note.—Section 2½ of the act inserting the above section provides: "The provisions of this act validating and ratifying sales heretofore made shall not apply

to any case now pending where an attack is being made on sales heretofore made because of the failure to properly advertise such sales."

§ 105-391.2. Validation of reconveyances of tax foreclosed property by county boards of commissioners.—The action of county boards of commissioners in heretofore reconveying tax foreclosed property by private sale to the former owners or other interested parties for amounts not less than such counties' interest therein is hereby ratified, confirmed and validated. (1951, c. 300, s. 2.)

§ 105-392. Alternative method of foreclosure.—(a) **Docketing Taxes as a Judgment.**—In lieu of following the procedure set forth in § 105-391, the governing body of any taxing unit may order the collecting official to file, not less than six months or more than two years (four years as to taxes of the principal amount of five dollars or less) following the collector's sale of certificates, with the clerk of superior court a certificate showing the name of the taxpayer listing the real estate on which such taxes are a lien, together with the amount of taxes, interest, penalties and costs which are a lien thereon, the year for which such taxes are due, and a description of such real property sufficient to permit its identification by parol testimony. The clerk of superior court shall enter said certificate in a special book entitled "Tax Judgment Docket for Taxes for the Year" and shall index the same therein in the name of the listing taxpayer: Provided that the clerk of the superior court may enter said certificate in a special continuing book or books entitled "Tax Judgment Docket for taxes for the years beginning" and index the same in the general judgment index in the name of the listing taxpayer or taxpayers. Immediately upon said docketing and indexing, said taxes, interest, penalties and costs shall constitute a valid judgment against said property, with the priority hereinbefore provided for tax liens, which said judgment, except as herein expressly provided, shall have the same force and effect as a duly rendered judgment of the superior court directing sale of said property for the satisfaction of the tax lien, and which judgment shall bear interest at the rate of six per cent per annum. The clerk shall be allowed fifty cents per certificate for such docketing and indexing, payable when

such taxes are collected or such property is sold, and shall account for said fees in the same manner as other fees of his office are accounted for: Provided, that the governing body of any county, if said clerk is on salary, or said clerk, if he is on fees or salary plus fees, may require such fees to be advanced by the taxing unit.

The collecting official filing said certificate shall, at least two weeks prior to the docketing of said judgment, send a registered or certified letter or by letter sent by certified mail to the listing taxpayer, at his last known address, stating that the judgment will be docketed and that execution will issue thereon in the manner provided by law. However, receipt of said letter by said listing taxpayer, or receipt of actual notice of the proceeding by said taxpayer or any other interested person, shall not be required for the validity or priority of said judgment or for the validity or priority, as hereinafter provided, of the title acquired by the purchaser at the execution sale. It is hereby expressly declared to be the intention of this section that proceedings brought under it shall be strictly in rem. It is further declared to be the intention of the section to provide a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all, for the requirements of local governments in this State; and to recognize, in authorizing such proceeding, that all those owning interests in real property know, or should know, without special notice thereof, that such property may be seized and sold for failure to pay such lawful taxes.

Nothing in this section shall be construed as a limitation of time on the right to foreclose a tax lien under § 105-391.

(c) Issue of Execution.—At any time after six months and before two years from the indexing of said judgment, execution shall be issued at the request of the governing body of the taxing unit, in the same manner as executions are issued upon other judgments of the superior court, and said property shall be sold by the sheriff in the same manner as other property is sold under execution: Provided, that no debtor's exemption shall be allowed; and provided, further, that in lieu of any personal service of notice on the owner of said property, registered or certified mail notice shall be mailed to the listing taxpayer, at his last known address, at least one week prior to the day fixed for said sale. The purchaser at said sale shall acquire title to said property in fee simple, free and clear of all claims, rights, interest and liens except the lien of other taxes and assessments not paid from the purchase price and not included in the judgment: Provided, that if a taxing unit has, by virtue of the taxes included in such a judgment, been made a defendant in a foreclosure action brought under § 105-391, it shall file answer therein and thereafter all proceedings shall be governed by order of court in accordance with the provisions of that section.

(1957, cc. 91, 1262.)

Cross Reference.—See note to § 105-391.

Editor's Note.—

The first 1957 amendment inserted the words "or certified" in line two of the second paragraph of subsection (a) and in the proviso to the first sentence of subsection (c). The second 1957 amendment made the same change in subsection (c), but in amending subsection (a) it inserted

the words "or by letter sent by certified mail" immediately following the words "certified letter" in line two of the second paragraph. Apparently the first amendment was overlooked when the second amendment was made.

As only subsections (a) and (c) were affected by the amendments the rest of the section is not set out.

§ 105-393. Time for contesting validity of tax foreclosure title.

Relations to Other Sections.—This section relates alike to §§ 105-391 and 105-392. *Boone v. Sparrow*, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

A remainderman, who has been served only by publication based upon a fatally defective affidavit, may attack the tax foreclosure more than one year afterward since neither this section nor any statute

of limitations can bar the right to attack a judgment for want of jurisdiction. *Board of Com'rs v. Bumpass*, 233 N. C. 190, 63 S. E. (2d) 144 (1951).

Cited in *Quevedo v. Deans*, 234 N. C. 618, 68 S. E. (2d) 275 (1951); *Franklin County v. Jones*, 245 N. C. 272, 95 S. E. (2d) 863 (1957).

§ 105-394. Facsimile signatures.

Relation to Other Sections.—This section relates alike to §§ 105-391 and 105-392. *Boone v. Sparrow*, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

§ 105-395. Application of article.

Relation to Other Sections.—This section relates to §§ 105-391 and 105-392. *Boone v. Sparrow*, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

SUBCHAPTER III. COLLECTION OF TAXES.

ARTICLE 30.

General Provisions.

§ 105-403. No taxes released.

Local Modification. — Anson: 1957, c. 104; Davie: 1957, c. 130.

§ 105-406. Remedy of taxpayer for unauthorized tax.

Editor's Note.—

For brief comment on this section, see 29 N. C. Law Rev. 169.

Ordinarily the sovereign may not be denied or delayed in the enforcement of its right to collect revenue upon which its very existence depends. This rule applies to municipalities and other subdivisions of the State government. If a tax is levied against a taxpayer which he deems unauthorized or unlawful, he must pay the same under protest and then sue for its recovery. And if the statute provides an administrative remedy, he must first ex-

haust that remedy before resorting to the courts for relief. Moreover, as broad and comprehensive as it is, even the Declaratory Judgment Act does not supersede the rule or provide an additional or concurrent remedy. *Bragg Development Co. v. Braxton*, 239 N. C. 427, 79 S. E. (2d) 918 (1954).

Adequate Remedy at Law.—

In accord with original. See *Fox v. Board of Com'rs*, 244 N. C. 497, 94 S. E. (2d) 482 (1956).

Applied in *Bowie v. West Jefferson*, 231 N. C. 408, 57 S. E. (2d) 369 (1950).

§ 105-407. Refund of taxes illegally collected and paid into State treasury.

This section is specifically limited to State taxes. It has no application to local taxing units. *Victory Cab Co. v. Charlotte*, 234 N. C. 572, 68 S. E. (2d) 433 (1951).

ARTICLE 31.

Rights of Parties Adjusted.

§ 105-408. Taxes paid in judicial sales and sales under powers.—

In all civil actions and special proceedings wherein the sale of any real estate shall be ordered, the judgment shall provide for the payment of all taxes then assessed upon the property and remaining unpaid, and for the payment of such sums as may be required to redeem the property, if it has been sold for taxes and such redemption can be had; all of which payments shall be adjudged to be made out of the proceeds of sale. The judgment shall adjust the disbursements for such taxes and expenses of redemption from tax sales between the parties to the action or proceeding in accordance with their respective rights. And whenever any real estate shall be sold by any person under any power of sale conferred upon him by any deed, will, power of attorney, mortgage, deed of trust, or assignment for the benefit of creditors, the person making such sale must pay out of the proceeds of sale all taxes then due and unpaid upon such real estate and such sums as shall be necessary to redeem the land, if it has been sold for taxes and such redemption is practicable, unless the notice of sale provided that the property would be sold subject to taxes or special assessments thereon and the property was so sold. This section shall apply both to taxes and special assess-

ments for paving, drainage, or other improvements; provided, that the person making such sale, whether under order of court or in the exercise of a power, shall be required, in cases where special assessments are payable in installments, to pay only such installments of special assessments as have become due at the date of such sale. The failure to comply with this section and pay such taxes or assessments shall not vacate or affect the lien of such taxes or assessments, but such lien shall be discharged only to the extent payment is actually made. (1901, c. 558, s. 47; Rev., s. 2857; C. S., s. 7980; 1929, c. 231, s. 1; 1951, c. 252, s. 1.)

Editor's Note.—

The 1951 amendment substituted "due and unpaid" for "assessed" in the third sentence, and added at the end thereof the words "unless the notice of sale provided that the property would be sold subject to taxes or special assessments thereon and the property was so sold."

Purpose of Section.—

The object of this section is to assure the payment of all tax liens on the property in one action, so that the purchaser will obtain title free of any lien for taxes assessed at any time before final judgment. *Boone v. Sparrow*, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

Tax Lien Transferred to Proceeds of Sale.—By this section, a judicial sale of land, as between the purchaser and the parties to the proceeding, transfers the lien of a designated class of tax accruals to the proceeds of sale in exoneration of the land. *Holt v. May*, 235 N. C. 46, 68 S. E. (2d) 775 (1952).

This section contemplates the payment, out of the proceeds of the sale, of only such taxes as are assessed when the sale

is made. To assess a tax is to fix the proportion which each person among those who are liable to it has to pay; to fix or settle a sum to be paid by way of a tax; to charge with a tax. An assessment or levy of a tax is essential to its certainty. *Holt v. May*, 235 N. C. 46, 68 S. E. (2d) 775 (1952).

A judicial sale is not deemed made as contemplated by this section until it is confirmed. *Holt v. May*, 235 N. C. 46, 68 S. E. (2d) 775 (1952).

Where tax levies had been made by both the city and the county before the order of confirmation was entered, the taxes of both taxing units should have been paid out of the proceeds of sale. *Holt v. May*, 235 N. C. 46, 68 S. E. (2d) 775 (1952).

Duty of Commissioners to Pay Taxes.—Upon the sale of property by commissioners appointed by the court to sell land, the commissioners had the duty to pay the taxes assessed or assessable against the property sold. *Rand v. Wilson County*, 243 N. C. 43, 89 S. E. (2d) 779 (1955).

§ 105-409. Tax paid by holder of lien; remedy.

Purpose of Section.—

This section was enacted for the benefit and protection of holders of notes and bonds secured by deeds of trust or mortgages, and it vests them with the right, at their election, to pay taxes due on the property to protect their security, but imposes no duty upon them to do so for the protection of the trustor. *Redic v. Mechanics & Farmers Bank*, 241 N. C. 152, 84 S. E. (2d) 542 (1954).

Where the holder of a note secured by

a deed of trust purchases the land at a tax foreclosure, but does not go into possession or collect the rents and profits from the land until after trustor has been divested of any interest in the land by such tax foreclosure, the transaction creates no equity in favor of trustor, and trustor is not entitled to impress a trust upon the creditor's title or enforce an accounting under the provisions of this section. *Redic v. Mechanics & Farmers Bank*, 241 N. C. 152, 84 S. E. (2d) 542 (1954).

§ 105-410. Forfeiture by life tenant failing to pay.

The forfeiture of a life estate for non-payment of taxes is not automatic, but this section contemplates an adjudication of forfeiture by a court of competent jurisdiction in a proceeding in which the alleged delinquent life tenant has notice and

an opportunity to be heard in order to satisfy the requirements of due process of law. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717 (1950).

Cited in *Waggoner v. Waggoner*, 246 N. C. 210, 97 S. E. (2d) 887 (1957).

§ 105-411. Remedies of cotenants and joint owners.

Stated in *Franklin County v. Jones*, 245 N. C. 272, 95 S. E. (2d) 863 (1957).

§ 105-412. Fiduciaries to pay taxes.

Cited in *National Surety Corp. v. Sharpe*, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

ARTICLE 32.

Tax Liens.

§ 105-414. Tax lien enforced by action to foreclose.

Persons who have disappeared or who cannot be located and persons whose name and whereabouts are unknown and all possible heirs or assignees of such persons may be served by publication; and such persons, their heirs and assignees may be designated by general description in such actions. It is hereby declared that service of summons by publication against such persons, in the manner provided by law, shall be as valid in all respects as such service against known persons who are nonresidents of this State. (1901, c. 558, ss. 42, 43; Rev., s. 2866; C. S., s. 7990; 1957, c. 1253.)

Editor's Note.—

The 1957 amendment added the above paragraph to this section. As the first paragraph was not changed it is not set out.

The very purpose of an action brought under this section is to foreclose the interest of the owners, sell all the right and title of the taxpayer, and enable the purchaser at the sale to ascertain what title it is that he buys. *Wilmington v. Merrick*, 231 N. C. 297, 56 S. E. (2d) 643 (1949).

An action under this section is founded on the original tax lien and not upon a tax certificate of sale as in §§ 105-391, 105-392. When the action is instituted under this section it must be conducted as in case of a foreclosure of a mortgage as modified by § 105-395. *Boone v. Sparrow*, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

Necessary Parties.—In an action to foreclose a tax lien under this section all persons having an interest in the equity of redemption must be made parties by name, G. S. 105-391 (e) not being applicable, and judgment rendered in such proceeding is void as to persons having such interest who are not made parties. *Wilmington v. Merrick*, 231 N. C. 297, 56 S. E. (2d) 643 (1949).

The owner of the remainder subject to a

life estate is a necessary party in an action to foreclose a tax lien under this section. *Board of Com'rs v. Bumpass*, 233 N. C. 190, 63 S. E. (2d) 144 (1951).

Failure of the affidavit for service by publication to state the cause of action cannot be cured by the complaint filed in the action when the affidavit and complaint are not filed simultaneously and it appears affirmatively that the complaint was not considered as the basis of the clerk's findings. Whether a complaint which does not mention the remainderman in its body and is ambiguous in setting out her interest, states a cause of action against her in a tax foreclosure quære? *Board of Com'rs v. Bumpass*, 233 N. C. 190, 63 S. E. (2d) 144 (1951).

Judgment Entered on Day Other than as Authorized by Statute.—A judgment entered by a clerk in any foreclosure action under this section on a day other than as authorized by statute, is void and of no effect. *Boone v. Sparrow*, 235 N. C. 396, 70 S. E. (2d) 204 (1952).

Applied in *Burnsville v. Boone*, 231 N. C. 577, 58 S. E. (2d) 351 (1950); *Wilmington v. Merrick*, 234 N. C. 46, 65 S. E. (2d) 373 (1951).

ARTICLE 33A.

Agreements with United States or Other States.

§ 105-417.1. Agreements to co-ordinate the administration and collection of taxes.

Cited in *United States v. Williams*, 139 F. Supp. 94 (1956).

ARTICLE 34.

Tax Sales.

Part 2. Refund of Tax Sales Certificates.

§ 105-422. **Tax liens barred.**—No action shall be maintained by any county or municipality to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens held by counties and municipalities, whether such taxes or tax liens are evidenced by the original tax books or tax sales certificates or otherwise, unless such action shall be instituted within ten years from the time such taxes became due: Provided, that as to tax foreclosure actions which under existing laws are not and will not be barred prior to December 31st, 1948, foreclosure actions may be instituted thereon at any time prior to December 31st, 1948: Provided, further, that this section shall not be construed as applying to the liens for street and/or sidewalk improvements; and provided further, that this section shall not be applicable to any pending tax foreclosure actions. Provided that the provisions of this section shall not apply to Ashe, Buncombe, Burke, Camden, Carteret, Clay, Columbus, Cumberland, Currituck, Dare, Davie, Duplin, Edgecombe, Gates, Greene, Harnett, Iredell, Lenoir, Macon, Madison, McDowell, Moore, Nash, New Hanover, Orange, Pamlico, Pender, Rockingham, Sampson, Scotland, Vance, Wayne, Wilkes and Wilson counties or any of the political subdivisions thereof. (1933, c. 181, s. 7; c. 399; 1947, c. 1065, s. 1; 1949, cc. 60, 735; 1951, cc. 71, 306, 572; 1953, cc. 381, 427, 538, 645, 656, 752, 775, 1008; 1955, c. 1087; 1957, cc. 53, 678, 1123.)

Editor's Note.—

The first 1951 amendment struck out Northampton from the list of counties in this section, the second 1951 amendment struck out Warren, and the third 1951 amendment struck out Franklin.

Session Laws 1953 made six changes in the list of exempt counties, and provided for two future changes. Chapters 427, 645 and 752 inserted in the list Duplin, Lenoir and New Hanover, respectively. And chapter 381, which inserted McDowell, specifically provided that the section shall not apply thereto. Chapter 656 struck "Richmond" from the list; and chapter 775, which struck out "Hyde", specifically made the section applicable thereto.

Session Laws 1953, c. 538, as amended by Session Laws 1955, c. 217, and Session Laws 1957, c. 54, provides for striking

"Pamlico" from the list of counties, effective March 1, 1959, so as to make the section applicable to Pamlico County beginning on that date. And Session Laws 1953, c. 1008, effective the first Monday in December, 1954, provided for the striking of "Perquimans" from the list and made the section applicable to Perquimans County on and after the said date.

Session Laws 1955, c. 1087, effective January 1, 1956, deleted "Lee" from the list of counties.

Session Laws 1957, c. 53, effective December 31, 1958, deleted "Hoke" from the list of counties. And chapters 678 and 1123 inserted "Sampson" and "Wilkes" in the list.

Cited in *Burnsville v. Boone*, 231 N. C. 577, 58 S. E. (2d) 351 (1950).

ARTICLE 35.

Sheriff's Settlement of Taxes.§ 105-424. **Time and manner of settlement.****Local Modification.**—

Hyde: 1951, c. 655, and 1953, c. 98.

SUBCHAPTER IV. LISTING OF AUTOMOBILES.

ARTICLE 35A.

Listing of Automobiles in Certain Counties.

§ 105-429. **Counties to which article applicable.**—This article shall apply to the following counties: Alamance, Buncombe, Cabarrus, Camden, Caswell, Chowan, Clay, Currituck, Cleveland, Columbus, Duplin, Durham, Gates, Guilford, Halifax, Harnett, Henderson, Hertford, Johnston, Iredell, Lee, Nash, Moore, McDowell, Orange, Pasquotank, Perquimans, Pitt, Polk, Rowan, Rutherford, Swain, Wayne and Watauga. (1931, c. 392, s. 5; 1949, c. 64; 1957, c. 160.)

Editor's Note.—

The 1957 amendment inserted "Duplin" in the list of counties.

SUBCHAPTER V. GASOLINE TAX.

ARTICLE 36.

Gasoline Tax.

§ 105-435. **Tax on fuels not within definition; manner of collection; from whom collected.** — (a) Every person who owns or operates over the highways of this State, any motor vehicle propelled by a motor which uses any product not included within the definition of "motor fuels" hereinbefore set out to generate power for the propulsion of said vehicle, shall pay to the Commissioner of Revenue, for the use of the highways of this State, a tax of seven cents (7¢) per gallon on the fuel used in such vehicle upon the highways of this State.

(b) Notwithstanding any provisions of subsection (a) to the contrary, the tax levied with respect to the special fuels therein described shall be collected in the manner and from the persons as set out in article 36A of chapter 105 of the General Statutes. (1941, c. 376, s. 2; 1949, c. 1250, s. 13; 1951, c. 838; 1955, c. 822, s. 2.)

Editor's Note.—

The 1951 amendment, effective July 1, 1951, changed subsection (b), and added former subsections (f) through (j).

The 1955 amendment, effective July 1, 1955, rewrote subsection (b) and struck out all subsections following (b).

§ 105-437. **Interest on unpaid tax; action by Commissioner of Revenue if distributor fail to report.**—If any distributor shall fail or neglect to pay the full amount of the tax levied by this article when the same shall be due, any deficiency shall bear interest at the rate of one-half per cent ($\frac{1}{2}\%$) per month or fraction thereof from the date same is due to be paid until paid. If any distributor shall willfully fail, neglect or refuse to make the reports required by § 105-434 within the time therein provided, the Commissioner of Revenue shall immediately inform himself as best he may as to all matters and things required to be set forth in such reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the State from such delinquent distributor for the period covering the delinquency, adding to the tax so determined and as a part thereof, an amount equal to twenty-five per cent (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per cent and transmit the same in the manner provided in § 105-436 for the disposition of other taxes. (1927, c. 93, s. 6; 1931, c. 145, s. 24; 1951, c. 838.)

Editor's Note.—The 1951 amendment, effective July 1, 1951, added the present first sentence.

§ 105-444. License constitutes distributor trust officer of State for collection of tax.—The licensing of any person, firm or corporation as a wholesale distributor of gasoline shall constitute such distributor an agent or trust officer of the State for the purpose of collecting the tax on the sale of gasoline imposed in this article. If any person, firm or corporation who or which adds the amount of the tax levied in this article to the customary market price for gasoline and/or special fuels and collects the same, shall fail to remit the gasoline and/or special fuels tax to the Commissioner of Revenue as provided herein, such failure shall be a misdemeanor, and any individual, partner or officer or agent of any association, partnership or corporation who shall fail to remit the tax so collected as herein provided when it is his duty to do so shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1933, c. 137, s. 1; 1951, c. 838.)

Editor's Note.—The 1951 amendment, effective July 1, 1951, rewrote the second sentence, making it applicable to dealers in special fuels and making failure to remit the amount of the tax a misdemeanor instead of a felony.

§ 105-446. Tax rebate on fuels not used in motor vehicles on highways.—Any person, association, firm, or corporation, who shall buy any motor fuels, as defined in this article, for the purpose of use, and the same is actually used, for other than the operation of a motor vehicle designed and licensed for use upon the highways shall be reimbursed at the rate of six cents per gallon of the amount of such tax or taxes paid under this article upon the following conditions and in the following manner:

- (1) On or before April 15, 1958, application for reimbursement, as provided in this section on taxes paid under this article for the period from July 1, 1957, through December 31, 1957, and thereafter on or before April 15 of any subsequent year application for reimbursement as provided in this section on taxes paid under this article for the preceding calendar year shall be filed with the Commissioner of Revenue. Such application shall be made upon such forms as the Commissioner of Revenue shall prescribe and the Commissioner of Revenue is hereby authorized to prescribe different forms of application for the several classes of uses for which said fuels may have been purchased, provided that as to all such applications for reimbursement the applicant shall be required to state whether or not such applicant has filed a North Carolina income tax return with the Commissioner of Revenue, and all such applications shall be sworn before an officer authorized to administer oaths.
- (2) The Commissioner of Revenue shall have authority to issue rules and regulations as to how claims shall be filed and the information that shall be submitted with said claims and the records required to support said claims.
- (3) If, upon the filing of such application, the Commissioner of Revenue shall be satisfied that the same is made in good faith and that the motor fuels upon which said tax refund is requested have been or are to be used exclusively for purposes as set forth in said application and for purposes other than the operation of a motor vehicle designed and licensed for use upon the highway, he shall issue to such applicant a warrant upon the State Treasurer for the tax refund.
- (4) If the Commissioner of Revenue shall be satisfied that the applicant for any refund authorized by this section has collected or sought to collect any refund of tax or taxes on fuels used in a motor vehicle designed and licensed for use on the highways, he shall issue to such applicant notice to show cause why such application should not be disallowed, which notice shall state a time and place of hearing upon said notice. If upon such hearing the Commissioner shall find as a

- fact that such applicant has collected or sought to collect any refund on fuels which have been used in a motor vehicle designed and licensed for use on the highways, he shall disallow the application in its entirety and the applicant shall be required to repay all tax or taxes which have been refunded to him on said application.
- (5) Any applicant for a refund may seek administrative review or appeal from the decision of the Commissioner of Revenue under the provisions of G. S. 105-241.2, 105-241.3 and 105-241.4.
 - (6) The Commissioner of Revenue is hereby authorized and directed, if at any time in his opinion there is reason to doubt the accuracy of the facts set forth in any application for tax refund to refer the matter to any agent of the Department of Revenue, and such person so designated shall make a careful investigation of all the facts and circumstances relating to said application in the use of the motor fuels therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of motor fuel products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the Commissioner of Revenue.
 - (7) If any court of last resort shall hold that the provisions for refund herein set out shall render the levying and collecting of the tax hereinbefore provided invalid, it is the intention of the General Assembly that such provisions for refund shall be annulled and the tax shall be levied without any provisions for such refund and that this article shall be so construed.

Any person making a false application or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding five hundred dollars (\$500.00) or imprisoned not exceeding two years, in the discretion of the court. (1931, c. 145, s. 24; c. 304; 1933, c. 211; 1937, c. 111; 1941, c. 15; 1943, c. 123; 1955, c. 1350, s. 24; 1957, c. 1236, s. 1.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote the former provision relating to review or appeal.

The 1957 amendment, which rewrote this section, provided that its former pro-

visions shall remain in effect for the purpose of authorizing refunds of taxes paid on motor fuels purchased prior to July 1, 1957.

§ 105-446.1. Refunds of taxes paid by counties and municipalities.
 —The State Highway Commission, counties and municipal corporations shall be entitled to be reimbursed at the rate of six cents (6¢) per gallon of the tax levied by § 105-434 of the General Statutes upon the filing of a statement with the Commissioner of Revenue, sworn to by the Director of Highways or the mayor, city manager or other municipal officer designated by the governing body of the municipality, or the chairman of the board of county commissioners, or other county officer designated by the board of county commissioners, showing the number of gallons of fuel purchased and used by the Highway Commission, the municipality or the county on which the tax levied by § 105-434 of the General Statutes has been paid. All claims for refunds for tax or taxes for motor fuels under the provisions of this section shall be filed with the Commissioner of Revenue on forms to be prescribed by him, on or before the last day of January, April, July, and October of each year, and at such periods only, and shall cover only the motor fuels so used during the quarterly period immediately preceding the month in which such application is filed. (1957, c. 1226.)

ARTICLE 36A.

Special Fuels Tax.

§ 105-449.1. **Short title.**—This article shall be known and may be cited as the “Special Fuels Tax Act.” (1955, c. 822, s. 1.)

Editor’s Note.—The act inserting this article became effective July 1, 1955.

§ 105-449.2. **Definitions.**—The following words, terms and phrases as used in this article are, for the purposes thereof, hereby defined as follows:

- (1) “Commissioner” shall mean the Commissioner of Revenue.
- (2) “Motor vehicles” shall mean and include all vehicles, engines, machines or mechanical contrivances which are propelled by internal combustion engines or motors upon which or by which any person or property is or may be transported or drawn upon a public highway.
- (3) “Fuel” or “fuels” shall mean and include all combustible gases and liquids, used, purchased or sold for use in an internal combustion engine or motor for the generation of power to propel motor vehicles on the public highways, except such fuels as are subject to the tax imposed by G. S. 105-434.
- (4) “Highway” shall mean and include every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets and alleys in towns and cities.
- (5) “Person” shall mean and include natural persons and partnerships, firms, associations and corporations.
- (6) “Use” shall mean and include, in addition to its original meaning, the receipt of fuel by any person into the fuel supply tank of a motor vehicle or into a receptacle from which fuel is supplied by any person to his own or other motor vehicles.
- (7) “User” shall mean and include any person who owns or operates any Diesel propelled motor vehicle or vehicles licensed under the motor vehicle laws of this State and who does not maintain storage facilities for fueling such vehicles. All such users shall be licensed hereunder.
- (8) “User-seller” means any person who maintains storage facilities in excess of 100 gallons and stores fuel therein, and who dispenses such fuel into the fuel tanks of, or attached to, motor vehicles and shall include any such person who so dispenses fuel for consumption in such motor vehicles owned, leased or operated by him.
- (9) “Supplier” means any person who sells or delivers fuel to a user-seller as herein defined for resale or use; and any person who imports fuel into the State other than in the usual tank or receptacle connected with the engine of the motor vehicle in the operation of which the fuel is to be consumed, and uses the same in a motor vehicle owned or operated by such person.
- (10) “Peddler” means any person who neither owns nor operates stationary storage facilities, and who transports fuel from place to place in any vehicle having thereon any tank or other container of more than 100 gallons capacity, and sells or offers to sell fuel and deliver the same from such vehicle to any user-seller or user as herein defined, and such peddler shall be deemed a supplier and as such be subject to all applicable provisions of this article.
- (11) “Liquid” means any substance which is liquid at temperatures in excess of 60 degrees F. and a pressure of 14.7 pounds per square inch absolute. (1955, c. 822, s. 1.)

§ 105-449.3. **Requirements of licenses.**—(a) It shall be unlawful for any person to sell or deliver fuel within this State to a user-seller as herein defined unless such person is the holder of an uncanceled license as a supplier issued by the Commissioner.

(b) It shall be unlawful for any person to maintain storage facilities for fuel

and dispense fuel therefrom into any fuel tank attached to a motor vehicle unless such person is the holder of a license as a user-seller issued by the Commissioner.

(c) It shall be unlawful for any peddler to sell or offer for sale any fuel unless he is the holder of an uncanceled supplier's license issued by the Commissioner. (1955, c. 822, s. 1.)

§ 105-449.4. **Application for license.**—To procure such license every supplier shall file with the Commissioner an application upon oath in such form as the Commissioner may prescribe setting forth the name and address of the supplier and such other information as the Commissioner may require. (1955, c. 822, s. 1.)

§ 105-449.5. **Supplier to file bond.**—A supplier's license shall not be issued until the applicant has filed with the Commissioner a bond in the approximate sum of three times the average monthly tax due to be paid by such supplier, but the amount of the bond shall in no case be less than five hundred dollars (\$500.00) nor more than twenty thousand dollars (\$20,000.00). Such bond shall be in such form and with such surety or sureties as may be required by the Commissioner, conditioned upon making proper reports and paying the tax provided for in this article, and otherwise complying with the provisions of this article: Provided, however, that a licensed distributor who has already furnished a bond under the provisions of G. S. 105-433 shall not be required to furnish any additional bond by reason of this section, but the terms of such bond may be altered so as also to include compliance with the provisions of this article as a condition thereof. The bonds provided for pursuant to this section shall be made payable to the State. (1955, c. 822, s. 1.)

§ 105-449.6. **When application may be denied.**—In the event that:

(1) Any application for a supplier's license shall be filed by any person whose license shall at any time theretofore have been cancelled for cause by the Commissioner, or

(2) The Commissioner shall be of the opinion that such application is not filed in good faith, or

(3) Such application is filed by some person as a subterfuge for the real person in interest whose license or registration shall theretofore have been cancelled for cause by the Commissioner:

Then and in any of such events the Commissioner after a hearing of which the applicant shall have been given five days' notice in writing and in which the applicant shall have the right to appear in person or by counsel and present testimony, may refuse to issue a license to such person. (1955, c. 822, s. 1.)

§ 105-449.7. **Issue of supplier's license.** — The application in proper form having been accepted for filing, and the other conditions and requirements of this article having been complied with, the Commissioner shall issue to such supplier a license and such license shall remain in full force and effect, unless cancelled as provided in this article. (1955, c. 822, s. 1.)

§ 105-449.8. **License not assignable.** — The license so issued by the Commissioner shall not be assignable and shall be valid only for the supplier in whose name issued. (1955, c. 822, s. 1.)

§ 105-449.9. **License required of user or user-seller; application; termination.**— After June 30, 1955, no user or user-seller, as defined in this article, shall use, sell or deliver fuel unless he has secured a license from the Commissioner. Such license shall be issued upon the furnishing by the applicant of such reasonable information as shall be required by the Commissioner, and shall continue in full force and effect, unless cancelled as provided by this article. (1955, c. 822, s. 1.)

§ 105-449.10. **Records and reports required of user-seller or user.**—Each user-seller or user licensed under this article shall keep such records and make such reports to the Commissioner as shall be prescribed under regulations promulgated by the Commissioner. Such records and reports shall be such as are adequate to show all purchases, sales, deliveries and use of fuel by such seller or user, provided that persons licensed as users shall file such reports quarterly on or before the twenty-fifth day of the month immediately following the end of the quarter. (1955, c. 822, s. 1.)

§ 105-449.11. **Display of license.**—Suppliers' and user-sellers' licenses so issued shall be displayed conspicuously by the licensee at his principal place of business. Each peddler shall display his license or an official duplicate thereof on each motor vehicle used by him for the sale or delivery of fuel. (1955, c. 822, s. 1.)

§ 105-449.12. **Record of licenses.**—The Commissioner shall keep and file all applications with an alphabetical index thereof, together with a record of all licensed suppliers and user-sellers. (1955, c. 822, s. 1.)

§ 105-449.13. **Commissioner to furnish licensed supplier with list of licensed user-sellers.**—The Commissioner shall upon request furnish to each licensed supplier a list showing the name and business address of each licensed user-seller as of the beginning of each fiscal year, and shall thereafter, during such year, supplement such list monthly. (1955, c. 822, s. 1.)

§ 105-449.14. **Power of Commissioner to cancel licenses.**—If a licensee shall at any time file a false report of any data or information required by this article, or shall fail, refuse or neglect to file any report as required by this article, or to pay the full amount of any tax required by this article, or if a supplier fails to keep accurate records of quantities of fuel received, produced, refined, manufactured, compounded, sold or used in this State, or if a user-seller fails to maintain accurately any required records, the Commissioner may forthwith cancel his license and notify him in writing of such cancellation by registered mail sent to his last address appearing on the files of the Commissioner.

The Commissioner may cancel any license upon the written request of the licensee. (1955, c. 822, s. 1.)

§ 105-449.15. **Discontinuance as a licensed supplier.**—Whenever any person ceases to be a supplier within the State by reason of the discontinuance, sale or transfer of the business of such supplier, such supplier shall notify the Commissioner in writing at the time the discontinuance, sale or transfer takes effect. Such notice shall give the date of discontinuance and, in the event of a sale or transfer of the business, the date thereof and the name and address of the purchaser or transferee thereof. All taxes for which such supplier has become liable under this article, although not yet due and payable under other provisions of this article, shall, notwithstanding such provisions, become due and payable concurrently with such discontinuance, sale or transfer and any such supplier shall make a report and pay all such taxes, interest and penalties and surrender to the Commissioner the license certificate theretofore issued to such supplier by the Commissioner.

Unless the notice above provided for shall have been given to the Commissioner as above provided, such purchaser or transferee shall be liable to the State for the amount of all taxes, penalties and interest under this article accrued against any such supplier so selling or transferring his business on the date of such sale or transfer, but only to the extent of the value of the property thereby acquired from such supplier. (1955, c. 822, s. 1.)

§ 105-449.16. **Levy of tax; purposes.**—A tax at the rate of seven cents (7¢) per gallon is hereby imposed upon all fuel sold or delivered by any supplier

to any licensed user-seller, or used by any such supplier in any motor vehicle owned, leased or operated by him, or delivered by such supplier directly into the fuel supply tank of a motor vehicle, or imported by a user-seller into, or acquired tax free by a user-seller or user in this State for resale or use for the propulsion of a motor vehicle. For the purpose of this section, "imported" shall not include fuels brought into this State in the usual tank or receptacle connected with the engine of a motor vehicle. The primary purposes of this levy and this article are to provide a more efficient and effective method of collecting the tax now imposed and collected pursuant to G. S. 105-435, by providing for the collection of said tax from the supplier instead of the user. The tax herein provided for is levied for the same purposes as the tax provided for in G. S. 105-435. It is not intended that the tax collected pursuant to this article shall be in addition to that provided in G. S. 105-435, but the payment of the tax as provided by this article shall be deemed conclusively to constitute a compliance with the provisions of G. S. 105-435. The seven cents (7¢) per gallon tax, hereinabove provided for, shall be subject to the provisions of section 13 of chapter 1250 of the Session Laws of 1949, relating to G. S. 105-435, in that one cent (1¢) out of every said seven cents (7¢) tax per gallon shall be applied exclusively to the payment of the principal of and the interest on the two hundred million dollars (\$200,000,000.00) State of North Carolina Secondary Road Bonds therein provided for and as further provided in said chapter 1250 of the Session Laws of 1949. (1955, c. 822, s. 1.)

§ 105-449.17. **Certain exempt sales.**—Sales of fuels to a user-seller shall be exempt from the tax levied under the provisions of this article when such user-seller purchases said fuel for non-highway uses or for sale for non-highway use and maintains storage facilities for such fuel separate and apart from facilities servicing motor vehicles, providing such storage facilities are plainly marked in such manner as the Commissioner may prescribe to indicate that non-taxpaid fuel is contained therein. Suppliers shall make reports of such sales, in such form as the Commissioner may require, each month on monthly tax report forms. Each user-seller shall maintain such records as the Commissioner may prescribe of all non-taxpaid fuel purchased pursuant to this section. All records of non-taxable sales and purchases made pursuant to this section shall be subject to audit by deputies, employees or other agents of the Commissioner. (1955, c. 822, s. 1.)

§ 105-449.18. **Liability of unlicensed person for tax on non-taxpaid fuels sold or delivered to others than licensees.**—Any person who shall, while not licensed under this article, deliver to persons or firms other than licensees under this article, any special fuels upon which the tax due hereunder has not been paid and which such person knows, or reasonably should know, is to be used or sold for the purpose of propelling motor vehicles on the public highways shall be liable for the tax imposed by this article. (1955, c. 822, s. 1.)

§ 105-449.19. **Tax reports; computation and payment of tax.**—On or before the twenty-fifth day of each calendar month, each supplier of liquid fuel shall render to the Commissioner a statement on forms prepared and furnished by the Commissioner, which shall show the quantity of fuel on hand on the first and last days of the preceding calendar month, the quantity received during the month and the quantity sold to user-sellers; and each supplier of fuels which are not liquid shall keep such records and make such reports of inventory as the Commissioner shall by regulation prescribe in order to show accurately the quantity of such fuel used by such supplier or sold to user-sellers and pay a tax thereon which as calculated by the Commissioner, would be equivalent to the seven cents (7¢) per gallon tax levied on liquid fuels. Each such supplier shall at the time of rendering such report pay to the Commissioner the tax or taxes herein levied during the preceding calendar month. (1955, c. 822, s. 1.)

§ 105-449.20. **When Commissioner may estimate fuel sold, delivered or used.**—Whenever any person shall neglect or refuse to make and file any report for any calendar month as required by this article or shall file an incorrect or fraudulent report, the Commissioner shall determine, from any information obtainable, the number of gallons of fuel with respect to which the person has incurred liability under the special fuels tax laws of the State. (1955, c. 822, s. 1.)

§ 105-449.21. **Report of purchases by user-seller.**—On or before the twenty-fifth day of each calendar month, each user-seller not otherwise licensed as a supplier shall render to the Commissioner a statement on forms furnished by the Commissioner, which shall be signed by the user-seller. The statement shall show the quantity of fuel on hand at the beginning of the month, the quantity on hand at the end of the month, the quantity sold or used and each and every purchase made by the user-seller during the preceding calendar month. Each purchase shall be specifically noted on the statement and the statement shall show the name and address of the supplier and the quantity and date of each purchase. (1955, c. 822, s. 1.)

§ 105-449.22. **Lease operations.**—A lessee of a motor vehicle, and not the lessor thereof, shall make such reports and be liable for and pay such taxes as may become due under this article with respect to all operations by a lessee pursuant to any lease of a motor vehicle. (1955, c. 822, s. 1.)

§ 105-449.23. **Penalty for failure to file report on time.**—When any user-seller or user shall fail to file a report within the time prescribed by this article, he shall be subject to a penalty of not more than fifty dollars (\$50.00) for the first offense and not more than one hundred dollars (\$100.00) for any subsequent offense, and any penalty pursuant to this section shall be assessed and collected by the Commissioner in the same manner as any tax provided for in this article and shall be subject to all other applicable provisions relating to the assessment and collection of taxes pursuant to this article. (1955, c. 822, s. 1.)

§ 105-449.24. **Penalty for failure to report or pay taxes promptly.**—When any supplier shall: (1) Fail to submit its monthly report to the Commissioner by the twenty-fifth day of the following month, (2) fail to submit the data required by G. S. 105-449.19 in such monthly report, or (3) fail to pay to the Commissioner the amount of taxes hereby imposed when the same shall be payable, there shall be added thereto a penalty equal to twenty-five per centum (25%) of the tax, to be paid by such supplier. Thereafter the tax shall also bear interest at the rate of one-half of one per centum ($\frac{1}{2}$ of 1%) per month until the tax is paid, and the tax, penalty and interest pursuant to this section shall be assessed and collected by the Commissioner in the same manner as any tax provided for in this article and shall be subject to all other applicable provisions relating to the assessment and collection of taxes pursuant to this article. The Commissioner of Revenue shall have the power, upon making a record of his reasons therefor, to reduce or waive any penalties provided for in this article. (1955, c. 822, s. 1.)

§ 105-449.25. **Use of metered pumps by user-sellers.**— Each user-seller shall dispense all liquid fuel sold by him to others from metered pumps which indicate the total amount of fuel measured through such pumps. Each such pump shall have marked thereon the words "Diesel Fuel;" or, if the fuel sold is not Diesel fuel, such other word or words descriptive of the type of fuel dispensed through such pump shall be prescribed by regulations promulgated by the Commissioner. (1955, c. 822, s. 1.)

§ 105-449.26. **Invoices or delivery tickets.**— (a) Each sale of liquid fuel by a user-seller shall be evidenced by an invoice or delivery ticket with the name and address of the user-seller printed or stamped thereon and showing the

name and address of the purchaser, date of purchase, number of gallons, price per gallon, tax per gallon, and total amount. One copy of such invoice shall be delivered to the purchaser at the time of sale, and a copy thereof shall be retained by the user-seller and preserved as other records are required to be preserved under this article.

(b) Not more than one original copy of any invoice for a single sale of fuel shall be prepared by any person. If an additional copy is required at any time, such copy shall be plainly marked "Duplicate," and the number of the original ticket or invoice shall be indicated thereon. (1955, c. 822, s. 1.)

§ 105-449.27. **Article 9 of Revenue Act made applicable.**—All the provisions of article 9 of chapter 105 of the General Statutes, relating to general administration, penalties and remedies pursuant to the State Revenue Act, shall insofar as practicable, and except when in direct conflict with the provisions of this article, be applicable with respect to this article. (1955, c. 822, s. 1.)

§ 105-449.28. **Retention of records by licensees.**—Each licensee shall maintain and keep for a period of two years such record or records of fuel received, produced, manufactured, refined, compounded, sold or used by such licensee together with invoices, bills of lading, and also such other pertinent records and papers as may reasonably be required by the Commissioner for the administration of this article. (1955, c. 822, s. 1.)

§ 105-449.29. **Inspection of records, etc.**—The Commissioner or any deputy, employee or agent authorized by him may examine, during the usual business hours of the day, records, books, papers, storage tanks and any other equipment of any licensee, purchaser, refiner, fuel dealer or distributor, or common carrier pertaining to the quantity of fuel received, produced, manufactured, refined, compounded, used, sold, shipped or delivered, as the case may be, to verify the truth and accuracy of any statement, report or return or to ascertain whether the tax imposed by this article has been paid. (1955, c. 822, s. 1.)

§ 105-449.30. **Refund for non-highway use.**—Any person who shall purchase fuel and pay the tax thereon pursuant to this article and use the same for purposes other than to propel vehicles operated or intended to be operated on the highway irrespective of whether originally purchased for such non-highway use or not, shall, upon making application therefor as herein provided, be reimbursed at the rate of five cents (5¢) per gallon. Such refund shall be paid only to persons who secure refund permits and otherwise comply insofar as practicable with the provisions of G. S. 105-446, relating to refunds, as modified by regulations of the Commissioner. (1955, c. 822, s. 1.)

§ 105-449.31. **Refund where taxpaid fuels transported to another state for sale or use.**—Any person, firm or corporation who purchases special fuels upon which the special fuels tax imposed by this article has been paid and who subsequently exports the same to another state, for sale or use without this State and delivers the same without this State shall be entitled to a refund of the tax paid upon presentation to the Commissioner of an application for a refund setting forth the fact that such special fuels were transferred out of this State for sale or use, together with such other information as the Commissioner may require. For the purposes of this section, "exports" means transporting fuel out of this State in a cargo tank, tank car, barge, or barrel and does not include transporting fuel in any tank connected with or attached to the engine of a motor vehicle. (1955, c. 822, s. 1.)

§ 105-449.32. **Rules and regulations; forms.**—The Commissioner shall promulgate such reasonable rules and regulations and shall prescribe such forms as shall be necessary to effectuate and enforce the purposes of this article. (1955, c. 822, s. 1.)

§ 105-449.33. **Equipment of vehicle in which liquid fuel transported for sale or delivery.**—No vehicle having attached thereto in a tank in which liquid fuel is transported for sale or delivery shall be equipped with any connection between the tank in which such fuel is transported for sale or delivery and the motor or fuel tank of the vehicle through which fuel may be supplied for consumption in the motor thereof. (1955, c. 822, s. 1.)

§ 105-449.34. **Acts and omission declared to be misdemeanors; penalties.**—A person shall be guilty of a misdemeanor if he wilfully violates any of the provisions of this article, a penalty for which is not otherwise provided, or if he shall:

- (1) Wilfully fail or refuse to pay the tax imposed by this article, or
- (2) Engage in business in this State as a supplier or user-seller without being the holder of an uncanceled license to engage in such business, or
- (3) Wilfully fail to make any of the reports required by this article, or
- (4) Make any false statement in any application, report or statement required by this article, or
- (5) Refuse to permit the Commissioner or any deputy to examine records as provided by this article, or
- (6) Fail to keep proper records of quantities of fuel received, produced, refined, manufactured, compounded, sold, used or delivered in this State as required by this article, or
- (7) Make any false statement on any delivery ticket or invoice as to the quantity of fuel delivered, sold or used; or make any false statement in connection with a report, or an application for the refund of any moneys or taxes provided in this article. (1955, c. 822, s. 1.)

§ 105-449.35. **Exchange of information among the States.** — The Commissioner, may, in his discretion, upon request duly received from the officials to whom are entrusted the enforcement of the use fuel tax laws of any other state, forward to such officials any information which the Commissioner may have in his possession relative to the production, manufacture, refining, compounding, receipt, sale, use, transportation or shipment by any person of such fuel. (1955, c. 822, s. 1.)

§ 105-449.36. **July 1, 1955 inventory.** — Every user-seller and every user who shall have on hand or in his possession any fuels shall take a true inventory of all such fuels on hand or in his possession as of 12:01 a.m., July 1, 1955, and shall on or before July 25, 1955, report to the Commissioner of Revenue the amount of such fuels on hand and shall pay to the Commissioner a tax of seven cents (7¢) per gallon together with an inspection tax of one-fourth cent ($\frac{1}{4}$ ¢) per gallon. The reports required shall be in such form as may be prescribed by the Commissioner. (1955, c. 822, s. 1.)

ARTICLE 36B.

Tax on Carriers Using Fuel Purchased Outside State.

§ 105-449.37. **Definitions.** — Whenever used in this article, the word "Commissioner" means Commissioner of Revenue except when the Commissioner of Motor Vehicles is specifically designated. Whenever used in this article, the term "motor carrier" means every person, firm or corporation who operates or causes to be operated on any highway in this State any passenger vehicle, other than public school busses, that has seats for more than seven passengers in addition to the driver, or any road tractor, or any tractor truck, or any truck having more than two axles.

The word "operations," when applied to a motor carrier who transports pas-

sengers or property for compensation, means operations of all vehicles, whether loaded or empty, regardless of size or kind, for compensation.

The word "operations," when applied to a motor carrier who transports property not for compensation, means operations of all road tractors, tractor trucks, and trucks having more than two axles, whether loaded or empty, for the transportation of property into or out of or through this State.

Any motor carrier who operates or causes to be operated any such passenger vehicle, or any road tractor, or any tractor truck, or any truck having more than two axles on one or more days of any quarter of the year, as hereinafter described, is liable for the tax imposed by this article for that quarter and is entitled to the credits allowed for that quarter. (1955, c. 823, s. 1.)

Editor's Note.—This article is effective as of January 1, 1956.

§ 105-449.38. **Tax levied.** — A road tax for the privilege of using the streets and highways of this State is hereby imposed upon every motor carrier, which tax shall be equivalent to seven cents (7¢) per gallon calculated on the amount of gasoline or other motor fuel used by such motor carrier in its operations within this State. Except as credit for certain taxes as hereinafter provided for in this article, taxes imposed on motor carriers by this article are in addition to any taxes imposed on such carriers by any other provisions of law. The tax herein levied is for the same purposes as the tax imposed under the provisions of G. S. 105-434. (1955, c. 823, s. 2.)

§ 105-449.39. **Credit for payment of motor fuel tax.** — Every motor carrier subject to the tax hereby imposed shall be entitled to a credit on such tax equivalent to seven cents (7¢) per gallon on all gasoline or other motor fuel purchased by such carrier within this State for use in operations either within or without this State and upon which gasoline or other motor fuel the tax imposed by the laws of this State has been paid by such carrier. Evidence of the payment of such tax in such form as may be required by, or is satisfactory to, the Commissioner shall be furnished by each such carrier claiming the credit herein allowed. When the amount of the credit herein provided to which any motor carrier is entitled for any quarter exceeds the amount of the tax for which such carrier is liable for the same quarter, such excess may under regulations of the Commissioner be allowed as a credit on the tax for which such carrier would be otherwise liable for another quarter or quarters; or upon application within 180 days from the end of any quarter, duly verified and presented, in accordance with regulations promulgated by the Commissioner and supported by such evidence as may be satisfactory to the Commissioner, such excess may be refunded if it shall appear that the applicant has paid to another state under a lawful requirement of such state a tax on the use or consumption in said state of gasoline or other motor fuel purchased in this State, to the extent of such payment to said other state, but in no case to exceed the rate per gallon of the then current gasoline or other motor fuel tax of this State.

The Commissioner shall not allow such refund except after an audit of the applicant's records and shall audit the records of an applicant at least once a year. (1955, c. 823, s. 3.)

§ 105-449.40. **Refunds to motor carriers who give bond.**—A motor carrier may give a bond in the amount of ten thousand dollars (\$10,000.00) payable to the State and conditioned that the motor carrier will pay all taxes due and to become due under this article. So long as the bond remains in force the Commissioner may order refunds to the motor carrier in the amounts appearing to be due on applications duly filed by the carrier under § 105-449.39 without first auditing the records of the carrier. Such bond shall be in such form and with such surety or sureties as may be required by the Commissioner. (1955, c. 823, s. 4.)

§ 105-449.41. **Penalty for false statements.**—Any person who wilfully and knowingly makes a false statement orally, or in writing, or in the form of a receipt for the sale of motor fuel, for the purpose of obtaining or attempting to obtain or to assist any other person, partnership or corporation to obtain or attempt to obtain a credit or refund or reduction of liability for taxes under this article shall be guilty of a misdemeanor. (1955, c. 823, s. 5.)

§ 105-449.42. **Payment of tax.**—For the purposes of making payment of taxes pursuant to this article and making reports pursuant to this article, the year is divided into four quarters of three consecutive months each, and the first quarter shall consist of the months of January, February and March. The tax herein imposed shall be paid by each motor carrier to the Commissioner on or before the twentieth day of the month immediately following the quarter with respect to which tax liability hereunder accrues and shall be calculated upon the amount of gasoline or other motor fuel used in its operations within this State by each such carrier during the quarter ending with the last day of the preceding month. A lessee of a motor vehicle, and not the lessor thereof, shall make such reports and be liable for and pay such taxes as may become due under this article with respect to all operations by a lessee pursuant to any lease of a motor vehicle. (1955, c. 823, s. 6.)

§ 105-449.43. **Taxes to be paid into State Highway Fund.**—All taxes collected pursuant to the provisions of this article shall be paid into the State Highway and Public Works Fund. (1955, c. 823, s. 7.)

Editor's Note.—The correct name of the Fund mentioned in this section is State Highway Fund. See §§ 105-436, 136-16.

§ 105-449.44. **How amount of fuel used in State ascertained.**—The amount of gasoline or other motor fuel used in the operations of any motor carrier within this State shall be such proportion of the total amount of such gasoline or other motor fuel used in its entire operations within and without this State as the total number of miles traveled within this State bears to the total number of miles traveled within and without this State. (1955, c. 823, s. 8.)

§ 105-449.45. **Reports of carriers.**—Every motor carrier subject to the tax imposed by this article shall on or before the twentieth day of April, July, October and January of every year make to the Commissioner such reports of its operations during the quarter of the year ending the last day of the preceding month as the Commissioner may require and such other reports from time to time as the Commissioner may deem necessary. When any person required to file a report as provided by this article fails to file such report within the time prescribed by this article, he shall be subject to a penalty of not more than fifty dollars (\$50.00) for the first failure, and not more than one hundred dollars (\$100.00) for any subsequent failure, and any penalty pursuant to this section shall be assessed and collected by the Commissioner in the same manner as is provided in this article with respect to any tax deficiency, and shall be subject to all other applicable provisions relating to the assessment and collection of taxes pursuant to this article. However, motor carriers are not required to make any reports with respect to vehicles used exclusively in intrastate operations in this State except as the Commissioner may specifically from time to time require, but this is not to be construed to eliminate the requirements as to registration and identification markers with respect to all such vehicles as provided in § 105-449-47. (1955, c. 823, s. 9.)

§ 105-449.46. **Inspection of books and records.**—The Commissioner and his authorized agents and representatives shall have the right at any reasonable time to inspect the books and records of any motor carrier subject to the tax imposed by this article. (1955, c. 823, s. 10.)

§ 105-449.47. **Registration cards and vehicle identifications.**—No motor carrier shall operate or cause to be operated in this State any vehicle listed or described in § 105-449.37 and not excluded therein from the scope of this article, unless and until he has secured from the Commissioner a registration card and an identification marker for such vehicle. The registration card shall be of such form and design as the Commissioner may prescribe. The registration card shall be carried in the vehicle for which it was issued at all times when the vehicle is in this State. The identification marker shall be in such form and of such size as the Commissioner may prescribe, and such marker may be either a plate, sticker, or such other form of identification marker as the Commissioner may prescribe. Such identification marker shall be attached or affixed to the vehicle in the place and manner prescribed by the Commissioner so that the same is clearly displayed at all times. Each identification marker for a particular vehicle shall bear a number which number shall be the same as that appearing on the registration card for the same vehicle. The registration cards and markers herein provided for shall be issued on an annual basis as of January 1st each year and shall be valid through the next succeeding December 31st. However, the Commissioner, in his discretion, may authorize renewal of registration cards and identification markers without the necessity of issuing new cards and markers. All identification markers issued by the Commissioner shall remain the property of the State. (1955, c. 823, s. 11.)

§ 105-449.48. **Fees.**—For issuing each registration card, a fee of one dollar (\$1.00) shall be paid to the Commissioner and no registration card shall be issued unless the applicant pays such fee upon making application for the registration card. Such fees shall be paid into the State Highway and Public Works Fund. (1955, c. 823, s. 12.)

Editor's Note.—The correct name of the Fund mentioned in this section is State Highway Fund. See §§ 105-436, 136-16.

§ 105-449.49. **Temporary emergency operation.**—In an emergency, the Commissioner, by letter or telegram, may authorize a vehicle to be operated without a registration card or identification marker for not more than ten days. (1955, c. 823, s. 13.)

§ 105-449.50. **Application blanks.**—The Commissioner shall prepare forms to be used in making applications in accordance with this article and the applicant shall furnish all information required by such forms. (1955, c. 823, s. 14.)

§ 105-449.51. **Violations declared to be misdemeanors.**—Any person who operates or causes to be operated on any highway in this State any motor vehicle that does not carry the registration card that this article requires it to carry, or any motor vehicle that does not display in such manner as is prescribed by the Commissioner the identification marker that this article requires to be displayed, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than ten dollars (\$10.00) nor more than two hundred dollars (\$200.00). Each day's operation in violation of any provision of this section shall constitute a separate offense. (1955, c. 823, s. 15.)

§ 105-449.52. **Violators to pay penalty and furnish bond.**—When any person is discovered in this State operating a vehicle in violation of the provisions of this article, it shall be unlawful for anyone thereafter to operate said vehicle on the streets or highways of this State, except to remove it from the street or highway for purposes of parking or storing said vehicle, until he shall pay to the Department of Revenue a penalty of twenty-five dollars (\$25.00). Such penalty may be paid to an agent of the Department of Motor Vehicles.

All penalties received by the Department of Revenue under this section shall be paid into the Highway Fund. Any person denying his liability for such penalty may pay the same under protest. He may apply to the Department of Revenue for a hearing, and said hearing shall be granted before a duly designated employee or agent of the Department within 30 days after receipt of the request for such hearing. If after said hearing the Department determines that the person was not liable for the penalty, the amount collected shall be refunded to him. If after said hearing the Department determines that the person was liable for said penalty, the person paying the penalty may bring an action in the Superior Court of Wake County against the Commissioner of Revenue for refund of the penalty. No restraining order or injunction shall issue from any court of the State to restrain or enjoin the collection of the penalty or to permit the operation of said vehicle without payment of the penalty prescribed herein.

In addition, the Commissioner may, if he deems it desirable or necessary to secure compliance with the provisions of this article, require the furnishing of a bond to the Commissioner in the amount of two hundred dollars (\$200.00), in such form and with such surety or sureties as he may prescribe, conditioned on a proper registration card and identification marker being applied for within 10 days and conditioned on the payment of any taxes found to be due pursuant to this article. In cases where the Commissioner shall require such bond, it shall be unlawful for anyone thereafter to operate said vehicle on the streets or highways of this State, except to remove it from the street or highway for purposes of parking or storing said vehicle, unless and until said bond is furnished.

Whenever the Commissioner is required to exercise his discretion under the provisions of this section, such discretion may be exercised by him or by a duly designated agent or employee of the Department of Motor Vehicles or the Department of Revenue. (1955, c. 823, s. 16; 1957, c. 948.)

Editor's Note.—The 1957 amendment lated only to the furnishing of bonds by rewrote this section which formerly re- violators.

§ 105-449.53. Other penalties. — Whenever it is discovered that any person has failed to pay the taxes or any part thereof due pursuant to this article, the Commissioner of Revenue is hereby authorized to make an assessment with respect thereto on the basis of the best information available and there shall be added to such assessment a penalty of twenty-five per cent (25%) thereof and interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month from the time said tax became due until paid. Except insofar as the same are in conflict herewith, all the provisions of article 9 of chapter 105 of the General Statutes, relating to general administration, penalties and remedies pursuant to the State Revenue Act, are hereby made applicable, insofar as practicable, with respect to this article. The Commissioner of Revenue shall have the power, upon making a record of his reasons therefor, to reduce or waive any penalties provided for in this article. (1955, c. 823, s. 17.)

§ 105-449.54. Commissioner of Motor Vehicles made process agent of nonresident motor carriers. — The acceptance by a nonresident motor carrier of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidence by the operation of a motor vehicle by such nonresident, either personally or through an agent or employee, on the public highways of this State, or the operation by such nonresident, either personally or through an agent or employee, of a motor vehicle on the public highways of this State other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident motor carrier of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process or notice in any action, assessment proceeding or other proceeding against him or his executor

or administrator, arising out of or by reason of any provisions of this article relating to such vehicle or relating to the liability for tax with respect to operation of such vehicle on the highways of this State. Said acceptance or operation shall be a signification by such nonresident motor carrier of his agreement that any such process against or notice to him or his executor or administrator shall be of the same legal force and validity as if served on him personally, or on his executor or administrator. All of the provisions of G. S. 1-105 following the first paragraph thereof shall be applicable with respect to the service of process or notice pursuant to this section. (1955, c. 823, s. 18.)

§ 105-449.55. **Commissioner of Motor Vehicles to aid in enforcement of article.**—The Commissioner of Motor Vehicles is hereby authorized and directed to utilize the State Highway Patrol, uniformed officers assigned to the various permanent weighing stations of the Department of Motor Vehicles, and such other personnel of the Department of Motor Vehicles as he may deem wise, to assist in enforcing the provisions of this article. (1955, c. 823, s. 19.)

§ 105-449.56. **Enforcement powers of weigh station officers of Motor Vehicle Department.**—The uniformed officers assigned to the various permanent weighing stations of the Department of Motor Vehicles shall, in addition to the powers set out in G. S. 20-183.10, have the powers of peace officers, including the power of making arrests, serving process, and appearing in court, in all matters and things relating to this article and the administration and enforcement thereof. (1955, c. 823, s. 20.)

SUBCHAPTER VI. TAX RESEARCH.

ARTICLE 37.

Department of Tax Research.

§ 105-450. **Provision for Department of Tax Research.**—The Department of Tax Research is hereby declared to be a separate and independent department of the State government. (1941, c. 327, s. 1; 1953, c. 1125, s. 1.)

Editor's Note.—

The 1953 amendment rewrote this section.

§ 105-453. **Study of taxation; data for Governor and General Assembly; reports from officials, boards and agencies; examination of persons, papers, etc.**

To the end that the Director of the Department of Tax Research may properly discharge the duties placed upon him by law, he is hereby accorded the following powers:

(1) He shall have authority to require from the Commissioner of Revenue, the Tax Review Board, other State officials, boards, and agencies, and from county tax supervisors, municipal clerks, and other county and municipal officers, on forms prepared and prescribed by the said Director, such annual and other reports as shall enable the Director to ascertain such information as he may require, to the end that he may have full, complete, and accurate statistical information as to the practical operation of the tax and revenue laws of the State.

(2) He shall have the same authority as is given the State Board of Assessment in G. S. 105-276 to examine persons, papers, and records. (1941, c. 327, s. 4; 1955, c. 1350, s. 12.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote the second paragraph to read as set out above. As the first paragraph was not changed it is not set out.

§ 105-455. **Submission of proposed amendments and information to Advisory Budget Commission; continuing study of economic conditions.**—The Director of the Department of Tax Research shall prepare and submit to the Advisory Budget Commission such amendments to the Revenue and Machinery Acts as the survey made by the Director indicates should be made, for their consideration in preparing amendatory Revenue and Machinery Acts for the General Assembly.

The Advisory Budget Commission is hereby authorized, empowered and directed to call upon the Director for such amendments and such recommendations as the Director shall make with respect to any needed changes in the Revenue and Machinery Acts. The Advisory Budget Commission is authorized, empowered and directed to consider such a report and shall make to the next session of the General Assembly a report on its findings with respect to such recommendations as it shall see fit to make and shall also report to the General Assembly the content of the report filed with it by the Department of Tax Research.

It shall be the duty of the Director of the Department of Tax Research to make a continuing study of economic conditions, and to evaluate the effect of these conditions on the tax bases and prospective collections therefrom. The Director shall submit estimates of revenue to the Advisory Budget Commission for its information. (1941, c. 327, s. 7; 1953, c. 1125, s. 2.)

Editor's Note.—The 1953 amendment added the last two paragraphs.

§ 105-456. **Publication of biennial report.**—The Director of the Department of Tax Research shall make and publish two thousand (2,000) copies of a biennial report of such scope as may be approved by the Governor, which shall include recommendations and a digest of the most important factual statistics of State and local taxation. (1941, c. 327, s. 8; 1955, c. 980; c. 1350, s. 13.)

Editor's Note.—The first 1955 amendment (chapter 980, ratified May 13) omitted provisions as to publication and Governor's approval of scope. The second 1955 amendment (chapter 1350, ratified May 26) deleted the words "combined with

the biennial report of the State Board of Assessment" formerly appearing after "biennial report" in line three. Only the second 1955 amendment is reflected in the amended section set out above.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

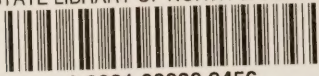
Raleigh, North Carolina

October 1, 1957

I, George B. Patton, Attorney General of North Carolina, do hereby certify that the foregoing 1957 Cumulative Supplement to 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.

GEORGE B. PATTON,
Attorney General of North Carolina

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